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THE
LAWYERS REPORTS
ANNOTATED

BOOK XLIII

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH, EDITOR, AND
HENRY P. FARNHAM, ASST.

ROCHESTER, N. Y.

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LAWYERS' REPORTS

ANNOTATED.

UTAH SUPREME COURT.

STATE of Utah, *Respt.*,
v.
George BATES, *Appt.*

(14 Utah, 293.)

*1. The description of the offense in the indictment included murder in the first degree, as well as in the second; but the crime was characterized as murder in the second degree, and the record showed that the defendant was actually tried for and convicted of that offense. *Held*, a trial by eight jurors did not violate § 10 of art. 1 of the state Constitution, nor did such trial by eight jurors violate § 7 of the same article, which declares that "no person shall be de-

prived of life, liberty, or property without due process of law."

2. Section 10 of article 1 of the Constitution of Utah, which declares that "in courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors," is not in conflict with article 6 of the amended Constitution of the United States, wherein it says that "in all criminal prosecutions the accused shall enjoy the right to . . . a trial by an impartial jury of the state and district wherein the crime shall have been committed." The last article does not apply to trials under state laws.

3. Nor is § 10 of the state Constitution repugnant to the 1st section of the 14th Amendment of the Federal Constitution. The 1st clause of that section makes all persons born or naturalized in the

*Headnotes by ZANE, Ch. J.

NOTE.—Number and agreement of jurors necessary to constitute a valid verdict.

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b. Construction placed upon constitutional provisions.

1. In general.
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III. Meaning of the terms "jury" and "jury trial."

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X. Distinction between courts of record and not of record.

XI. Jury of more than twelve.

XII. The question of demand of jury of twelve.

XIII. Agreement of the jury.

a. Unanimity.

b. Majority verdicts.

The question as to the constitutionality of a verdict of less than twelve jurors in proceeding for the assessment of damages for the taking of private property for public uses under the law of eminent domain will form the subject of a future note.

The constitutional right to a jury for the assessment of damages on default will be found treated in *note* to *Dean v. Willamette Bridge R. Co.* (Or.) 15 L. R. A. 614.

The question of jury trial on appeal, as satisfying the constitutional right to trial by jury, will be found in *note* to *Miller v. Com.* (Va.) 15 L. R. A. 441.

As to the number of grand jurors necessary or proper to act, see *note* to *State v. Belvel* (Iowa) 27 L. R. A. 846.

This note is intended to be exhaustive only as to the number and agreement of jurors necessary to constitute a valid trial jury, and must not be taken as covering the question of the right of trial by jury, or the construction placed upon the state constitutional provisions as to the right remaining inviolate, since many cases are to be found upon those questions which do not include or specifically pass upon the number or agreement of jurors necessary to render a valid verdict upon a trial.

The principal case, *STATE v. BATES*, in so far as it upholds the change made by the Constitution as not *ex post facto*, is overruled by the United States Supreme Court in the case of *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, which held the same to be *ex post facto*, although there were two dissentients.

In this case the United States Supreme Court also held that when Magna Charta declared that

United States, and subject to its jurisdiction, citizens of the United States, and of the state wherein they reside; and the second clause, which declares that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, has no application to jury trials under state laws in state courts. It does not refer to the privileges or immunities of the individual as a citizen of the state; it refers to the privileges and immunities of the individual as a citizen of the United States.

4. Nor does § 10 of the state Constitution conflict with the 3d provision of § 1 of article 14 of the Federal Constitution, which declares that "no state shall deprive any person of life, liberty, or property without due process of law." That provision left the power with the people of the state, by a constitutional provision, to reduce the number of jurors for the trial of a cause in the state courts from twelve to eight.
5. The defendant was tried by eight jurors on April 7, 1896, upon an indictment charging him with murder in the second degree, and convicted. The offense was com-

mitted on the 22d day of September, 1896, and the provision of the state Constitution reducing the number of jurors from twelve to eight took effect on January 4, 1896. Held, that the change did not deprive the defendant of a substantial right, and that the constitutional provision making the change was not *ex post facto* and void.

(December 10, 1896.)

APPEAL by defendant from a judgment of the District Court for the Third District convicting him of murder. *Affirmed.* The facts are stated in the opinion.

Messrs. Powers, Straup, & Lippman, and *W. I. Snyder*, for appellant:

Section 10, art. 1, of our Constitution is repugnant to the 14th Amendment of the United States Constitution. It abridges the privileges of citizens, and deprives citizens charged with crime of due process of law.

Thompson, Charging the Jury, 810, and cases cited; *Hill v. People*, 16 Mich. 355; *Cancemi v. People*, 18 N. Y. 128; *Work v.*

no free man should be deprived of life, etc., "but by the judgment of his peers or by the law of the land," it referred to a trial by twelve jurors.

The above holding of the court has been severely criticized in an article in vol 32, American Law Review, 634, 635, in which the author contends that "the phrase *judicium parium* does not point to trial by jury," and that "the barons who won Magna Charta were opposed to the then novel and obnoxious procedure of jury trial."

It is not, however, the province of this annotation to discuss that question; yet the great mass of authority shows that the general construction placed upon the provisions of the United States and state Constitutions that trial by jury shall remain inviolate, is that a "jury" and "trial by jury" mean a trial by twelve men in all cases in which the defendant was entitled to it at the time the Constitution was adopted. Therefore, whether the Supreme Court of the United States erred in its construction of Magna Charta or not, its holding is in keeping with the trend of the decisions of the courts, and with the general acceptance of the terms "jury" and "trial by jury."

I. Common-law doctrine.

In treating of the right of trial by jury under the common law the following passage is to be found in vol. 5 of Bacon's Abridgment, title *Juries*, p. 308: "The trial *per pais*, or by a jury of one's country, is justly esteemed one of the principal excellencies of our Constitution; for what greater security can any person have in his life, liberty, or estate, than to be sure of not being devastated of, or injured in, any of these, without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta."

So, the same author, in the same volume of his treatise, p. 314, further states that "the grand jury . . . must consist of twelve at least, the petit jury of twelve, and can be neither more nor less; but it is said that particular inquests may consist of a more or less number than twelve. . . . But, on a writ of error, a judgment out of an inferior court was reversed, because, being by default, the inquiry of damages was only by two jurors, and though a custom was alleged to warrant it, yet it was resolved that there could not be less than twelve, though the writ of inquiry saith only *per sacra* 43 L. R. A.

mentum proborum et legalium hominum, and not *duodecim*, as in a venire. . . . Also it hath been frequently holden that a custom in an inferior court to try by six jurors is void." *Norval v. Rice*, 2 Wis. 23, 27. The above passage is relied upon and quoted by the court, and the same doctrine is to be found stated in 1 Vent. 113.

So, in Coke upon Littleton, book 3, chap. 9, in speaking of the different modes of trial under the English law, it is said: "Of these a trial by twelve men is the most frequent and common. And in ancient time, they were twelve knights. This trial of the fact *per duodecim liberos et legales homines* is very ancient," and further: "Usage and ancient course maketh law; and . . . the law in this case delighteth herself in the number of twelve; for there must not only be twelve jurors for the trial of matters of fact, but twelve judges, of ancient time, for trials of matters of law in the exchequer chamber." *Norval v. Rice*, 2 Wis. 22, 26.

And it is said in Wooddeson's Lectures on the Law of England, vol. 3, p. 199, that "where no challenge is taken, either to the whole array, or to the jurors individually, twelve of them are sworn to well and truly try the issue joined between the parties."

So, in 2 Hale, P. C. pp. 161, 296, it is said: "But in case of a trial by the petit jury, it can be by no more nor less than twelve;" and: "If only eleven be sworn by mistake, no verdict can be taken of the eleven, and if it be, it is error." *Norval v. Rice*, 2 Wis. 22, 28.

Again, in 2 Bl. Com. p. 349, it is said: "The founders of the English law have, with excellent forecast, contrived that no man shall be called to answer to the King for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury; and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion." *Harris v. People*, 128 Ill. 585.

So, in Chitty, Crim. Law, p. 505, it is said: "The petit jury, when sworn, must consist precisely of twelve, and is never to be either more or less on the trial of the general issue;" and this fact it is necessary to insert upon the record. *Norval v. Rice*, 2 Wis. 22.

State, 2 Ohio St. 296, 59 Am. Dec. 671; *Flint River S. B. Co. v. Roberts*, 48 Am. Dec. 186, note, 2 Fla. 102; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232; *Opinion of the Justices*, 41 N. H. 550.

Section 10, art. 1, of the Constitution of Utah, in so far as it provides for the trial of criminal cases by eight men, is repugnant to and in conflict with § 12, art. 1, of the Constitution of Utah, and is therefore void.

Section 12 guarantees to the accused the right "to have a speedy public trial by an impartial jury." This is without limitation or qualification. It means a jury of twelve men.

State v. McClellan, 11 Nev. 46; *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116; *Wynehamer v. People*, 13 N. Y. 378; *Cruger v. Hudson River R. Co.* 12 N. Y. 190.

Being later in position it is a later expression of the legislative will.

Sutherland, Stat. Constr. § 220.

Section 10, art. 1, of our state Constitution, so far as it relates to crimes alleged to

have been committed prior to said Constitution going into effect, is retrospective and *ex post facto*, and is repugnant to and in conflict with subsec. 1, art. 1, of the Constitution of the United States.

Sutherland, Stat. Constr. chap. 17, p. 603. *Mr. O. W. Powers*, also for appellant:

Life, liberty, and property of a citizen may be forfeited and lost, but not without due process of law. This protection is contained in both the National and state Constitutions.

See Utah Const. art. 1, § 7.

"The judgment of his peers" was, by the law of England, the trial of a man by a jury of his equals, and in this country means a trial by jury, who are called the peers of the party accused.

Potter's Dwarr. Stat. p. 428.

Chancellor Kent defines the term "right in civil society," to be "that which any man is entitled to have, or to do, or to require from others, within the limits prescribed by law."

2 Kent, Com. p. 1.

And again, it has been said that whatever may be the magic of the number "twelve," as legal antiquarians have endeavored to trace it, its unanimity seems always to have been required in criminal cases, although not so certainly settled in questions of property until the reign of Edw. III. 2 Reeves, History of the English Law, p. 270; *Com. v. Shaw*, 1 Pittsb. 492, 497.

Again, in Hale, P. C., the following passage is found: "But in case of a trial by the jury, it can be by no more nor less than twelve, and all assenting to the verdict; accordingly it was adjudged, M. 42 E. 3 Rot. 16, Suff. Rex, the judgment was reversed, because but eleven indictors." 2 Hale, P. C. p. 161.

So, Magna Charta, by its declaration that no freeman should be deprived of life, etc., but by the judgment of his peers or by law of the land, referred to a trial by twelve jurors. *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061.

And the right of a trial by a jury of twelve men in all capital cases was justly regarded as the great safeguard of personal liberty. *Harris v. People*, 128 Ill. 585.

So, the common-law import of the word "jury" is twelve men impaneled, sworn, and charged according to law. *Brazier v. State*, 44 Ala. 392.

By common law a jury of twelve men was the only tribunal which the law recognized for the trial of the question of guilt of the accused under an indictment, especially for a felony and a plea of not guilty. *People v. Lyons* (Ill.) 5 Crim. L. Mag. 674, 675.

It may therefore be stated as a general rule that the common-law jury consists of twelve men. *Carroll v. Byers* (Ark.) 36 Pac. 499; *Larillan v. Lane*, 8 Ark. 372, 875; *English v. State*, 31 Fla. 340, 846; *Brown v. State*, 8 Blackf. 561; *Brown v. State*, 16 Ind. 496; *Jackson v. State*, 6 Blackf. 461; *Bryan v. State*, 4 Iowa, 349, 352; *Higgins v. Farmers' Ins. Co.* 60 Iowa, 50, 51; *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116; *Territory v. Ah Wah*, 4 Mont. 169, 47 Am. Rép. 846; *Cancemi v. People*, 18 N. Y. 128, 135; *People, Metropolitan Bd. of Health, v. Lane*, 55 Barb. 168, 178; *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 674; *Bradford v. Territory*, 1 Okla. 366; *Com. v. Shaw*, 1 Pittsb. 492; *Mackey v. Enzensperger*, 11 Utah, 154, 168; *Barlow v. Daniels*, 25 W. Va. 512, 517.

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Again, it has been said that a jury consists of twelve persons, and a verdict of a less number is of no effect unless the objection is waived. *Eshelman v. Chicago, R. I. & P. R. Co.* 67 Iowa, 296; *Cowles v. Buckman*, 6 Iowa, 162.

And a jury must consist of twelve men, and no other number is known to the law. *Dixon v. Richards*, 2 How. (Miss.) 771.

In the case of a trial by a petit jury it can be no more nor less than twelve. *Com. v. Shaw*, 1 Pittsb. 492, citing 2 Hale, P. C. p. 161.

Again it has been stated that a petit jury must consist of precisely twelve men, no more, no less,—no other number is known to the law; and they must appear upon the record to have rendered their verdict. *State v. Mansfield*, 41 Mo. 470, 474; *Rex v. St. Michael*, 2 W. Bl. 719; *Dixon v. Richards*, 2 How. (Miss.) 771.

The trial by jury has been considered of common right, and one of the most sacred safeguards against oppression under the common law. It has always consisted of twelve men, and a verdict of a less number has ever been regarded in the criminal law as of no validity. *State v. Gutierrez*, 15 La. Ann. 190, 194; *People v. Lyons* (Ill.) 5 Crim. L. Mag. 674.

So, it has been stated that a jury of twelve is the only legally constituted tribunal of a trial for an indictment of a felony. *Harris v. People*, 128 Ill. 585.

And, at common law, the number of the jury for the trial of all issues involving the personal rights and liberties of the subject could never be less than twelve. *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116.

Again, it has been held that every issue of fact must be tried by a jury of twelve men, although it is not necessary that their names should be recorded. *Foot v. Lawrence*, 1 Stew. (Ala.) 483.

But a common-law jury can only be had in a court of common-law jurisdiction, both as regards the character of the court and its mode of procedure, and it is not true that simply making a jury to consist of twelve men constitutes a common-law jury trial. *People, Booth, v. Fisher*, 20 Barb. 652.

If, therefore, the number returned be less than twelve any verdict must be ineffectual and the judgment will be reversed for error, but if more than twelve be accidentally sworn it will not vitiate the proceedings though it is an irregularity to be avoided. 1 Chitty, Crim. Law, p. 505; *State v. Mansfield*, 41 Mo. 470, 474.

The absolute rights of individuals are: (1) The right of personal security; (2) the right of personal liberty; (3) the right to acquire and enjoy property.

These rights are natural, inherent, and inalienable.

Citizens' Sav. & L. Assn. v. Topeka, 20 Wall. 655, 662, 22 L. ed. 455, 461.

The right to a trial by jury, as known at the common law by one charged with crime, is, in America, an inalienable right, which cannot be restricted by legislative or constitutional enactment. One of the institutions that is an essential part of due process of law is the right of trial by jury.

Hurtado v. California, 110 U. S. 558, 28 L. ed. 246; *Story*, Const. § 1779; 1 *Palfrey's New England*, 340.

The jury guaranteed to a person accused of crime consists of twelve men, no more and no less.

1 *Thompson*, Trials, p. 4; 2 *Hale*, P. C. p. 161; 1 *Chitty*, Crim. L. p. 505; *Trials per*

If there be eleven agreed, and but one dissenting, who says he would rather die in prison, yet the verdict shall not be taken by eleven, nor yet the refuser fined or imprisoned; and therefore, where such a verdict was taken by eleven, and the twelfth fined and imprisoned, it was upon great advice ruled the verdict was void, and the twelve men delivered and a new venire awarded. For men are not to be forced to give their verdict against their judgment. 41 *Assise*, 11.

So, if only eleven be sworn by mistake no verdict can be taken of the eleven, and if it be it is error, and so in a presentment, but if twelve be recorded sworn no averment lies that one was not sworn. 2 *Hale*, P. C. p. 296; *Com. v. Shaw*, 1 *Pittsb.* 492.

There can be no question that at common law the only recognized tribunal for the trial of the guilt of the accused, under an indictment for felony and a plea of not guilty, was by a jury of twelve men. *Harris v. People*, 128 Ill. 585.

And, in *Maduska v. Thomas*, 6 Kan. 153, 159, which was an action of ejectment, it is said that the verdict of eleven jurors or less than twelve is not the verdict of the jury.

The judgment of the court was reversed as being that of eleven jurors, in *Dayton v. Church*, 7 Abb. N. C. 367, where a juror was personated by another person without the knowledge of the parties to the action.

In some analogous English cases a question of mistrial by reason of the impersonation of a juror by another person upon a trial by twelve jurors arose. *Hill v. Yates*, 12 East, 229; *King v. Tremaine*, 7 Dowd. & P. 684; *Norman v. Beament*, *Willes*, Rep. 484. These cases, however, do not show whether the objection to the verdict was based upon the ground of the number of legal jurors rendering the same, and only show that a mistrial was claimed. They are important, however, as showing that the jury of twelve must be a legal one.

II. Adoption of common-law doctrine.

a. By constitutional provisions.

Article 3, § 2, of the Constitution of the United States provides: "The trial of all crimes, except in cases of impeachment, shall be by jury."

And article 7 of the Amendments to that Constitution provides that, "In suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Pais (Anno. 1725), 79; *Cancemi v. People*, 18 N. Y. 128; *Cooley*, Const. Lim. p. 319; *May v. Milwaukee & M. R. Co.* 3 Wis. 219; *State v. Coz*, 8 Ark. 436; *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671; *Brazier v. State*, 44 Ala. 387; *Turns v. Com.* 6 Met. 235; *Lamb v. Lane*, 4 Ohio St. 167; *Wynehamer v. People*, 13 N. Y. 378; *State v. McClellan*, 11 Nev. 39; *People v. O'Neil*, 48 Cal. 257; *People v. Powell*, 87 Cal. 348, 11 L. R. A. 75; *Hurd*, *Habeas Corpus*, p. 108.

Section 10, art. 1, of the Constitution of the state of Utah is repugnant to the 14th Amendment of the Constitution of the United States, and to the fundamental principles underlying our government.

U. S. Const. 14th Amend.

Eight men do not constitute a jury. They are a body of triers unknown to our law in courts of general jurisdiction.

Cooley, Const. Lim. p. 319; *Swart v. Kimball*, 43 Mich. 448; *Opinion of the Justices*, 41 N. H. 550; *Ward v. People*, 30 Mich. 116;

ceed \$20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

In the Constitutions of the several states provision is made, impliedly if not expressly, adopting the rules and doctrines of the common law with reference to the right of trial by jury, and the number of jurors upon such trial, and such provisions are construed to imply the right to the common-law jury of twelve.

The state Constitutions upon the subject are not, however, uniform, so far as the actual language used is concerned. In some, and perhaps the larger number, the terms used are "the right of trial by jury" shall remain inviolate. This will be found to be the case in Alabama,—Declaration of Rights, Const. 1875, art. 1, § 12; Arkansas,—art. 2, § 7, Declaration of Rights; California,—art. 1, § 7, Declaration of Rights; Colorado,—art. 2, § 23, adding the words "in criminal cases"; Connecticut,—art. 1, § 21, of the Declaration of Rights; Florida,—§ 3, Declaration of Rights, adding the word "forever"; Georgia,—art. 6, § 18, with the addition of the words "except where it is otherwise provided in this Constitution"; Illinois,—art. 2, § 5, with the use of the special phrase "as heretofore enjoyed"; Indiana,—art. 1, § 20; Iowa,—art. 1, § 9, Bill of Rights; Kansas,—§ 5, Bill of Rights; Kentucky,—§ 7, Bill of Rights, with the addition of the words "Ancient mode of trial by jury shall be held sacred, and the right, etc." with a special clause subjecting it "to such modifications as may be authorized by Congress"; Minnesota,—art. 1, § 4; Missouri,—art. 2, § 28; Montana,—art. 3, § 23; Nebraska,—art. 1, § 6; Nevada,—art. 1, § 3, adding the word "forever"; New Jersey,—art. 1, § 7; New York,—Const. 1894, art. 1, § 2, adding the words, "In which it has been heretofore used," and "forever"; North Dakota,—art. 1, § 7; Ohio,—art. 1, § 5; Oregon,—art. 1, § 17, with the addition of the words "in all civil cases"; Pennsylvania,—art. 1, § 6, saying that trial by jury "shall be as heretofore, and the right thereof remain inviolate"; Rhode Island,—art. 1, § 15; South Carolina,—art. 1, § 11; Tennessee,—art. 1, § 6; Texas,—art. 1, § 15; Utah,—art. 1, § 10, "in capital cases"; Washington,—art. 1, § 21; Wisconsin,—art. 1, § 5.

The Constitution of Delaware, art. 1, § 4, uses the term "trial by jury shall remain as heretofore."

Work v. State, 2 Ohio St. 296, 59 Am. Dec. 671; *Hill v. People*, 16 Mich. 351; *Allen v. State*, 54 Ind. 461; *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281.

When one section of a public act limits or abrogates a right existing prior to its enactment, and another section of the same act preserves that right, the courts, in giving force to the act, will disregard the section of limitation or abrogation and enforce the right.

Section 10 must receive a strict construction, for it deprives citizens of pre-existing rights.

Sherwood v. Reade, 7 Hill, 431; *Striker v. Kelly*, 2 Denio, 323; *Sharpe v. Speir*, 4 Hill, 76; *Potter's Dwarrr. Stat.* p. 141; *Sutherland, Constr.* § 217; *The Hickory Tree Road*, 43 Pa. 139; *Packer v. Sunbury & E. R. Co.* 19 Pa. 211; *Ryan v. State*, *Eller*, 5 Neb. 276; *Gibbons v. Brittenum*, 56 Miss. 232; *Harrington v. Rochester*, 10 Wend. 547; *Brown v. Philadelphia County Comrs.*

The Constitution of Maine, art. 1, § 7, in dealing with the right of trial by jury in criminal cases of a capital or infamous nature, says: "Their usual number and unanimity, in indictments and convictions, shall be held indispensable."

Section 20 of the same article declares that "in all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practised."

So, art. 12 of the Declaration of Rights of Massachusetts provides that the legislature shall not make any law that shall subject any person to a capital or infamous punishment, except for the government of the army and navy, without trial by jury.

And art. 15 of the Declaration of Rights of the same state provides that in all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practised, the parties have a right to a trial by jury, and this method of procedure shall be held sacred, unless, in cases arising on the high seas and such as relate to mariner's wages, the legislature shall hereafter find it necessary to alter it.

In the Constitution of Michigan the term used is "the right of trial by jury shall remain." Art. 6, § 27.

Article 16 of the Constitution of New Hampshire, Bill of Rights, provides that the legislature shall not "make any law that shall subject any person to a capital punishment (excepting for the government of the army and navy, and the militia in actual service) without trial by jury."

And article 20 of the Bill of Rights of that state is similar in its provisions to the above-mentioned § 15 of Massachusetts Declaration of Rights, with the additional exception of cases "in which the value in controversy does not exceed \$100, and title of real estate is not concerned."

By § 13, art. 1, of the Constitution of North Carolina, it is provided that no person shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men in open court.

In § 19 of the same Constitution which relates to civil actions, it is said that "the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." 43 L. R. A.

21 Pa. 37; *Quick v. Whitewater Twp.* 7 Ind. 570; *Albertson v. State*, 9 Neb. 429; *Sams v. King*, 18 Fla. 557; *Branagan v. Dulaney*, 8 Colo. 408; *Gee v. Thompson*, 11 La. Ann. 657; *Farmers' Bank v. Hale*, 59 N. Y. 53.

Section 10 must give way to § 12, and § 10 cannot be held to limit or qualify § 12.

Von Holst, Const. L. of U. S. p. 258; *Work v. State*, 2 Ohio St. 301, 59 Am. Dec. 671; *Hagany v. Cohnen*, 29 Ohio St. 82; *Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 194; *Ordronaux, Constitutional Leg.* p. 261; *Barron v. Baltimore*, 7 Pet. 247, 8 L. ed. 674; *Livingston v. Moore*, 7 Pet. 469, 8 L. ed. 751; *Fox v. Ohio*, 5 How. 434, 12 L. ed. 223; *Edwards v. Elliott*, 21 Wall. 557, 22 L. ed. 492; *Cooley, Const. Lim.* pp. 19-410; *Pearson v. Yocdall*, 95 U. S. 294, 24 L. ed. 436; *Miller v. McQuerry*, 5 McLean, 460.

"Law of the land" means "due process of law" according to the principles of the common law, rather than to the provisions of the statute law. That is to say, liberty,

Article 5, § 13, of the Constitution of Texas provides that "petit juries in the district courts shall be composed of twelve men."

Article 10, chap. 1, Declaration of Rights, Vt. Const. provides: "In all prosecutions for criminal offenses a person hath a right to . . . a speedy public trial by an impartial jury of the country; without the unanimous consent of which jury he cannot be found guilty."

And article 12 of the same chapter provides that when any issue of fact for the cognizance of a jury is joined in a court of law the parties have a right to trial by jury which ought to be held sacred.

Article 1, Bill of Rights, Va. Const. § 13, provides that in any controversy respecting property, and any suits between man and man, the trial by jury is preferable to any other, and ought to be held sacred.

The Constitution of West Virginia, Bill of Rights, art. 3, § 13, says that in suits at common law, "where the value in controversy exceeds \$20 exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved."

And art. 3, Bill of Rights, § 14, of that state provides that "trials of crimes, and of misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men."

b. Construction placed upon constitutional provisions.

1. In general.

As it is a general rule that where terms used in the common law are contained in a statute or the Constitution, without an explanation of the sense in which they are employed, they should receive that construction which has been affixed to them by the former; therefore, in order to ascertain in what the right of trial by jury consists, recurrence must necessarily be made to the provisions of the common law defining the qualifications, and ascertaining the number of which the jury shall consist as the standard to which the framers of the Constitution referred. *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116.

And in determining the constitutionality of state statutes changing the law in relation to juries, and providing for the number of jurors required to try a cause, it has been said that it is a well-settled and unquestionable rule of construction, that the language used by the legislature in the statutes enacted by them, and that

property, and health shall be placed under the general laws governing society.

Sedgwick Stat. & Const. L. p. 475; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Randall v. Brigham*, 7 Wall. 523, 19 L. ed. 285; *Parsons v. Russell*, 11 Mich. 129, 83 Am. Dec. 728; *Westervelt v. Gregg*, 12 N. Y. 212, 62 Am. Dec. 160; *Wynehamer v. People*, 13 N. Y. 378; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Den, Murray, v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372.

It means, according to Lord Coke, being brought in to answer according to the "old law of the land."

2 Inst. 50; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274.

The distinction between the abolishment of the grand-jury system and the substitution of prosecutions by information, and the

interference with the right of trial by jury, is that the first is largely a method of procedure. The latter is a substantive right.

Bradford v. Territory, Woods, 1 Okla. 366; *Mackey v. Enzensperger*, 11 Utah, 154; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Cancemi v. People*, 18 N. Y. 128.

So far as this defendant is concerned, § 10, art. 1, of the Constitution of Utah is void in that it is *ex post facto*, and in conflict with subs. 1, § 10, art. 1, of the Constitution of the United States.

Sutherland, Stat. Constr. § 467; Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506; *Cooley, Const. Lim. pp. 329, 330; Calder v. Bull*, 3 Dall. 386-390, 1 L. ed. 648-650; *Fletcher v. Peck*, 6 Cranch, 138, 3 L. ed. 178; *Hartung v. People*, 22 N. Y. 95; *Opinion of the Justices*, 41 N. H. 555; *Kennett's Petition*, 24 N. H. 139; *Willard v. Harvey*, 24 N. H. 344.

used by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the Constitution and the laws were adopted. Opinion of the Justices, 41 N. H. 550.

In *Cooley's Constitutional Limitations*, 4th ed. p. 395, it is said, any less than this number of twelve would not be a common-law jury, or such a jury as the Constitution guarantees to accused parties when a less number is not allowed in express terms; and the necessity of a full panel cannot be waived,—at least in a case of felony, even by consent, the infirmity in case of a trial by jury of less than twelve, by consent, would be that the tribunal would be one unknown to the law, created by mere voluntary act of the parties, and it would in effect be an attempt to submit to a species of arbitration the question whether the accused has been guilty of an offense against the state. *People v. Lyons* (Ill.) 5 Crim. L. Mag. 674.

So, the jury referred to in the Federal Constitution, and in the 6th Amendment thereto, is a jury constituted as it was at common law, of twelve persons, neither more nor less. *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061.

And the right of trial by jury as at common law was guaranteed by the Amendment of the United States Constitution, and such a jury was a jury of twelve, and entitled the parties to a unanimous verdict; and as the provisions of the Constitution applied to the territory, any material change takes away a substantial right, and therefore a person convicted by a jury of less than that number of persons is entitled to have the same reversed, and the cause remanded. *Bradford v. Territory, Woods*, 1 Okla. 366.

In further support of the theory that a jury as constituted at common law was the jury intended by and provided for in the Constitution, the remarks of Justice King in his dissenting opinion in the case of *Mackey v. Enzensperger*, 11 Utah, 154, 160, are of value. He says that in adopting a Constitution for our government and guidance, our fathers had in mind the great charter of English liberty, and that the right of trial by jury as it was understood at common law was not the least of these rights; and further, that when a jury is mentioned in the organic law of a territory, the term is understood to have reference to it as constituted at common law unless the contrary plainly appears, and 43 L. R. A.

that such was the construction uniformly put upon the provisions common in all the Constitutions of the several states, that the right of trial by jury should remain inviolate.

And in the same case Justice King distinctly states that the common-law jury imports a jury of twelve men whose verdict must be unanimous to be legal, and that such must be its acceptance to everyone acquainted with the history of the common law, and aware of the high estimation in which that institution so constituted has for so long a period been held.

The trial by jury is by twelve free and lawful men who are not of kin to either party, for the purpose of establishing, by their verdict, the truth of the matter which is in issue between the parties, and it is called the trial by one's peers, that is by men who have that concern for the party on trial which naturally flows from a parity of circumstances common to him and his judges; and such is the trial by jury guaranteed by the Constitution, and originally secured by the Magna Charta of England. *Dowling v. State*, 5 Smedes & M. 664, 685.

And the "due course of the law of the land" demands a legal conviction by a legal jury, that is to say, it must consist of such "number of jurors as is allowed by the law." *Stell v. State*, 14 Tex. App. 59, in which case a jury of five in the county court was held unconstitutional, the statutes of the state providing for a jury of six, the court stating that the case was not tried by a legal jury and in conformity with the due course of the law of the land. *Territory v. Ah Wah*, 4 Mont. 149, 47 Am. Rep. 341, to the same effect.

In *Larillian v. Lane*, 8 Ark. 372, 875, it is said that the trial by jury is a great constitutional right, and that when the convention incorporated the provision into the Constitution of the country they most unquestionably had reference to the jury trial as known and recognized by the common law.

And it will be assumed that the meaning of the term "jury" so far as numbers are concerned, is fixed by the Constitution in accordance with the common law as it existed at the date of the adoption of the Constitution. *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116.

Again, it is said that a petit jury must be composed of twelve men according to the meaning of the term in the common law. *United States v. Insurgents of Pennsylvania*, 2 Dall. 335, 1 L. ed. 404; *Bonaparte v. Camden & A. R. Co. Baldw.* 205; *Twins v. Com.* 6 Met. 231;

Messrs. C. S. Varian and Benner X. Smith, with **Mr. A. O. Bishop**, Attorney General, for respondent:

Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state.

Walker v. Sauvinet, 92 U. S. 92, 23 L. ed. 679; *Hurtado v. California*, 110 U. S. 517, 28 L. ed. 232; *Re Kemmler*, 136 U. S. 448, 34 L. ed. 524.

The question as to what is an *ex post facto* law, within the meaning of the Constitution, has received much consideration. At an early day Mr. Justice Chase defined *ex post facto* laws as those which created or aggravated the crime; or increased the punishment; or changed the rules of evidence for the purpose of conviction.

Calder v. Bull, 3 Dall. 391, 1 L. ed. 650.

In subsequent decisions the rule was stated generally to be when, "in relation to that offense or its consequences, it (the law)

alters the situation of a party to his disadvantage."

Gut v. Minnesota, 9 Wall. 35, 19 L. ed. 573; *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506; *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *Cook v. United States*, 138 U. S. 183, 34 L. ed. 913; *Duncan v. Missouri*, 152 U. S. 382, 38 L. ed. 487; *Hopt v. Utah*, 110 U. S. 589, 28 L. ed. 268; *Mathis v. State*, 31 Fla. 291; *Lybarger v. State*, 2 Wash. 552; *Re Wright*, 3 Wyo. 478, 13 L. R. A. 748; *State v. Ah Jim*, 9 Mont. 167.

The states have power to provide by their Constitutions for the trial of persons charged with crimes by juries of less than twelve.

Ordronaux, Const. Leg. p. 261; 1 Hare, Am. Const. L. p. 615; 2 Hare, Am. Const. L. p. 860; *Kallock v. San Francisco*, 56 Cal. 229.

The constitutional provision of this state, in its application to appellant, is not *ex post facto*.

Cruger v. Hudson River R. Co. 12 N. Y. 190; *Wynehamer v. People*, 13 N. Y. 427; *Dowling v. State*, 5 Smedes & M. 684.

And it is this right which is held sacred and made inviolable by the Constitution of the county. *Carson v. Com.* 1 A. K. Marsh. 290.

The contention that twelve is the legal number of jurors necessary to render a valid verdict in a criminal action is further supported by the case of *People v. Scoggins*, 37 Cal. 689, in which the court stated that when the jury is completed so that there are twelve qualified in the box, and not before, they are to be sworn to try the case. In this case, however, the main question involved was the impaneling of a jury in a criminal case, and the court did not, further than as above stated, pass upon the number requisite to constitute a constitutional jury.

And, in *Neely v. State*, 4 Baxt. 174, 180, the court stated that the right of trial by jury is a right guaranteed to every citizen to have the facts involved in any litigation which he may have tried and determined by twelve good and lawful men.

So, it is a right to which the people have clung with more tenacity than to any other, as securing the mode of trial best calculated to insure a just result. *Van Sickle v. Kellogg*, 19 Mich. 49, 52.

Again, in *M'Cormick v. Brookfield*, 4 N. J. L. 69, 71, which was a civil action to recover the balance of a book account, it is said it is the high privilege of parties to have their rights decided by twelve men, who are free from the suspicion of bias or partiality; who are *omni exceptione majores*, and any aberration from the legal mode of proceeding ought at once to arrest the judgment. This case, however, involved the question of the validity of a challenge to the favor.

And in the dissenting opinion of Justice King in *Mackey v. Ensenaperger*, 11 Utah, 154, 161, it is said that the origin of the trial by jury, although lost in the dimness of the past, has existed from the earliest period to the adoption of the Constitution, and unanimity of twelve jurors alone has constituted a verdict. *Paul v. Detroit*, 32 Mich. 108, to the same effect.

And in reversing the verdict of a jury of eleven upon a conviction of felony, the court, in *Territory v. Ah Wah*, 4 Mont. 149, 47 Am. Rep. 341, 342, stated that the law had established certain tribunals, with defined powers and forms of proceeding, for the trial of per- 43 L. R. A.

sons charged with crime, and that security to the defendant and to the public was only found in a strict compliance with the law of the land.

So, in *State v. Williams*, 35 S. C. 344, 352, 353, the court, in stating that the constitutional provision that the right of trial by jury should remain inviolate, was fully met when the prisoner is vouchsafed, by the law of the land, a fair trial by twelve jurors, men good and true, remarked that as a tribunal to determine all issues of fact the trial by jury was forever inviolably preserved by the paramount law, and quoted with approval the remarks of the court in the cases of *Cregier v. Bunton*, 2 Strobb. L. 487, and *State v. Boatwright*, 10 Rich. L. 407.

Again, in the dissenting opinion of Mr. Justice King in *Mackey v. Ensenaperger*, 11 Utah, 154, 163, wherein he contended that the jury at common law could never be less than twelve, and that all the jurors must concur in order to authorize a verdict, the justice states that it is to be inferred that trial by jury as imposed by the Constitution has relation to the common law as it was understood in England, and to the right to such trial in the class of cases, and cites *Miller*, U. S. Const. 492.

And any attempt to reduce the number of jurors in the jury trial should be viewed by the courts as an attempt upon the constitutional rights of a citizen, and should be declared of no effect. *State v. Gutierrez*, 15 La. Ann. 190, in which the court followed the decision in *Parsons v. Bedford*, 3 Pet. 433, 446, 7 L. ed. 732, 736.

The case of *Parsons v. Bedford*, 3 Pet. 433, 446, 7 L. ed. 732, 736, relied upon in the above case, was not, however, one in which the question of the number of jurors requisite to form a valid verdict was raised, although it did expressly pass upon the right to a trial by jury, and the language of the court may be said to apply equally to a case in which the question of number has arisen. The language in effect is as follows: The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every state Constitution in the Union.

But the constitutional provisions only give the right to a trial by a common-law jury of twelve in cases wherein such a jury was customarily used and legally claimed at the time of the adoption of the Constitution, as they

State v. Welch, 65 Vt. 50; *People v. McNulty* (Cal.) 28 Pac. 816; *Sage v. State*, 127 Ind. 15; *South v. State*, 86 Ala. 617; *State v. Cooler*, 30 S. C. 105, 3 L. R. A. 181; *Moore v. Missouri*, 159 U. S. 675, 40 L. ed. 302.

So far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place.

Cooley, Const. Lim. 3d ed. p. 272; *Ex parte McCordle*, 7 Wall. 506, 19 L. ed. 264; *Cook v. United States*, 138 U. S. 183, 34 L. ed. 913; *Re Converse*, 137 U. S. 630, 34 L. ed. 798.

Zane, Ch. J., delivered the opinion of the court:

The defendant was tried upon an indictment charging him with the murder of the late John Nordquist, by feloniously and with malice aforethought, striking him upon the

head with a wooden pole. In the indictment the grand jury expressly characterized the crime as murder in the second degree. Upon the trial, the petit jury found the defendant guilty of murder in the second degree. The court overruled a motion for a new trial, and sentenced him to confinement in the state prison for the term of ten years. From the order overruling the motion for a new trial, and from the sentence, the case is before this court on appeal.

The trial was by a jury of eight men, to which the defendant objected at the time, and demanded twelve and excepted to the denial of his objection and demand, and now assigns it as error. Section 10, art. 1, of the Constitution of the state of Utah declares that "in capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the ver-

only secure existing rights. *People v. Phillips*, 1 Edm. Sel. Cas. 386; *Blanchard v. Raines*, 20 Fla. 467; *Triggally v. Memphis*, 6 Cold. 382; *Kimball v. Connor*, 3 Kan. 414; *Ross v. Irving*, 14 Ill. 171; *Mead v. Walker*, 17 Wis. 187; *People, Murray, v. New York City & County Justices*, 74 N. Y. 406, 407; *Murphy v. People*, 2 Cow. 815; *Re Sweatman*, 1 Cow. 151; *Dean v. Willamette Bridge Co.* 22 Or. 167, 15 L. R. A. 614, 615; *Kendall v. Post*, 8 Or. 146; *Tribau v. Strowbridge*, 7 Or. 158; *Ferrier's Petition*, 103 Ill. 367, 374, 42 Am. Rep. 10; *Emerick v. Harris*, 1 Binn. 416, 428; *Flint River S. B. Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248, 260; *Harper v. Elberton Comrs.* 23 Ga. 566; *Com. v. Byers*, 5 Pa. Co. Ct. 295; *Doebler v. Com.* 3 Serg. & R. 237.

2. State Constitutions.

Alabama.

The usages of the common law with reference to juries are adopted by the Constitution of Alabama, and therefore a lawful jury under such Constitution means a jury of twelve as at common law. *Woodward Iron Co. v. Cabaniss*, 87 Ala. 328, 380; *Montgomery & F. R. Co. v. McKenzie*, 85 Ala. 546; *Collins v. State*, 88 Ala. 212, 214; *Brazier v. State*, 44 Ala. 387, 392.

So, the right to be tried by such a jury extends to all prosecutions instituted by indictment, and it must be secured to the defendant in the court of original jurisdiction, or he must have such right upon appeal. *Collins v. State*, 88 Ala. 212, 215.

And it is generally conceded that the parties are entitled to have all claims, demands, and contentions so tried under the constitutional guaranty, which embraces all purely legal rights and contentions known to the common law. *Montgomery & F. R. Co. v. McKenzie*, 85 Ala. 546, 549.

But when a jury of twelve men is not demandable of right by the common law it is not demandable of right under a constitutional provision. *Montgomery & F. R. Co. v. McKenzie*, 85 Ala. 546, 549.

And the right to be tried by such a jury can only be said to exist in cases in which the right did so exist either at common law or under a state statute at the adoption of the Constitution of the state. *Tims v. State*, 26 Ala. 165, 168. **Arkansas.**

The word "jury" as used in the Arkansas Bill of Rights means a jury in the common-law 43 L. R. A.

sense twelve men. *State v. Morrill*, 16 Ark. 384, 410; *State v. Cox*, 8 Ark. 436; *Warwick v. State*, 47 Ark. 568.

As the common-law jury consists of twelve men, and as the Constitution is silent upon the subject, the conclusion is irresistible, that the framers of that instrument intended to require the same number. *Larillian v. Lane*, 8 Ark. 372, 375.

And the constitutional provisions are so construed that a defendant cannot be deprived of his right to a trial by such a jury except by his own consent. *State v. Cox*, 8 Ark. 436, 447.

And so strongly are the constitutional provisions construed in favor of a jury of twelve that the legislature cannot abridge the number. *State v. Morrill*, 16 Ark. 384, 410; *State v. Cox*, 8 Ark. 436; *Cairo & F. R. Co. v. Trout*, 32 Ark. 17, 25. **California.**

The court did not expressly pass upon the number of jurors necessary to constitute a valid jury under the California Constitution in the case of *Koppikus v. State Capitol Comrs.* 16 Cal. 248, 253, 254, yet, in construing the language of such Constitution as to the right being secured to all and remaining inviolate forever, the court held that the language was used with reference to the right as it existed at common law. It would therefore seem that if the right as it existed at common law was a right to be tried by twelve men such right would exist under the state Constitution, and the language so used by the court might well be said to warrant such a construction. **Connecticut.**

The case of *Goddard v. State*, 12 Conn. 448, 450, passed upon the construction of the same provision in the Constitution of that state, and held that the word "remain" as therein used was a relative term, and referred to the state of things existing at the time the same was adopted, and declared that the right then enjoyed should be enjoyed forever. The question of the number of jurors did not arise in this case, but the construction placed by the court upon the words of the Constitution may be said to be of equal weight in construing the terms of the Constitution in reference to the number of jurors, as, if a jury of twelve was the jury to which a person was entitled at the date of the Constitution, his right to such a jury would under such a construction still continue.

This contention is further supported by the later case of *Seely v. Bridgeport*, 53 Conn. 1,

dict shall be unanimous. In civil cases three fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded." The punishment of murder in the second degree is imprisonment at hard labor in the penitentiary, "for not less than ten years, and which imprisonment may be extended to life." Laws 1890, p. 94. While the description of the offense included murder in the first degree, as well as murder in the second degree, the grand jury characterized the crime as murder in the second degree, and thereby expressed an intent to accuse the defendant of that offense, and not with a capital crime. The defendant was tried for murder in the second degree, as the rulings of the court and its charge to the jury show, and he was convicted of and sentenced for that crime. Therefore the crime was within the 2d clause of the above section.

But the defendant insists that § 7 of the same article, which says that "no person

shall be deprived of life, liberty, or property, without due process of law," secured him the right to be tried by twelve persons. To hold that the authors of the state Constitution intended by the use of the phrase "due process of law" to require a jury of twelve jurors in all cases would be to say, in effect, that they intended to create a repugnancy in that instrument. The rules of construction of constitutional law, as well as statute law, require that both sections shall be allowed to stand, and effect be given to each. We are of the opinion that they can stand together, and that no conflict was intended.

The defendant also claims that § 10, *supra*, conflicts with the Constitution of the United States, and that it is void for that reason. Article 6 of the Amendment to that instrument declares that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. . . ."

2, although the number of jurors was not the exact question raised in that case.

Florida.

The provision in the original Florida Constitution that the right of trial by jury shall remain inviolate forever, taken by itself, refers to a jury according to the common law, to be composed of twelve persons. *Gibson v. State*, 16 Fla. 291, 300.

By the amendment of the Constitution of Florida adopted in 1875, the number of jurors for the trial of causes in any court may be fixed by law. Under this amendment it was held, in *Gibson v. State*, 16 Fla. 291, wherein the defendant was convicted of larceny by a jury of six, that the right of trial by jury as given by the original Constitution was qualified and controlled without destroying or infringing the right of trial by jury, and the number of jurors had been regulated by law, and six were made sufficient, and that therefore such a jury was constitutional.

The construction placed upon the Florida Constitution by the case of *Blanchard v. Raines*, 20 Fla. 467, 476, is also in the same line.

And the above provision has been construed as referring only to the number of jurors for the trial of causes in the court of that state. *English v. State*, 31 Fla. 340, 344.

Georgia.

The provision in the Georgia Constitution which declares that "trial by jury as heretofore used in this state shall remain inviolate" contemplates a trial by a jury as at common law, that is by twelve free and lawful men of the body of the county. *Jones v. State*, 1 Ga. 610, 616. In this case, however, the question turned largely upon the point of the number of challenges that the prisoner was entitled to on an indictment for larceny.

So, the clause in the Georgia Constitution has been held to embrace a trial by jury as at common law in all its essential elements. *Costly v. State*, 19 Ga. 614, 620.

It includes the right as declared by *Magna Charta*. *Mahan v. Cavender*, 77 Ga. 118, 121.

And, although the question of number was not expressly passed upon by the court in *Flint River S. B. Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248, 260, and in *Harper v. Elberton Comrs.* 23 Ga. 566, yet the general construction placed upon the constitutional provisions by those cases, that it was the right as it existed at common law that was guaranteed, would apply with equal force to a construction thereof with 43 L. R. A.

reference to the number necessary to constitute a valid jury.

In construing the Georgia Constitution of 1868, which provides that the right of trial by jury, "except where it is otherwise provided in this Constitution," shall remain inviolate, and the general assembly shall provide by law for the selection of upright and intelligent persons to serve as jurors, the court in *Allen v. State*, 51 Ga. 264, 266, stated that the exception therein contained had reference to that clause which authorizes the superior court to render judgment without the verdict of a jury in civil cases where no issuable plea is filed, and not to the number of persons who shall compose the jury; and further, that if the Constitution had used the words "trial by jury as heretofore used in this state" there would be ground for supposing that a common-law jury of twelve men as previously used in that state was intended and no other, but such words were omitted and it declared that a jury of seven should be lawful in the district court which was authorized to be organized by it.

So, the Georgia Constitution of 1877, § 18, art. 3, which prohibits a jury of less than twelve men, was not intended to annul the practice in the city courts, under the Georgia statute legislating the practice in such court until some other law was passed to take its place, and therefore a jury of five trying a case in such courts pursuant to the defendant's demand of a jury cannot afterwards be assailed as unconstitutional. *Kneeland v. State*, 62 Ga. 395.

In *Conyers v. Graham*, 81 Ga. 615, 619, it was held that art. 6, § 18, ¶ 1, of the Constitution (Ga. Code, § 5174), provides in effect that the trial by jury shall remain inviolate in the city and superior courts, in which courts a jury is composed of twelve men, and it is the trial by twelve jurors which the Constitution declares shall remain inviolate. This case, however, turned more especially upon the question of the application of the provision of the Constitution to acts regulating the mode or manner of selecting the twelve jurors and the number of strikes that each party was entitled to. The court stated that if the act relating thereto provided for a trial by a jury of twelve that was sufficient, and there was no limitation to the power of the legislature to prescribe how the twelve should be selected.

Illinois.

Under the Illinois Constitution a jury of less than twelve is not a common-law jury as guar-

This amendment applies to the United States government, not to the states. Limitations imposed on the powers of government by the Constitution of the United States are upon that government alone, unless the states are mentioned. "The states may, if they choose, provide for the trial of all offenses against the states, as well as for the trial of civil cases in the state courts, without the intervention of a jury, or by some different jury from that known to the common law." Cooley, Const. Lim. 6th ed. pp. 29, 30; *Twitchell v. Pennsylvania*, 7 Wall. 321, 19 L. ed. 223; *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487.

Defendant's counsel also insists that § 10, *supra*, conflicts with § 1 of the 14th Amendment to the Constitution of the United States, as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or en-

force any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The 1st clause of the section makes all persons born or naturalized in the United States, and subject to the jurisdiction thereof, citizens of the United States, and of the state wherein they reside. Citizenship of the United States is distinguished from citizenship of the state. All persons of the description mentioned are clothed with two distinct citizenships,—they are citizens of the United States, and of the state wherein they reside. As to the 2d clause of the section, it may be said that the privileges and immunities of an individual as a citizen of the United States go with him and protect him in any state, and, under treaties and the law of nations, into foreign lands and distant climes. But his privileges and

anted to accused parties by that instrument, especially where a less number than twelve is not expressly allowed. *People v. Lyons* (Ill.) 5 Crim. L. Mag. 674, 676.

The following cases, although they do not expressly pass upon the number of jurors, also uphold a construction of the constitutional provisions showing that the common-law jury of twelve men as it had been theretofore enjoyed was the one that was intended to be secured by the terms of such Constitution. *Johnson v. Joliet & C. R. Co.* 23 Ill. 203; *Seavey v. Seavey*, 30 Ill. App. 625, 637, 638; *Ross v. Irving*, 14 Ill. 171; *Whitehurst v. Coleen*, 53 Ill. 247; *Harris v. People*, 128 Ill. 585, 589-591.

Under the Illinois Constitution of 1870 juries of less than twelve in justices' courts are legal. *Indiana*.

The jury at common law consists of twelve men, and the same is the case under the Indiana Criminal Code, as it does not speak of a less number. *Brown v. State*, 16 Ind. 496; *Jackson v. State*, 6 Blackf. 461; *Brown v. State*, 8 Blackf. 561.

And the constitutional provision was adopted in reference to the common-law right of trial by jury. *Allen v. Anderson*, 57 Ind. 389. *Iowa*.

The jury contemplated by the provisions of art. 1, § 19, of the Iowa Constitution, Code 770, is the common-law jury constituted of twelve competent persons. *State v. Kaufman*, 51 Iowa, 579, 33 Am. Rep. 148, 149; *Eshelman v. Chicago, R. I. & P. R. Co.* 67 Iowa, 296; *Kelsh v. Dyersville*, 68 Iowa, 187; *Connors v. Burlington, C. R. & N. R. Co.* 74 Iowa, 385.

It is, however, within the power of the people of the state when forming their fundamental law to provide that a jury shall consist of six in inferior courts, and that such courts shall try inferior offenses leaving the way open to a jury of twelve by appeal. *State v. Beneke*, 9 Iowa, 203, 206.

And § 9 of art. 1 of the Iowa Bill of Rights was not designed as providing that in no case should a party be deprived of the right of trial by a jury of twelve, as the word "jury," as used in the 2d clause of such article is used in a sense different from the common-law meaning, even with regard to the right of appeal. *Higgins v. Farmer's Ins. Co.* 60 Iowa, 50, 51.

A municipal corporation is entitled to the benefit of the provisions of § 9 of the Iowa Bill of Rights, which guarantees the right to a trial by a jury, as the law makes no distinction be-

tween the two classes of persons, and therefore the provisions for a trial by less than twelve jurors in case of sickness is no more binding upon a municipal corporation than upon any other person. *Kelsh v. Dyersville*, 68 Iowa, 137. *Kansas*.

The Constitution of Kansas refers to the right to trial by jury as it existed at common law, and to those cases only in which a party was then entitled to a common jury. *Kimball v. Connor*, 3 Kan. 414. *Kentucky*.

In *Beatty v. Com.* 91 Ky. 313, 321, with respect to the right of trial by jury under the Constitution of the state, it was said that the period of time must be looked to in determining what was the ancient mode of trial by jury, and whether the constitutional guaranty as to it has been violated. This case involved the question of the constitutionality of the Kentucky statute of February 21, 1890, securing a more uniform and equal distribution of jury service, but the question of the number of jurors requisite to try a case did not expressly arise, nor was it absolutely determined.

The following cases, although they do not pass upon the exact number, recognize the theory that a jury as at common law is guaranteed by the Constitution. *Enderman v. Ashley, Sneed* (Ky.) 53; *Ross v. Neal*, 7 T. B. Mon. 407, 408. *Maryland*.

Although the question of number was not before the court in the case of *State v. Glenn*, 54 Md. 572, 606, yet the court declared that the constitutional provisions declared and made firm the pre-existing rights of the people, as those rights had been established by usage and the settled course of the law, although they were not intended to embrace every species of accusation involving either criminal or penal consequences; and further, that it gives the right to which the parties were entitled by the common law of England, according to the course of that law. *State v. Glenn*, 54 Md. 572, 599. It would therefore seem that if the established usage and settled course of law recognized the right to a jury of twelve, such a jury was the one declared and made firm by the Constitution of that state. *Massachusetts*.

In *Com. v. Dorsey*, 103 Mass. 412, 418, it is said that the jury referred to in article 12 of the Massachusetts Declaration of Rights is what was known as a petit jury, which consisted by

immunities as a citizen of the state abroad depend upon courtesy and comity. The provision did not define or create those rights termed the "privileges" and "immunities" of citizens of the state. The power to do so is among those reserved to the people, to be exercised by the states, according to the will of its people, expressed in constitutions and laws. This provision does not limit the power of the state as to the establishment of courts or other tribunals, or as to the modes of procedure in them. It has no application to jury trials in state courts. *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394.

It is further insisted that § 10 of the state Constitution is within the limitation imposed by the 3d clause of § 1, above quoted, which declares that no state shall "deprive any person of life, liberty, or property without due process of law;" that this language entitled a person on trial charged with a crime against a state law to a common-law jury—twelve jurors. We have seen that

the common law of "twelve good and impartial men of the neighborhood," and undoubtedly the Constitution contemplated a jury of twelve men who should be good and impartial.

Michigan.

By the Constitution of Michigan, art. 7, § 28, the jury may consist of less than twelve in all courts not of record. *Hill v. People*, 16 Mich. 351, 355; *Campau v. Detroit*, 14 Mich. 276.

And the provisions of Mich. Const. art. 6, § 27, that "the right of trial by jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties, in such manner as shall be prescribed by law," must be construed as meaning the right to trial by jury as it existed before, and as it had become known to the previous jurisprudence of the state. *Swart v. Kimball*, 43 Mich. 443, 448; *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633; *Tabor v. Cook*, 15 Mich. 322, 325; *Paul v. Detroit*, 32 Mich. 108, 114; *Van Sickle v. Kellogg*, 19 Mich. 49, 52.

The provisions contained in art. 4, § 46, of the Michigan Constitution, that the legislature may authorize the trial by a jury of less than twelve men, even though they give the legislature authority to fix and define a number less than twelve which shall compose the jury, do not authorize the making of provisions for contingencies in which a jury might consist of less than twelve in the discretion of the trial court. *McRae v. Grand Rapids, L. & D. R. Co.* 93 Mich. 399, 17 L. R. A. 750.

Minnesota.

A jury as used under art. 1, § 6, of the Minnesota Constitution, which declares that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," imports a body of twelve men. *State v. Everett*, 14 Minn. 439, 444; *Ætna Ins. Co. v. Grube*, 6 Minn. 82, 85.

And although the Constitution does not define trial by jury, yet it must be taken as meaning the right which existed at common law, history showing what the term meant, and to what the Constitution referred. *Lommen v. Minneapolis Gaslight Co.* 65 Minn. 196, 33 L. R. A. 437, 441.

The right must be taken as the same as that which existed at common law at the time the state Constitution was adopted. *Whallon v. Bancroft*, 4 Minn. 109.

Mississippi.

The Mississippi Constitution is silent as to the number of jurors, and also as to their qual-

ifications, but it is to be taken that the number, which by the common law was known to be twelve, was contemplated by the Constitution, and therefore it is not competent for the legislature to abolish or change in a substantial manner such jury, although they may prescribe the qualifications attached to a juror. *Byrd v. State*, 1 How. (Miss.) 163.

So, it has been stated that there is no jury for the trial of issues known to the Constitution and laws of Mississippi except that which consists of "twelve good and lawful men who are tried, elected, and sworn." *Wolfe v. Martin*, 1 How. (Miss.) 30, 31.

And the term "jury" as used in the Mississippi statutes is to be taken as having the fixed and determined meaning ascertained by the paramount law, and the courts will assume that the constituents of the jury, so far as numbers are involved, are fixed by the Constitution according to the common law as it existed at the time of the adoption of the same. *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116.

To the same effect, *Dowling v. State*, 5 Smedes & M. 664; *Lewis v. Garrett*, 5 How. (Miss.) 434; *Hunt v. State*, 61 Miss. 577, 580; *Tillman v. Ailles*, 5 Smedes & M. 373, 43 Am. Dec. 520; *Dixon v. Richards*, 2 How. (Miss.) 771.

Missouri.

Under the Constitution of the state of Missouri the defendant in a criminal prosecution has a right to twelve jurors, and in civil cases either party has a right to demand a jury of twelve, and such is the settled law of the state. *State v. Van Matre*, 49 Mo. 268.

So, whenever there is a constitutional guaranty of the right of trial by jury, the jury must be composed of twelve men. *State v. Mansfield*, 41 Mo. 470, 474; *State v. Robertson*, 71 Mo. 448.

And in all courts of record a jury must consist of twelve, and the defendant has a right to demand such number under the Constitution. *Vaughn v. Scade*, 30 Mo. 600.

The terms used in the Missouri Constitution mean the historical jury of twelve men with all its incidents. *Kansas City, C. & S. R. Co. v. Story*, 96 Mo. 611, 621.

So, in *State, St. Louis, K. & N. W. R. Co., v. Withrow*, 133 Mo. 500, it is said that vast substantial incidents and consequences which pertain to the right of trial by jury are beyond the reach of hostile legislation, and are preserved in their ancient substantial extent as existing

land. Nothing essential can emanate from arbitrary power. The rights of the defendant and the duty of the court are equally under the finger of the law. But the law defining crime, the rules of evidence, or the procedure, may be changed by competent authority, constitutional authority, or common law. It will not be denied that the common law requiring twelve jurors can be changed by the people of the United States by amending their Constitution. And the question is: Have they, by the constitutional provision under consideration, prohibited the people of the state from reducing the number of jurors from twelve to eight? Have they, in using the phrase "due process of law," deprived the people of the state of Utah of the power to reduce the number of jurors in the trial of a felony to eight? They have assumed to do so, and we must presume that they believed the jury they provided most suitable and best calculated, under existing and probable conditions, to discharge the du-

ties of a jury. The purpose of the provision relied upon was to secure the rights to life, liberty, and property, and the benefits of just laws. If a jury of eight men is as likely to ascertain the truth as twelve, that number secures the end. There can be no magic in the number twelve, though hallowed by time. Intelligence, impartiality, and integrity are the qualities that will enable and influence jurors to ascertain and declare the truth. Such a result does not depend upon any particular number. Legal process must submit to reform, in the light of experience and advancing intelligence. True principles must endure, but the methods, modes, and means of securing their application to human conduct, human rights and duties,—the social system,—will change with development and progress and more complicated conditions. We are of the opinion that the people of the state had the power, in the Constitution, to abolish the common-law jury, or to change it as they have done in

at common law. This case, however, did not involve the question of the number of jurors requisite, but passed upon the question of the Constitution in methods of drawing a special jury, and it is only here cited as showing the construction put upon the words of the state Constitution.

The above principles are also borne out by *State v. Meyers*, 68 Mo. 266; *Bank of Missouri v. Anderson*, 1 Mo. 174, 175; *Foster v. Kirby*, 31 Mo. 496, 498; *Aka v. Anderson*, 34 Mo. 74; *Hennig v. Hannibal & St. J. R. Co.* 35 Mo. 408; *Scott v. Russell*, 39 Mo. 407, 409.

Montana.

A common-law jury consists of twelve persons, and this is the jury secured and guaranteed by the Constitution, and by the law of the land. A jury of twelve persons forms a part of the tribunal before which a defendant charged with a capital crime is to be tried. *Territory v. Ah Wah*, 4 Mont. 149, 47 Am. Rep. 341.

The provisions of the Federal Constitution which declare that in all suits at common law where the value at controversy shall exceed \$20, the right of trial by jury shall be preserved, and that no fact tried by a jury shall be otherwise re-examined by any court of the United States than according to the rules of the common law, has been construed as extending to cases tried in a district court wherein the verdict has not been unanimous, as when rendered by nine jurors only, the others dissenting, the verdict thus rendered being declared void. *Kleinschmidt v. Dunphy*, 1 Mont. 118, 131.

This decision appears in 11 Wall. 610, 20 L. ed. 223, to have been rendered on the verdict and affirmed on appeal by the supreme court of the territory, but reversed on other grounds by the Supreme Court of the United States.

Nevada.

The provision of Nev. Const. § 3, art. 1, that "the right of trial by jury shall be secured to all, and remain inviolate forever," has reference to the right of trial by jury as it existed at the time of the adoption of the Constitution. A jury for the trial of a cause was a body of twelve men. *State v. McClear*, 11 Nev. 39, 44; *State v. Borowsky*, 11 Nev. 119, 127; *State v. Potts*, 20 Nev. 389, 397.

New Hampshire.

It has been stated that no body of less than twelve men, though they should be by law denominated a jury, would be a jury within the meaning of the Constitution, nor would a trial 43 L. R. A.

by such a body, though called a trial by jury, be such within the meaning of that instrument. *Opinion of the Justices*, 41 N. H. 550, 551.

In the above case the court said that at the date of the adoption of the Constitution no such thing as a jury of less than twelve men, or a jury deciding by less than twelve voices, had ever been known, or ever been the subject of discussion, in any country of the common law.

The trial by jury as guaranteed by the Constitution is a trial according to the course of the common law, and the same in substance as that which was in use when the Constitution was adopted. *State v. Wilson*, 48 N. H. 398; *East Kingston v. Towle*, 48 N. H. 64, 97 Am. Dec. 575, 2 Am. Rep. 174; *Copp v. Henniker*, 55 N. H. 193, 20 Am. Rep. 194.

New Jersey.

It is the old right, whatever it was, that is to remain inviolate. *Howe v. Plainfield Treasurer*, 37 N. J. L. 145, 148.

New York.

The provision of the New York Constitution has been construed to mean a common-law jury of twelve, but as not applying to the petty offenses triable before a single magistrate, or a court of special sessions. *People, Eckler, v. Clark*, 23 Hun, 374, 376; *People, Murray, v. New York City & County Justices*, 74 N. Y. 406, 407.

And it has been stated that the constitutional provision should be viewed as recognizing and protecting the right to a trial by a common-law jury of twelve in cases in courts of record in which it had been theretofore used. *People, Metropolitan Bd. of Health, v. Lane*, 55 Barb. 168, 178.

In *People v. Kennedy*, 2 Park. Crim. Rep. 312, 317, it is said that the obvious meaning of the expression "heretofore used" as contained in the New York Constitution was "in use at the time of the adoption of the Constitution" and that the meaning of the term "trial by jury" meant a common-law jury of twelve men.

N. Y. Const. art. 1, § 2, declares a "trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever," and the Revised Statutes of that state (2 Rev. Stat. 734, § 5, 735, § 14, 420, § 61), provide, in reference to trials in criminal cases, that the twelve first jurors who shall appear on being called and being approved as indifferent, shall constitute the jury.

In *Cancemi v. People*, 18 N. Y. 128, 135, 138, the above provisions were construed as mean-

the section of their Constitution above quoted.

In *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678, the court said: "A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of national citizenship, which the states are forbidden by the 14th Amendment to abridge. A state cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Den, Murray, v. Hoboken Land & Improv. Co.* 18 How. 280, 15 L. ed. 376. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land,—that is

to say, with the Constitution and laws of the United States made in pursuance thereof,—or with any treaty made under the authority of the United States." *Ordronaux, Const. Leg.* p. 261; *Hurtado v. California*, 110 U. S. 517, 28 L. ed. 232.

The defendant was convicted of an offense committed on the 22d day of September, 1895, and § 10 of article 1 of the Constitution of Utah went into effect on the 4th day of January, 1896; and it is also urged that it is an *ex post facto* law, and of no effect as to that offense. The defendant was tried on April 7, 1896; and the question is: Did the reduction of the number of jurors from twelve to eight, on the 4th of January, after the offense was committed, deprive the defendant of a substantial right? The law defining the offense, imposing the punishment, or the rules of evidence, was not changed. The tribunal for the trial was altered. Whether the alteration was prejudicial to the defendant cannot be known. We cannot

ing that where issue was joined upon an indictment the trial must be by the tribunal and in the mode which the Constitution and laws provide, without any essential change, and that in such cases the jury cannot be less than twelve men by consent of all the parties.

So, it has been construed as extending to cases triable by a jury of twelve prior to time of adoption of the state Constitution. *Wynhamer v. People*, 13 N. Y. 378, 458; *People, Murray, v. New York City & County Justices*, 74 N. Y. 406, 407; *Baxter v. Putney*, 37 How. Pr. 140, 143; *Dater v. Loomis*, cited in 37 How. Pr. 142; *People, Metropolitan Bd. of Health, v. Lane*, 55 Barb. 168; *Cruger v. Hudson River R. Co.* 12 N. Y. 190, 198; *Greason v. Keteltas*, 17 N. Y. 498; *People v. Kennedy*, 2 Park. Crim. Rep. 317, 321; *People v. Carroll*, 3 Park. Crim. Rep. 22; *Warren v. People*, 3 Park. Crim. Rep. 544; *Duffy v. People*, 6 Hill, 77, 78; *People v. Goodwin*, 5 Wend. 253; *Murphy v. People*, 2 Cow. 815.

In *Clark v. Utica*, 18 Barb. 451, 454, it is said that when the framers of the original Constitution of 1777 ordained that "trial by jury in all cases in which it hath heretofore been used in the colony of New York shall be established and remain inviolate forever," they spoke as the very words import, of a thing well known, and in common use, and they were to be understood as ordaining that it was to continue to be used in its ordinary and well-known attributes and functions, and further, that when it was said that all proceedings according to the common law were to be by jury what was indicated was clearly understood, and the necessary functions and accessories were clearly implied.

In *People v. Johnson*, 2 Park. Crim. Rep. 322, the right to a trial by a jury of twelve for a misdemeanor was held a constitutional right which could not be interfered with by state legislation.

So, the constitutional right to be tried by a jury of twelve men extends to misdemeanors even though the offense of that grade is constituted by subsequent statute. *People v. Kennedy*, 2 Park. Crim. Rep. 312, 317.

The qualifying words of the New York Constitution imply that there were, and had been, trials otherwise than by a common-law jury, and the framers of the Constitution of that state must be presumed to have had knowledge of previous legislation, and the use as to trials otherwise than by a jury of twelve in inferior courts of local jurisdiction, and must be presumed to 43 L. R. A.

have recognized, and adopted, the principle which had dictated the legislature, and which originated and undertook to authorize the usage. *People, Metropolitan Bd. of Health, v. Lane*, 55 Barb. 168, 178.

It was not the purpose of the provisions of the New York Constitution to enlarge the practice or use of trials by a jury of twelve men. *People, Metropolitan Bd. of Health, v. Lane*, 55 Barb. 168; *Lee v. Tillotson*, 24 Wend. 337, 35 Am. Dec. 624; *Rathbun v. Rathbun*, 3 How. Pr. 139; *Sands v. Kimbark*, 27 N. Y. 147; *United States Trust Co. v. United States F. Ins. Co.* 18 N. Y. 199.

So, a jury of six in a justice's court is constitutional, especially where it is the method resorted to in that tribunal prior to the adoption of the state Constitution. *Knight v. Campbell*, 62 Barb. 16, 20.

The jurisdiction of justices' courts under the New York Laws of 1879, chap. 390, is not in conflict with the constitutional right to be tried by a jury of twelve men. *People, Comford, v. Dutcher*, 20 Hun. 241; *People, Stetser, v. Rawson*, 61 Barb. 619.

And, there is nothing in the New York state Constitution which prohibits the legislature from enlarging the jurisdiction of justices' courts in the mode contemplated by the act of 1861, Laws of 1861, chap. 158, and the increase of jurisdiction thereby given is not obnoxious to the constitutional provision for the reason that it transfers a class of cases from courts of record, where juries are composed of twelve, to justices' courts in which they consist of six, and the right to a trial by a jury therefore remains unimpaired in such courts. *Dawson v. Horan*, 51 Barb. 459, 464, 466.

In *Knight v. Campbell*, 62 Barb. 16, 25, in answer to the contention that the provision in the state Constitution meant a common-law petit jury of twelve men and nothing else, the court stated that the provision did not say this in terms, but what it did say was "a trial by a jury as it has been heretofore used," and therefore a jury of six men in a justice's court was as much a jury in the eye of the law as a jury of twelve men in a court of record, as the law had made it the jury of that tribunal, and also for the reason that it was the jury which had been "heretofore used" in that tribunal.

And in that case the court further stated that the provision in the New York Constitution (Constitution of 1777) must have intended to secure the right of trial by jury in justices'

infer that the jury who tried the case did not understand the evidence and the charge of the court, and impartially decide; that they did not reach as correct a verdict as twelve jurors would have reached. The law in force at the time of the trial threw around the defendant all the substantial protection that the law at the time of the commission of the offense did. The change complained of related to an instrumentality employed in the pursuit of the remedy. To investigate the evidence, the law employed a jury. We are of the opinion that the provision of the state Constitution complained of was not *ex post facto*, and inapplicable to the offense charged against the defendant.

Judge Cooley, in his work on Constitutional Limitations, 6th ed. pp. 326, 327, lays down the law in these words: "But, so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have

taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when the facts arose. The legislature may abolish courts, and create new ones, and it may prescribe altogether different modes of procedure, in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime. Statutes giving the government additional challenges, and others which authorized the amendment of indictments, have been sustained and applied to past transactions, as, doubtless, would be any similar statute, calculated merely to improve the remedy, and, in its operation, working no injustice to the defendant, and depriving him of no substantial right." In his work on Statutory Construction (§ 469), Judge Sutherland says:

courts, as it had been theretofore used in the colony, as well as in any other court, and such language is certainly broad enough to include all trials in all courts, and should be so construed unless there is something to give it a special or exceptional application. Knight v. Campbell, 62 Barb. 16, 25. Ohio.

The constitutional right of trial by jury comprehends the right as it was recognized by the common law. *Sovereign v. State*, 4 Ohio St. 489; *Hagany v. Cohen*, 29 Ohio St. 82, 84; *Inwood v. State*, 42 Ohio St. 186.

The institution of the jury referred to in the Ohio Constitution, and its benefits secured to every person accused of crime, "is precisely the same, in every substantial respect, as that recognized in the great charter, and its benefits secured to the freeman of England, and again and again acknowledged in fundamental compacts as the great safeguard of life, liberty, and property; the same, brought to this continent by our forefathers, and perseveringly claimed as their birth-right in every contest with arbitrary power, and finally, an invasion of its privilege prominently assigned as one of the causes which was to justify them in the eyes of mankind, in waging the contest which resulted in independence." Such right was made a corner stone in erecting the state governments; and after the adoption of the Federal Constitution, without a provision securing it, an amendment was proposed and carried giving to every person accused of crime in the courts of the Union "the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime should have been committed." *Work v. State*, 2 Ohio St. 296, 302, 59 Am. Dec. 671, 672.

So, the true characteristics and essential features of the institutions and proceedings named and established by the Constitution must be sought from the system of law from which it is taken. *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671, 672; *Lehman v. McBride*, 15 Ohio St. 573, 630.

In *Lamb v. Lane*, 4 Ohio St. 176, 177, it is said that the above clause of the Constitution had reference to a body of twelve men.

Yet the constitutional right of trial by jury does not apply to trials before justices of the peace, and therefore an act allowing a jury of six in such courts is constitutional. *Work v. 43 L. R. A.*

State, 2 Ohio St. 296, 308, 59 Am. Dec. 671; *Norton v. McLeary*, 8 Ohio St. 205; *Warner v. Baltimore & O. R. Co.* 31 Ohio St. 268.

So, wherever facts are to be found in any proceeding, in which a jury was not required by the common law, a jury of any number may be authorized within the discretion of the legislative body. *Work v. State*, 2 Ohio St. 296, 308, 59 Am. Dec. 671.

Juries did not belong to inferior courts, such as courts of justices of the peace, at common law, and so long as an appeal is provided for to the common-law courts from their determination no constitutional objection can arise whether facts are found by the magistrate or by the aid of a jury of any number of men. *Work v. State*, 2 Ohio St. 296, 308, 59 Am. Dec. 671; *Emerick v. Harris*, 1 Blinn. 416.

Oregon.

A trial by jury is secured to a party by the Constitution in all criminal prosecutions, and is understood to mean the common-law trial by jury, which must be by twelve good and lawful men. *Wong v. Astoria*, 13 Or. 538, 545.

But the constitutional provisions do not apply or give a right to a jury of twelve in proceedings for violations of city ordinances. *Wong v. Astoria*, 13 Or. 538.

And a similar construction has been placed upon the constitutional provisions relative to civil cases, and the right of trial by jury remaining inviolate therein. *Dean v. Willamette Bridge Co.* 22 Or. 167, 15 L. R. A. 614, 615; *Kendall v. Post*, 8 Or. 146; *Tribau v. Strowbridge*, 7 Or. 158.

Pennsylvania.

Trial by jury at the adoption of the Pennsylvania Constitution of 1790 contemplated, where trial by jury was had, that the jury should consist of twelve, that twelve should be sworn, and that the same twelve should return the verdict, and this being the jury trial contemplated by the fundamental law of the commonwealth, it follows that if any other trial by jury be had there must be some authority shown for it. *Com. v. Byers*, 5 Pa. Co. Ct. 295.

And no less number than twelve can satisfy the requirements of the bill of rights. *Com. v. Saal*, 10 Phila. 496.

The trial on an indictment must be by a jury of twelve men lawfully sworn, and a verdict by eleven jurors is illegal. *Doebler v. Com.* 3 Serg. & R. 237; *Com. v. Byers*, 5 Pa. Co. Ct. 295.

"Acts for transferring criminal cases to another court, or providing a new tribunal, or giving a new jurisdiction, to try offenses already committed, do not abridge any right, and are not *ex post facto*. When the offense was committed, the jury was, by statute, judge of the law. This act was repealed before the trial. Such change, as applied to that case, was held not *ex post facto*. Nor are treaties which provide for surrender of persons charged with previous offenses; nor statutes giving additional challenges to the government; statutes reducing the defendant's peremptory challenges, or modifying the grounds of challenge for cause; statutes authorizing amendments to indictments; statutes regulating the framing of indictments, with a view to exclude redundancies, and reduce them to essential allegations; statutes to generally facilitate the routine of procedure, and preclude defendants from taking advantage of mere technicalities, which do not prejudice them. Where there has been a legal conviction, but an erroneous

judgment thereon, which resulted, according to the law, in a discharge of the convict on reversal of the judgment, a law enacted subsequent to the commission of the crime, that, on such a reversal, the court in which the conviction was had should, on return of the record, pass such sentence thereon as the appellate court should direct, was not an *ex post facto* law." *Marion v. State*, 20 Neb. 233; *Gut v. Minnesota*, 9 Wall. 35, 19 L. ed. 573; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648.

Upon examination of the record, we find no error in the ruling of the court admitting evidence objected to by the defendant, or in the portions of the charge excepted to. We do not deem it necessary to particularly examine in this opinion such alleged errors. We find no errors against the defendant in this record. Therefore the judgment of the court below is affirmed.

Bartch and Miner, JJ., concur.

If the number returned be less than twelve any verdict may be ineffectual, and the judgment will be reversed on error. *Com. v. Shaw*, 1 Pittsb. 492; 1 Chitty, *Crim. Law*, p. 505.

Yet the constitutional provision that trial by jury shall be as heretofore only refers to such cases as were triable by a jury under the common law. *Rhines v. Clark*, 51 Pa. 96, 101; *Haines v. Levin*, 51 Pa. 412; *Re Pennsylvania Hall*, 5 Pa. 204, 208.

Trial by jury as "heretofore," had not been known in the forum of the justices' courts. *Emerrick v. Harris*, 1 Binn. 416, 428; *Biddle v. Com.* 13 Serg. & R. 405, 411; *Com. v. Seamans*, 3 Law Times, N. S. (Pa.) 133; *Lavery v. Com.* 101 Pa. 560.

South Carolina.

The right to a trial by jury under the South Carolina Constitution is fully satisfied, when the prisoner is vouchsafed, by the law of the land, a fair trial by twelve jurors, men good and true, and there is no infringement of such constitutional right so long as the right to a jury of twelve is prescribed. *State v. Williams*, 35 S. C. 344, 352; *Cregler v. Bunton*, 2 Strobb. L. 487; *State v. Boatwright*, 10 Rich. L. 407.

And the provisions of the Constitution of 1868 do not prohibit a jury of less than twelve in inferior courts in this state, and therefore a jury of six under a then existing law in cases of smaller misdemeanors is not contrary to the constitutional provisions, "however evasive of jury trial" it may seem to be. *State v. Williams*, 40 S. C. 373, 377.

Tennessee.

The settled meaning of art. 1 of § 6 of the Tennessee Constitution is that the right of trial by jury shall remain inviolate as it existed at common law at the time of the formation of the Constitution. *Neely v. State*, 4 Baxt. 174, 180; *Trigally v. Memphis*, 6 Coldw. 382; *McGinnis v. State*, 9 Humph. 43, 49 Am. Dec. 697.

And so state statutes which provide for the trial of an offense are to be considered in reference to the principles of the common law. The rule applies alike to a provision of the constitutional or fundamental law, and for the same reason. The framers of the law in either case are not to be presumed to have intended to make any change or innovation on the common law further than is expressly declared. *McGinnis v. State*, 9 Humph. 43, 49 Am. Dec. 697, 699. 43 L. R. A.

Utah.

In *Mackey v. Enzensperger*, 11 Utah, 154, 160, the term "jury," as used in the state Constitution, was construed to mean a jury of twelve men.

The Constitution of this state declared that "in capital cases the right of trial by jury shall remain inviolate," but in courts of general jurisdiction, except in such cases, a jury shall consist of eight men, and in inferior courts of four men, with a unanimous verdict in all criminal cases, and a three-fourths verdict in all civil cases, and a waiver of a jury in such cases unless demanded. Art. 1, § 10.

The principal case of *STATE V. BATES* held that these constitutional provisions do not contravene the United States Constitution, as that, in its provisions for jury trials, does not apply to trials under state laws, and its provisions as to the privileges and immunities of citizens and as to due process of law do not prevent the people of the state from providing by their Constitution for a jury of less than twelve.

This case was approved and followed by the court in the case of *State v. Thompson*, 15 Utah, 488, wherein a conviction of larceny by a jury of eight was upheld although the crime was committed prior to the admission of Utah as a state of the Union.

But this decision was reversed by the United States Supreme Court in *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, wherein the substitution of a jury of less than twelve (8) in cases of crimes committed before the territory was admitted as a state of the Union, and before the passing of the state Constitution, was held to be an *ex post facto* law.

The case of *STATE V. BATES* was also cited with approval in *State v. Carrington*, 15 Utah, 480, wherein the offense was also committed prior to the date of the state's admission to the Union. But in that case the question was whether or not the constitutional provision for a grand jury of seven was *ex post facto*, where the offense was committed before the Constitution went into effect. This decision would also seem to be overruled by the above case of *Thompson v. Utah*.

Vermont.

In the provisions in the Vermont Constitution of 1793, and subsequent Constitutions, the word "jury" means a jury of twelve men. *State v. Peterson*, 41 Vt. 504; *Pilbinton v. Somerset*, 33 Vt. 283, 293.

And so strongly is the constitutional provision construed that any act which destroys or materially impairs the right of trial by jury according to the course of the common law in cases proper for its cognizance is unconstitutional. *Pilplinton v. Somerset*, 33 Vt. 283, 290. *Virginia*.

The right of trial by jury which is secured by the state Constitution is the right as it existed at the time the Constitution was adopted. *Miller v. Com.* 88 Va. 618, 15 L. R. A. 441, 443; *Ex parte Marx*, 86 Va. 40. *West Virginia*.

The provisions in the 13th section of art. 3 of the Constitution of West Virginia, that no fact tried by a jury shall be otherwise re-examined in any case than according to the rules of the common law, apply to cases tried in the justice's court before a jury of six. *Barlow v. Daniels*, 25 W. Va. 512; *Hall v. Wadsworth*, 30 W. Va. 55, 56.

And in *State v. Cottrill*, 81 W. Va. 162, 183, it was held that where a person is indicted for a crime or misdemeanor, and a plea of not guilty is entered, the trial of such issue, under the mandate of § 14 of the Bill of Rights, must be by a jury of twelve. In this case, however, there was an equal division of the court upon the question whether the constitutional provision applied to misdemeanors so as to prevent a waiver of the right by the defendant. *Wisconsin*.

The trial by a jury as secured by the Wisconsin Constitution means a jury of twelve good and lawful men according to the common-law understanding. *Norval v. Rice*, 2 Wis. 22.

The term "trial by jury shall remain inviolate," has reference to the law which existed prior to the adoption of the state Constitution. *Gaston v. Babcock*, 6 Wis. 503; *Stillwell v. Kellogg*, 14 Wis. 462; *Mead v. Walker*, 17 Wis. 190.

3. United States Constitution.

The provision in the United States Statutes at Large that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law implies, not merely that the form of a jury trial should be preserved, but also all its substantial elements. *Walker v. New Mexico & S. P. R. Co.* 105 U. S. 593, 41 L. ed. 837; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079.

The provision of the Federal Constitution which secures to every party, where the value in controversy exceeds \$20, the right of trial by jury, does not apply to trials in the state courts. *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487; *Barron v. Baltimore*, 7 Pet. 248, 8 L. ed. 674; *Twitshell v. Pennsylvania*, 7 Wall. 326, 19 L. ed. 224; *Livingston v. Moore*, 7 Pet. 469, 8 L. ed. 751; *Fox v. Ohio*, 5 How. 434, 12 L. ed. 223; *Smith v. Maryland*, 18 How. 76, 15 L. ed. 271.

A substitution of a jury of eight persons in place of a common-law jury, in case of a crime committed before the change in the law, constitutes an *ex post facto* law. *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061.

The provisions of the Constitution of Utah, providing for the trial in courts of general jurisdiction in criminal cases not capital by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the territory became a state. *Ibid*.

III. Meaning of the terms "jury" and "jury trial."

In *Reece v. Knott*, 3 Utah, 451, 454, it is said that, when the framers of the Constitution of the United States used the word "jury," they 43 L. R. A.

used it with reference to its signification at common law, which was a jury of twelve men and householders.

So, it has been stated that it must be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country, and in England, at the time of the adoption of that instrument, and therefore secures the right to a trial by a jury of twelve. *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061.

The expression "trial by jury" is as old as *Magna Charta*, and has obtained a definite historical meaning well understood by the English-speaking race, and for that reason no American Constitution has ever assumed to define it, and therefore the common law must be looked to in order to ascertain its meaning, and from such time it is found that its essential elements have always been number, impartiality, and unanimity; it must consist of twelve men who must act impartially and indifferently between the parties, and give a unanimous verdict. *Lommen v. Minneapolis Gaslight Co.* 65 Minn. 196, 33 L. R. A. 37, 441.

And although the language used by the courts is not identically the same in the numerous cases that have passed upon this question, yet the above meaning is adopted and asserted as that universally given to the terms "jury" and "jury trial" in the following cases: *Times v. State*, 26 Ala. 165; *Brazier v. State*, 44 Ala. 392; *Montgomery & F. R. Co. v. McKenzie*, 85 Ala. 549; *Woodward Iron Co. v. Cabaniss*, 87 Ala. 328, 330; *Foot v. Lawrence*, 1 Stew. (Ala.) 483; *Carroll v. Byers* (Ariz.) 36 Pac. 499; *Warwick v. State*, 47 Ark. 568; *People v. Williams*, 6 Cal. 207; *Koppikus v. State Capitol Comrs.* 16 Cal. 248; *Flint River S. B. Co. v. Foster*, 5 Ga. 195, 48 Am. Dec. 248; *Costly v. State*, 19 Ga. 614, 629; *Mahan v. Cavender*, 77 Ga. 118, 121; *Ross v. Irving*, 14 Ill. 171; *Whitehurst v. Coelen*, 53 Ill. 247; *Bryan v. State*, 4 Iowa, 352; *Higgins v. Farmers' Ins. Co.* 60 Iowa, 50, 51; *Campau v. Detroit*, 14 Mich. 276; *Paul v. Detroit*, 32 Mich. 108; *Whallon v. Bancroft*, 4 Minn. 109; *Ætna Ins. Co. v. Grube*, 6 Minn. 82, 85; *State v. Everett*, 14 Minn. 439, 444; *Carpenter v. State*, 4 Iowa, 163, 34 Am. Dec. 116; *Redus v. Wofford*, 4 Smedes & M. 579, 592; *Dowling v. State*, 5 Smedes & M. 664; *Vaughn v. Scade*, 30 Mo. 600; *Kleinschmidt v. Dumphy*, 1 Mont. 118, 131; *State v. McClellan*, 11 Nev. 39, 46, 60; *State v. Potts*, 20 Nev. 389, 397; *Opinion of The Justices*, 41 N. H. 550, 551; *East Kingston v. Towle*, 48 N. H. 64; *State v. Wilson*, 48 N. H. 398; *Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 194; *Howe v. Plainfield Treasurer*, 37 N. J. L. 145; *Wynehamer v. People*, 13 N. Y. 424; *Cancami v. People*, 16 N. Y. 504; *People, Murray v. New York City & County Justices*, 74 N. Y. 406; *People, Eckler v. Clark*, 23 Hun, 374, 376; *Clark v. Utica*, 18 Barb. 451, 454; *People, Booth v. Fisher*, 20 Barb. 652; *Knight v. Campbell*, 62 Barb. 16, 27; *Baxter v. Putney*, 37 How. Pr. 140, 145; *Dater v. Loomis*, cited in *Baxter v. Putney*, 37 How. Pr. 142; *People v. Bodine*, 1 Denio, 304; *Freeman v. People*, 4 Denio, 34, 47 Am. Dec. 216; *People v. Kennedy*, 2 Park. Crim. Rep. 317; *People v. Carroll*, 3 Park. Crim. Rep. 22; *Work v. State*, 2 Ohio St. 307, 59 Am. Dec. 371; *Lamb v. Lane*, 4 Ohio St. 176, 177; *Smith v. Atlantic & G. W. R. Co.* 25 Ohio St. 91; *Williard v. Hamilton*, 7 Ohio, pt. 2, p. 111, 30 Am. Dec. 195; *Wong v. Astoria*, 13 Or. 538; *Re Pennsylvania Hall*, 5 Pa. 204, 208; *Byers v. Com.* 42 Pa. 89; *Rhines v. Clark*, 51 Pa. 96; *Haines v. Levin*, 51 Pa. 412; *Staup v. Com.* 74

Pa. 458; Com. v. Saal, 10 Phila. 496; Doebler v. Com. 3 Serg. & R. 237; Com. v. Byers, 5 Pa. Co. Ct. 295; Com. v. Shaw, 1 Pittsb. 492; Com. v. Mead, 5 Law Times, N. S. (Pa.) 123; Emerick v. Harris, 1 Binn. 416, 428; Trigally v. Memphis, 6 Coldw. 382; Cooley v. State, 38 Tex. 637; Mackey v. Enzensperger, 11 Utah, 154, 160; State v. Peterson, 41 Vt. 504; Ingersoll v. Wilson, 2 W. Va. 59; May v. Milwaukee & M. R. Co. 3 Wis. 219; Stillwell v. Kellogg, 14 Wis. 462; Mead v. Walker, 17 Wis. 190.

IV. In criminal matters.

a. Felony and high-grade offenses.

As the common-law doctrine would seem to have been impliedly, if not expressly, adopted by the Constitutions of most of the states of the Union, and the constructions placed upon such provisions show that they were meant to declare that the right to a common-law jury of twelve men should always exist and remain inviolate in all cases in which that right existed at common law at the time of the adoption of the state Constitutions, and as the meaning of the terms "jury" and "trial by jury" or "jury trial" as declared by the courts is construed to mean a jury of twelve men, it necessarily follows that the question of the validity of a verdict by less than twelve jurors depends largely upon the question whether the particular crime with which the defendant was charged is one on the trial of which he was entitled to a jury of twelve men by the common law as adopted by the state Constitution.

The grade of the offense charged must therefore be considered in the determination of the question whether the defendant is entitled to the verdict of a full common-law jury, or whether he is legally convicted by a jury of less than twelve men.

The general rule deducible from the decision of the courts upon the question in this respect would seem to be that if the offense is of a capital nature, or a felony, or other high-grade offense, the defendant is entitled to a full jury of twelve men, as such a jury is secured to him by the common law and by the constitutional provisions in criminal offenses of that degree. Territory v. Ah Wah, 4 Mont. 149, 47 Am. Rep. 341; McGill v. State, 34 Ohio St. 228, 234; People v. Guidici, 100 N. Y. 503; People v. Lyons (Ill.) 5 Crim. L. Mag. 674, 675; State v. Mansfield, 41 Mo. 470; Brazier v. State, 44 Ala. 387, 392; Collins v. State, 88 Ala. 212, 214; Harris v. People, 128 Ill. 585, 589, 591.

And in such cases the Constitution guarantees to the defendant the right to a trial by twelve competent jurors, and this number must continue throughout the trial. People v. Deegan, 88 Cal. 608, Dissenting opinion of De Haven, J.

Again, it has been stated that the number of jurors must be twelve, they must be impartially selected, and must unanimously concur in the guilt of the accused before a conviction can be had. McGill v. State, 34 Ohio St. 228, 254.

So, under the Illinois statute as shown by the Criminal Code, questions both of law and fact are for the jury, and therefore the only tribunal possessing the legal power under the laws of that state to determine the question of guilt of an accused upon an indictment for felony and a plea of not guilty, is a jury of twelve men, and the determination of that matter by any other tribunal or functionary is not due process of law. People v. Lyons (Ill.) 5 Crim. L. Mag. 674; Harris v. People, 128 Ill. 585.

In Stokes v. People, 53 N. Y. 164, 171, 13 Am. Rep. 492, the defendant, convicted of murder in the first degree, contended that the right of 43 L. R. A.

trial by jury was secured to persons accused of felony by the Constitution, and that he was also entitled to a trial by an impartial jury. The court stated that any act of the legislature providing for the trial otherwise than by a common-law jury composed of twelve men would be unconstitutional and void, and any act requiring or authorizing such trial by a jury partial and biased against either party would be a violation of one of the essential elements of the jury referred to and secured by the Constitution.

In Rich v. State, 1 Tex. App. 206, 210, the defendant, indicted in the district court of the city for murder, was convicted of murder in the second degree. The record showed that a certain jury were impaneled, but eleven names only were mentioned. The court reversed the judgment and remanded the case for a new trial, as it could not be inferred or presumed that the trial was by a fully constituted jury.

This decision was based upon the provisions of art. 5, § 13, of the Texas Constitution, and of art. 695 of the Code of Criminal Procedure of that state under which the number necessary to constitute a jury in the district court was specifically fixed at twelve. The cases of Huebner v. State, 3 Tex. App. 458, a conviction of theft, and Jester v. State, 26 Tex. App. 369, a conviction of burglary, are the same in effect, and uphold the doctrine there set forth.

The case of Cancemi v. People, 18 N. Y. 128, also upholds the rule that in such cases the jury must be twelve in number.

This case was commented upon in Pierson v. People, 79 N. Y. 429, 430, 35 Am. Rep. 524, and was distinguished from the case then before the court as in that case the prisoner was tried by a common-law jury of twelve, and all the jurors possessed the qualifications prescribed by statute, and the withdrawal of the challenge was the main question before the court.

And in Iowa the courts have said that in trials for criminal offenses the defendant has a right to a trial by a jury of twelve men. Bryan v. State, 4 Iowa, 349, 352.

In Mississippi it has been held that in criminal proceedings there can be no valid verdict by less than twelve men. Hunt v. State, 61 Miss. 577, 580; Byrd v. State, 1 How. (Miss.) 163; Carpenter v. State, 4 How. (Miss.) 163, 34 Am. Dec. 116; Lewis v. Garrett, 5 How. (Miss.) 434.

So, a verdict by a jury of less than twelve has been held unconstitutional in prosecutions for the following offenses, upon the ground that the defendant in such cases is entitled to a full jury of twelve. Work v. State, 2 Ohio St. 296, 59 Am. Dec. 671, assault and battery; Sovereign v. State, 4 Ohio St. 489, larceny; Com. v. Bridge, 7 Dane's Dig. 159, forgery; State v. Meyers, 68 Mo. 266, embezzlement; State v. Mansfield, 41 Mo. 470, felony; Huebner v. State, 3 Tex. App. 458, theft; Jester v. State, 26 Tex. App. 369, burglary; People v. O'Neill, 48 Cal. 257, 258, rape; Jackson v. State, 6 Blackf. 401, riot; Collins v. State, 88 Ala. 212, obscene language; Brown v. State, 8 Blackf. 561, 16 Ind. 406, malicious trespass.

As larceny was a crime only triable at common law by a jury of twelve, and this before the adoption of the state Constitutions, it follows that a conviction by a jury of less than twelve is unconstitutional. Thus, where it is sought to recover the costs of a prosecuting witness in a case of a prosecution for larceny under § 45 of the Ohio Probate Court Code, it must appear that the person accused of the offense was acquitted, either by the judge, or by a constitutional jury of twelve, and such a person cannot be tried before a jury of six men,

especially after the demand of a jury of twelve. *Sovereign v. State*, 4 Ohio St. 489.

So, in *Com. v. Eagles*, 7 W. N. C. 324, wherein the defendant was indicted for larceny, pleaded not guilty, and a jury was sworn, the former trial and acquittal of the defendant for the same offense before a justice of the peace and a jury of six persons, under Pa. act of May 1, 1861, was held to be a nullity, as the act was unconstitutional in so far as it constituted a justice and a jury of six a court for the trial of the crime of larceny.

In *Com. v. Bridge*, 7 Dane's Dig. 159, there was a variance between the indictment and the judgment in a prosecution for forgery, which the court held to be material, whereupon a juror was withdrawn by the commonwealth, and on the call only eleven jurors answered, and therefore a grand jury found a new indictment.

The presence of only eleven jurors in court at the time of receiving a verdict upon a conviction in the circuit court for embezzling United States bonds is fatal, and the verdict will be reversed. *State v. Meyers*, 68 Mo. 266; *State v. Mansfield*, 41 Mo. 470.

In *Brown v. State*, 8 Blackf. 561, a verdict by eleven jurors in a prosecution for larceny was held to be a nullity, and was set aside.

And the same decision was rendered in *Allen v. State*, 54 Ind. 461, 462, wherein the defendant was convicted by a jury of ten for a similar offense.

A similar decision was also rendered by the court in *Brown v. State*, 16 Ind. 496, wherein the defendant was convicted of malicious trespass by a jury of eleven.

In *People v. O'Neil*, 48 Cal. 257, 258, the court reversed the verdict, and remanded the case for a new trial, in a conviction of assault with intent to commit rape, where a verdict was rendered by a jury of eleven, as a jury in a criminal action must, within the meaning of the Constitution, consist of twelve men.

In *Jackson v. State*, 6 Blackf. 461, a conviction upon an indictment for riot by a jury of eleven men was held a fatal defect, as twelve were required by law, and the cause was therefore remanded for a new trial.

In some cases, however, a conviction of an offense of the higher grade by a jury of less than twelve has been upheld, but where such is the case it will be found that the validity of the verdict is based upon the provisions of the state Constitution and some special act of the legislature passed in pursuance of the same.

The case of *State v. Worden*, 46 Conn. 349, 33 Am. Rep. 27, was one wherein the validity of a statute providing that the accused might elect to be tried by the court instead of a jury was involved. The court drew a distinction between cases occurring under such a statute, and those arising under statutes providing that the accused shall be tried by a jury of less than twelve, and also pointed out the distinction which existed between higher and lower grades of crimes in such cases, and stated that such statutes had in many cases been held constitutional.

The amended Constitution of Florida, which provides that "the number of jurors for the trial of causes in any court may be fixed by law," is to be taken as qualifying and controlling the provision in the original Constitution, which declares that the right shall remain inviolate, without destroying or infringing the right of trial by jury, and therefore a jury of six in all offenses, other than capital cases, prosecuted by indictment, presentment, or information, as fixed by law, is constitutional. *Gibson v. State*, 16 Fla. 291, a prosecution for larceny.

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of special sessions to hear and determine charges of petit larceny not charged as a second offense are not unconstitutional as depriving the accused of the right of trial before a common-law jury of twelve, although only six jurors are allowed in courts of special sessions. *People, Comaford, v. Dutcher*, 20 Hun. 241; *People, Stetzer, v. Rawson*, 61 Barb. 619.

b. Misdemeanors.

In misdemeanors and other minor offenses, upon the trial of which the defendant was not entitled to a full jury of twelve at common law, the courts have generally held that the right to a jury of twelve men is not an absolute right secured by the state Constitutions. There are cases, however, in which the courts have held that the right to a full jury of twelve men exists even in such cases.

The Alabama statute, which confers on a county court jurisdiction of all misdemeanors committed in the county, and provides for the transfer to that tribunal of all indictments pending and untried in the circuit court, and providing for a trial of such cases by a jury of eight instead of twelve persons, with the right to appeal directly to the supreme court only, is contrary to the provision in the declaration of rights of that state, which provides that in all prosecutions by indictment the defendant should have a right to a jury, and that such right shall remain inviolate, as such declaration provides for a jury of twelve men. *Collins v. State*, 88 Ala. 212, 215.

And in *People v. Kennedy*, 2 Park. Crim. Rep. 312, 317, it is said that the constitutional right to a trial by jury of twelve applies in the case of a misdemeanor, as at the time of the adoption of the Constitution the right existed and extends to any offense of that grade, even though it may be constituted by a statutory enactment subsequently passed.

But in *State v. Borowsky*, 11 Nev. 119, 127, a case of misdemeanor, the court distinguished the cases of *Hill v. People*, 16 Mich. 354, and *Cancemi v. People*, 18 N. Y. 128, upon the ground that in those cases the crime charged against the prisoner was that of murder, which was a felony, and the weight of authority showed that in prosecutions for misdemeanors the court might, with the defendant's consent, try him with less than the full number of jurors.

The provision of the South Carolina act of December, 1866, relating to the trial of misdemeanors in the district court and inferior courts by a petit jury of eight, which provides: "that the juries in the district court shall consist of one jury of eight at each quarterly session, and the venire therefore shall consist of a panel of sixteen," passed pursuant to the provisions of art. 9, § 7, of the Constitution of South Carolina of 1865, is constitutional and within the power of the legislature to pass. *State v. Starling*, 15 Rich. L. 120, 185.

So, an act of the legislature providing for a jury of less than twelve in a recorder's court upon the trial of minor offenses is in accordance with the common law, and also with the provisions of La. Const. art. 103. *State v. Gutierrez*, 15 La. Ann. 190.

And the constitutional right to a common-law jury of twelve does not apply to prosecutions for violation of municipal ordinances. *Wong v. Astoria*, 13 Or. 538.

Other courts hold that the right extends to all cases of crimes, and that the right was secured to the offender by the provisions of the state Constitution in all criminal cases.

The case of *Moore v. State*, Clegg, 72 Ind. 358, was a misdemeanor prosecuted before a justice of the peace and a jury of six, in which the

justice granted a new trial, and in his return to the alternative writ which issued set out the proceedings had before him showing a verdict by six jurors; the demand of the state for judgment on the verdict, and the setting aside of the verdict and the dismissal of the case by him. The court held the proceedings of the justice in the case as tried by a jury of six to be an absolute nullity, and followed its prior decision in *Brown v. State*, 16 Ind. 496, and *Allen v. State*, 54 Ind. 461.

In *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671, 675, wherein the defendant was tried for assault and battery by a jury of six, the Ohio statute of March 14, 1853, defining the jurisdiction and regulating the practice of probate courts, was held unconstitutional and void, as it was beyond the powers of the general assembly to impair the right or materially change the character of jury trial, and that the number of jurors could not be diminished, or a verdict authorized, short of a unanimous concurrence of all the jurors.

By the Indiana statute a criminal case must be tried by the court upon an agreement by the parties, or by a jury of twelve men. *Brown v. State*, 16 Ind. 496, wherein the prisoner was convicted of malicious trespass by a jury of eleven, and the court reversed the judgment, and remanded the cause for a new trial.

And by the West Virginia Bill of Rights, art. 3, § 14, of the state Constitution, the trial of misdemeanors is to be by twelve men unless otherwise provided.

c. Offenses triable in justices' and other inferior courts.

In many cases the legislature has conferred jurisdiction upon inferior courts to try misdemeanor and other minor offenses, not triable by a jury of twelve under the common law as adopted by the state Constitutions, by a jury of less than twelve, and the validity of convictions under such statutes has often been contested.

These statutes are generally held to be constitutional and within the power of the state legislature to enact.

The validity of a jury of six in a county court as constituted by the Texas Code of Criminal Procedure, arts. 395, 708, was not denied in the case of *Marks v. State*, 10 Tex. App. 334, 336, but the case turned upon the question of the showing of the record, which recited the name of only one juror. On this account, and not on the ground of the unconstitutionality of the statute, the verdict was set aside upon a conviction for an aggravated assault.

In *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 676, 677, wherein the court declared against the constitutionality of the jury of six in proceedings for the offense of assault and battery in the probate court, the court stated that it did not intend to imply a doubt as to the constitutionality of an act allowing juries before justices of the peace composed of six men, for the reason that, where facts were to be found in any proceeding in which a jury was not required by the common law, a jury of any number might be authorized within the discretion of the legislative body, as juries do not belong to inferior courts at common law, and that so long as an appeal was provided for to common-law courts from their determination no constitutional objection could arise where the facts were found by the magistrate or by the aid of a jury of any number of men.

So, in *Biddle v. Com.* 18 Serg. & R. 405, 411, it is said that laws giving jurisdiction to magistrates, and justices of the peace in certain cases, are made for the purpose of promoting justice 43 L. R. A.

and leave the substance of the trial by jury unimpaired, which is all that is required by the expression in the Constitution "trial by jury shall be as heretofore."

An act of the state legislature making offenses not triable by a full jury of twelve men at the time of the adoption of the New York Constitution triable by a justice of the peace and a jury of six, is constitutional. *People, Murray, v. New York City & County Justices*, 74 N. Y. 406, 407.

The case of *Com. v. Seamans*, 3 Law Times, N. S. (Pa.) 133, also supports the constitutionality of an act authorizing the trial of certain offenses before a justice of the peace and a jury of six.

In *Bryan v. State*, 4 Iowa, 349, 352, a trial by a jury of twelve was claimed before a justice of the peace in proceedings under the Iowa act for the suppression of intemperance, of January 22, 1855; but the right was denied and the conviction affirmed on the ground that the state law might make offenses of inferior grades originally cognizable by inferior courts, and the state Constitution might provide, as in § 9, art. 1, of the Constitution of that state, that the general assembly might authorize trial by a jury of a less number than twelve men in such inferior courts.

A similar decision was rendered in *State v. Beneke*, 9 Iowa, 203, 206, in another prosecution before a justice of the peace for the sale of intoxicating liquors in violation of the Iowa laws, Dec. 22, 1858.

The provisions of the New York laws of 1855, for the prevention of intemperance, pauperism, and crime, which require the party charged with the unlawful sale of intoxicants to be tried by a court of special sessions without the right to give bail and transfer the cause to another court, deprive him of a right to trial by a jury as guaranteed by the Constitution, as the offense therein charged is of a class triable by jury at the time the present Constitution was adopted, although not so when the earlier Constitution was adopted. *Wynehamer v. People*, 13 N. Y. 378, 458.

The above case overrules the case of *People, Booth, v. Fisher*, 20 Barb. 652, which held the statute to be constitutional.

Several later cases hold that the Constitution does not guarantee a jury of twelve in courts of special sessions for the reason that no jury was provided for such courts until the year 1824, but these cases do not mention the above case of *Wynehamer v. People*. They are, however, cases in which the accused had the option of giving bail and transferring his case to another court in which he had the right to a common-law jury of twelve. They are therefore distinguished from the case of *Wynehamer v. People*, although in these cases there is a broad statement to the effect that the constitutional provisions do not apply to courts of special sessions.

It has been stated that the term "jury" as used in the New York Constitution means a common-law jury of twelve men, and cannot be taken away by state legislation, and therefore a statute giving justices of the peace the right to try and determine a complaint of assault and battery in a summary manner, whether the party charged requests to be so tried or not, is unconstitutional, in so far as it denies the person the right to give bail for his appearance and to demand a jury trial in a criminal court having jurisdiction of the cause. *People v. Carroll*, 3 Park. Crim. Rep. 22. *People v. Kennedy*, 2 Park. Crim. Rep. 317, followed.

So, in *People, Murray, v. New York City and County Justices*, 74 N. Y. 406, 407, wherein the

defendant, when taken before a police justice on a charge of assault and battery, elected to be tried by a court of special sessions of the peace, the court denied that he had the constitutional right of trial by jury for the reason that the Constitution did not apply to the petty offenses triable before a court of special sessions, because the provision of the Constitution was that "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever," and the right to a trial by a jury in the courts of special sessions did not exist until the year 1824, when the legislature provided for a jury of six.

N. Y. Laws 1834, chap. 78, which provides for the trial by a jury of six on the trial and punishment of persons disturbing religious meetings, does not conflict with the provisions of the New York state Constitution, as prior to its adoption such cases were not triable by a jury. *People, Eckler, v. Clark*, 23 Hun, 374, 376.

The Oklahoma act providing for justices' courts a jury of six men, and giving the right of appeal to a district court where a jury of twelve may be had, is not unconstitutional. *Collier v. Territory*, 2 Okla. 444.

Again, in *Lavery v. Com.* 101 Pa. 580, in a conviction for assault and battery, the court upheld the constitutionality of the Pennsylvania statute of May 1, 1861, which changed the mode of criminal procedure in Erie and Union counties, and gave jurisdiction to a justice of the peace and a jury of six in certain offenses.

Upon a conviction for carrying a deadly weapon concealed upon his person the defendant is not entitled as an absolute right to a trial by a jury of twelve, as, under the provisions of § 19, art. 1, S. C. Const. 1868, cases of that class may be tried without a jury. *State v. Williams*, 40 S. C. 373. It would, however, appear that this case was tried by a justice without a jury.

So, a trial before a recorder and a jury of three slave holders under the Louisiana statute for the prevention and punishment of the offense of selling liquors to slaves is constitutional, as the trial is not one of the ordinary cases of trial by jury under the constitutional guaranty of an impartial trial by jury of the vicinage. *State v. Gutierrez*, 15 La. Ann. 190.

In the above case the court stated that as the mode of trial prescribed by the statute had none of the forms and solemnities of an ordinary trial by jury, and did not fall under the operation of the constitutional clause, it was unnecessary to express any opinion on the question as to the number of jurors required to constitute that body, either at common law or by the state Constitution. There was, however, a dissenting opinion holding that the act was unconstitutional for the reason that the law neither entrusted the decision of the cause to the recorder alone nor provided him with an impartial jury of the vicinage as known to the common law and the then existing and prior Constitutions of that state. And the same conclusions were reached on rehearing with the same dissenting opinion.

On a trial in the county court upon an indictment for gambling, transferred from the superior court, the accused is not entitled to a jury of twelve, but to a jury of six. *Grant v. State*, 89 Ga. 393.

So, in *Allen v. State*, 51 Ga. 264, a conviction by a jury of five in the county court for vagrancy under § 31 of the Georgia act of 1872, establishing that court, and the amendatory act of 1873, was upheld as constitutional for the reason that the Georgia Constitution of 1868 did not declare that the right of trial by jury, 43 L. R. A.

"as heretofore used in this state, shall remain inviolate," but did declare that the right of trial by jury "except where it is otherwise provided in this Constitution shall remain inviolate," and that the general assembly shall provide by the law for the selection of upright and intelligent persons to serve as jurors.

The Georgia Constitution of 1868 expressly declared that a jury of seven shall be a lawful jury in the district court authorized to be organized by it, and demonstrated that it was not intended that there should be a jury of twelve in all cases, and therefore the act of the general assembly establishing the county court, which provided that the sheriff should summon a jury of twelve men who were subject to jury duty, from whom the defendant and the state should alternately strike until but five jurors remained, who should compose the jury, is constitutional. *Allen v. State*, 51 Ga. 264. In this case the court expressed no opinion as to the right of trial by a common-law jury of twelve men on an indictment for murder or in cases of felony under the Georgia Constitution of 1868.

And a jury of five in a city court under the Georgia statute regulating the practice in city courts in a prosecution for keeping a faro table, after the defendant's demand of a jury trial, cannot be assailed as unconstitutional upon the ground that the provisions of the state Constitution subsequently adopted prohibit a jury of less than twelve, especially where no act of the legislature has been passed to carry it into effect by any practical machinery providing for a jury of twelve. *Kneeland v. State*, 62 Ga. 395, 397.

The same conclusion was reached in the later case of *Downing v. State*, 66 Ga. 110, 66 Ga. 164, in which the prisoner was tried in the city court for selling kerosene oil contrary to the statute, the court holding a jury of five constitutional, as the Constitution of 1877 was not intended to operate upon the then existing system of the city courts, until some other law provided otherwise.

The Illinois act to aid industrial schools for girls, May 20, 1879, Laws 1879, p. 309, which makes provision for dependent infant girls who beg or receive alms, or frequent the streets and become wanderers or vagrants or resort to improper houses, and provides for a jury of six, does not violate the constitutional provision that the right of trial by jury as heretofore enjoyed shall remain inviolate, as it is not a proceeding according to the course of the common law in which the right of trial by jury is guaranteed, but the proceeding is a statutory one under a statute enacted since the adoption of the Constitution, for which offense the enjoyment of a jury trial did not exist at that time. *Ferrier's Petition*, 103 Ill. 867, 374, 42 Am. Rep. 10.

These statutory provisions must, however, be strictly complied with, and no verdict will be upheld upon a conviction under the same unless it is shown that the statutory provisions with respect to the number of such jury have been acted up to.

So, in *Stell v. State*, 14 Tex. App. 59, a case of assault and battery with a deadly weapon, the court reversed the judgment in the county court, which recited a trial by "a jury of good and lawful men," naming one and four others, but failed to disclose how such a jury was impaneled, upon the ground that it was the express provision of the Constitution of that state, art. 1, § 15, "that the right of trial by jury shall remain inviolate," and that "the legislature shall pass such laws as may be needed to regulate the same and to maintain its purity and efficiency," and upon the further ground that § 17 of art. 4 provided that "a jury in the county

court shall consist of six men," and art. 595 of the Code of Criminal Procedure declared, *inter alia*, that "in the county court and inferior courts the jury shall consist of six men," and that "in the county court, in all criminal actions, the jury consists of six men, and the verdict must be concurred in by each of them."

So, whenever any of such statutes contravene the express provisions of the state Constitutions they will be declared void, and the proceeding had under them will be set aside. Thus, a conviction upon an indictment for using abusive and obscene language in the presence of a female, under the Alabama statute of February 20, 1889, which gave jurisdiction to county courts in all misdemeanors, and provided for their transfer thereto from the circuit court, and allowed a trial by eight jurors, was declared unconstitutional in *Collins v. State*, 88 Ala. 212, as depriving the defendant of his right to trial by jury guaranteed by the Constitution.

The statute in question in the above case clearly infringed the provisions of the state Constitution inasmuch as such Constitution declared the right of trial by jury to be inviolate, and that in all prosecutions by indictment the accused shall have a right to a speedy trial by an impartial jury. Ala. Const. 1875, art. 1, §§ 7, 12.

In *State v. Cox*, 8 Ark. 436, 441, which was a conviction of assault and battery, the constitutionality of the act of December 16, 1846, defining the jurisdiction and regulating the proceedings of justices' courts in cases of breach of the peace, and which provided that the cases mentioned in the Constitution might be prosecuted and punished in a summary manner before justices of the peace, and limited the jury in such courts to six, was involved. The act rested for support upon the 3d amendment of the Arkansas Constitution adopted in 1846, which gave the general assembly power to confer such jurisdiction as it might deem proper on justices of the peace in all matters of contract, covenant, and actions for the recovery of fines, and forfeitures when the amount claimed did not exceed \$100, and in actions and proceedings for assault and battery, and other penal offenses less than felony punishable by fine only. The court upheld the constitutionality of the act except so far as the 11th section declared that the trial "shall" be by a jury of six men, and made a jury of six compulsory, thereby leaving the defendant without a right to demand a full jury of twelve men as at common law if he thought fit to exercise that option.

In this case also the court's opinion was founded upon the theory that the defendant's constitutional right to a full jury of twelve could not be taken away from him except by his own consent, and as he was not shown to have waived the right or to have consented to the verdict of a less jury than twelve, but, on the other hand, demanded a full jury, the verdict was set aside as unconstitutional.

A trial for a misdemeanor by a jury of six in a justice's court under a state statute giving the defendant a right to appeal only upon finding sureties is not a trial by jury as guaranteed by the Minnesota Constitution. *State v. Everett*, 14 Minn. 430, 444.

So, in Pennsylvania it has been held, in proceedings before justices of the peace in criminal matters, that such a justice has no power to hear a charge of an aggravated assault and battery before a jury of six, and that in such a case he is to hear the case on the complaint of the prosecutor, and either bind the prisoner over to court or discharge him. *Com. v. Mead*, 5 Law Times N. S. (Pa.) 123; 8 Brightly's Digest, pt. 1, p. 4210.
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The Pennsylvania statute of May 24, 1871, which gives concurrent jurisdiction to justices of the peace and a jury of six with the quarter sessions in liquor cases, was held unconstitutional in *Com. v. Saal*, 10 Phila. 496, as the offense was made a misdemeanor punishable upon an indictment by a jury of twelve under the colonial laws as they existed at the time of the adoption of the first Constitution in that state.

V. In civil actions.

a. Less than twelve valid.

The constitutionality of a verdict in civil cases by less than the common-law jury of twelve men has, however, been upheld, especially in cases in inferior and justices' courts under the statutes of some of the states, notwithstanding that the Constitutions of the same have provided that the right shall remain inviolate.

The constitutionality of such statutes has generally been upheld upon the ground that juries did not form any part of the machinery of such tribunals at common law, and upon the further ground that in such cases there is an appeal to the courts of common law where the parties are entitled to a trial by jury unless the same is waived.

This doctrine will be found admitted by the court in the case of *Vaughn v. Scade*, 30 Mo. 600, 605, although that case was founded upon the constitutionality of a verdict of a jury of six in a court of law commissioners, a court of record in which a jury of less than twelve could not sit.

In *Miller v. Lampson*, 66 Conn. 432, 438, the court upheld the provisions of the Connecticut statute, § 1356, Gen. Stat., which provides for a jury of six in cases of summary process in a justice's court between landlord and tenant, although the defendants requested a jury of twelve and claimed that the Constitution guaranteed the right, and that before and at the time the Constitution of the state was adopted he could not be deprived of his property unless upon the verdict of a jury of twelve.

In *Kreuchl v. Dehler*, 50 Ill. 176, 178, the court stated that a statutory provision that "the verdict of the jury" should be an indemnity in an action in trover before a justice of the peace to recover personal property alleged to have been taken by the defendant as a constable under execution, and directing that the jury shall consist of not less than six nor more than twelve persons, must be understood as absolutely prescribing that number only in cases where the parties were not present to agree upon a less number; and, further, that the provisions of the statute authorizing the constable to summon not exceeding twelve jurors by consent was not to be considered as prohibiting the parties from agreeing upon less than six, as the legislature undoubtedly intended to prevent more than twelve persons being called from their business to serve upon a jury, but to allow the parties to take any number under twelve upon which they could agree.

So, in proceedings before justices of the peace a jury may consist of less than twelve men, as the constitutional provision was not meant to apply to cases wherein the right to a common-law jury did not exist prior to the adoption of the Constitution. *Ward v. Farwell*, 97 Ill. 593, 614.

And a statute providing for a jury of six in a justice's court, instead of a jury of twelve, is a valid enactment. *Rhodes, Burford Furniture Co. v. Mattox*, 135 Ind. 372, 376.

So, an act of the legislature which provides for a jury of six in superior courts, but does not prohibit the right to a jury of twelve, and only

provides that certain conditions, such as a deposit of money to pay expenses, shall be compelled with by the party seeking such a jury, does not conflict with the provisions of the Constitution of Iowa, § 9 of the Bill of Rights. *Conners v. Burlington, C. R. & N. R. Co.* 74 Iowa 383.

The provisions of Iowa Laws 1880, chap. 163, limiting the right of appeal from justices' courts and a jury of six to the circuit court where the amount in dispute is more than \$25, was attacked in the case of *Higgins v. Farmers' Ins. Co.* 60 Iowa, 50, 51, upon the ground that they were contrary to the Constitution, and contravened the right to a trial by jury which was thereby declared to be inviolate; but the court upheld the same as, although the word "jury" as used in the 1st clause of art. 1, Bill of Rights, was used in the sense of a common-law jury, yet it was qualified by the language which followed it, which gave the general assembly power to authorize a "jury" of less than twelve in inferior courts, thus implying that the word was used in a different sense in such last paragraph.

And a state statute which creates a court of small claims or causes, and provides that in cases where property levied upon is claimed by another person a jury of six may be summoned to try the title, is constitutional. *Berry v. Chamberlain*, 53 N. J. L. 463.

The New York act of 1857, relating to district courts in the city of New York which give jurisdiction in such courts to a justice and a jury of six in actions upon the charter, ordinances, and by-laws of the corporation of the city of New York, or the statutes of the state, where the penalty does not exceed \$250, does not violate the constitutional right to a trial of the issue by a common-law jury of twelve, for the reason that by subdiv. 3, § 3, of the act, the defendant has a right at any time after issue joined and before trial to remove the cause to the common pleas, and to have a trial by a jury of twelve upon executing an undertaking with one or more sureties to pay any judgment recovered against him in the court. *People, Metropolitan Bd. of Health, v. Lane*, 55 Barb. 168, 178. Under the act mentioned in the above case the justice only had jurisdiction to summon a jury of six.

So, it has been held that § 53 of the New York Code of 1861, as amended, which extended the jurisdiction of the justices of the peace to actions of replevin, is constitutional, although it transfers such cases from courts of record, in which the jury consists of twelve men, to justices' courts, wherein only six jurors are required. *Knight v. Campbell*, 62 Barb. 16. In this case, however, there was a dissenting opinion by Mullin, P. J.

In the above case it is said that the fact that all three of the Constitutions of the state of New York contained similar provisions respecting the right to trial by jury, and to its remaining inviolate forever, together with the fact that nothing had been more common than for the legislature, under each and all of such Constitutions, to exercise the power of altering and enlarging the jurisdiction of inferior tribunals, such as justices' courts, and of authorizing them to try actions and classes or kinds of actions with a jury of six men, which before were triable only in a court of record by a jury of twelve men, was of great weight in favor of its constitutionality, and one which ought to be conclusive as to the true construction and meaning of the constitutional provision in this regard.

And in *Norton v. McLeary*, 8 Ohio St. 205, 208, a civil action brought before a justice of the peace on a promissory note, the court upheld the constitutionality of the Ohio statute 43 L. R. A.

of May 1, 1854, which extended the jurisdiction of justices of the peace in civil cases, and purported to give such justices concurrent jurisdiction with the court of common pleas, although it made no provision for a trial by a jury of twelve.

Where, by the provisions of the act in force at the time the jury was selected and served with process in the case, a jury of twelve men was legal before a justice of the peace, and after the jury had been selected and served, but before the day of trial, an act was passed abolishing a jury of twelve, and substituting a jury of six men as a legal jury before a justice, the court held that it was settled in that state that the constitutional provision in reference to the trial by jury did not apply to trials before justices of the peace, and it was therefore a subject over which the legislature had control, and that the legislative power to reduce the number of jurors from twelve to six, as was done by the Ohio statute of March 4, 1876, could not be questioned. The court therefore reversed the judgment, as the justice had no legal authority to impanel a jury of twelve. *Warner v. Baltimore & O. R. Co.* 31 Ohio St. 265, 268.

A statute authorizing the appointment of a jury of six men to ascertain and determine out of court the amount of damage to property done by a mob is constitutional. *Re Pennsylvania Hall*, 5 Pa. 204.

In this case, the court based its decision upon the ground that although the state Constitution guaranteed that the right to trial by jury should be 'as heretofore' in all civil and criminal cases in court, and should remain inviolate, yet the mode of ascertaining damages in cases similar to the one then before the court had been used by the legislature both before and since the adoption of the state Constitution, and in a great variety of cases, and therefore there was no change in the right of trial by jury.

The 3d section of the Colorado statute of February 13, 1874, provides that "all issues of fact in said probate courts shall be tried by a jury of six men, unless both parties waive a trial by jury," etc., and "section 4 of said act further provides that if at any time before the calling of the cause for trial, and before any venire shall have issued, either party shall demand a trial by a jury of twelve men, a jury of twelve men shall be summoned and impaneled, but the party demanding the same shall be required to advance and pay into court the sum of \$20 at the time of making such demand."

In *No. 5 Min. Co. v. Bruce*, 4 Colo. 293, 296, an action to recover for work done, the court construed the above provisions of the statute as implying that the trial should be had by a jury of six men, unless a trial by jury should be waived by both parties, or unless one party or the other demanded a trial by a jury of twelve, and that as the record did not show that a jury was waived, nor that a jury of twelve was demanded by either party, the case was properly tried by a jury of six.

In *Rhodes Burford Furniture Co. v. Mattox*, 135 Ind. 372, 375, it was sought to enjoin a judgment recovered before a justice of the peace, upon the ground that the cause was tried by a jury of twelve instead of six, as required by § 209 of Elliott's Supp. Ind. Stat., and that the judgment was therefore void, but the court refused the relief, as such a judgment could not be collaterally attacked in that manner, for the reason that so long as the irregularity did not deprive the court of jurisdiction over the subject or the parties, its judgment, though the proceedings leading up to it, and the judgment itself, were erroneous, nevertheless if jurisdiction remained, was not void.

In *Clark v. Spicer*, 6 Kan. 440, 447, an action of trespass to recover damages against the defendant, a justice of the peace, for alleged error in trying the plaintiff criminally for misconduct in office as school director before a jury of six men, the court stated the question depended upon whether § 2 of chap. 49 of the Kansas Laws of 1867, p. 81, was constitutional or not, but it did not decide the question, as the jurisdiction of the justice did not depend upon the constitutionality of the section, for the reason that he had jurisdiction of both the defendant and the subject-matter of the action whether the section was constitutional or not, and that in determining the question whether the plaintiff should be tried by a jury of six or by a jury of twelve men, he acted judicially, and therefore, no matter whether he erred or not, he was not liable.

An action in debt to recover \$40, wherein plaintiff files a demand for \$6, and defendant files a plea setting out a note for \$33, may be tried by a jury of twelve men instead of six, as required by N. J. Rev. Laws, p. 634, and the Supplement, § 4, p. 772, known as the small cause act, as the plaintiff's demand is less than \$16, and the defendant's more than that amount. *Jones v. Oliver*, 7 N. J. L. 149.

b. Invalid.

In civil actions also the state Constitutions make twelve jurors necessary for a jury trial where a party was entitled to a common-law jury of twelve at the time of the adoption of such Constitutions.

This construction was adopted by the court in the case of *Enderman v. Ashby*, Sneed (Ky.) 53, wherein an act of the general assembly of Kentucky of 1792, which prohibited the dealing with slaves without the consent of their owners, and gave an action before a justice of the peace for the recovery of four times their value, was held to be unconstitutional as depriving the defendant of a right to a trial by a jury in a case in which prior to the Constitution he was entitled to it.

And in *Ross v. Neal*, 7 T. B. Mon. 407, 408. It was held that a jury of less than twelve would vitiate a verdict in an action for malicious prosecution.

So, in *Tabor v. Cook*, 15 Mich. 322, 325, the provision of the state Constitution was construed as showing the intention to preserve to parties the right to have their controversies tried by jury in all cases where the right then existed, and as showing that suitors could not be constitutionally deprived of the right, except where, in civil cases, they voluntarily waived it by failing to demand the same as pointed out by the legislature.

The doctrine declared in this case is also borne out by the later cases of *Van Sickle v. Kellogg*, 19 Mich. 49, 52; *Paul v. Detroit*, 32 Mich. 108, 114; *Swart v. Kimball*, 43 Mich. 443, 448.

And in such cases it is the common-law jury of twelve men that is meant. *McRae v. Grand Rapids, L. & D. R. Co.* 93 Mich. 399, 405, 17 L. R. A. 750.

And a statute authorizing courts to discharge some of the jurors who have been impaneled in a cause if they are unable to attend, and to proceed with the trial, and take a verdict with less than twelve jurors, but which does not authorize a jury of less than twelve to be impaneled in the first instance, violates the Michigan constitutional right of "trial by jury," and is not within another provision of the Constitution that "the legislature may authorize a trial by a jury of a less number than twelve," since the legislative power cannot be delegated to the court. *Ibid.*

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In Mississippi a jury of less than twelve in civil actions on contracts is void. *Tillman v. Ailles*, 5 Smedes & M. 373, 43 Am. Dec. 520.

And in *Dixon v. Richards*, 2 How. (Miss.) 771, which was an action in assumpsit, the court reversed a judgment on a verdict by eleven jurors, and remanded the cause on the ground that a jury must consist of twelve men.

And the same construction is placed upon the provisions of the Missouri Constitution, the constitutional provision meaning a jury of twelve men whose verdict must be unanimous.

This was early decided in that state, in the case of *Bank of Missouri v. Anderson*, 1 Mo. 174, 175, in which the right to a jury of twelve men was upheld in proceedings by way of motion in a summary manner, under § 27 of the bank charter, which provided the summary remedy.

The above decision was followed in *Vaughn v. Scade*, 30 Mo. 600, 603, in which the court reversed the verdict of six jurors, in an action for damages, in the law commissioner's court, which was a court of record.

So, in *Foster v. Kirby*, 31 Mo. 496, 498, which was an action originally commenced in a justice's court and appealed to the law commissioner's court, where a jury of twelve was refused, the court reversed the judgment on the ground of such refusal, and followed its prior decision in *Vaughn v. Scade*, 30 Mo. 600, as a court of law commissioners is a court of record in which the defendant is entitled to a jury of twelve.

The above decisions were followed by the court in the subsequent case of *Aka v. Anderson*, 34 Mo. 74; and also in *Henning v. Hannibal & St. J. R. Co.* 35 Mo. 408, and *Scott v. Russell*, 39 Mo. 407, 409, which latter cases hold that on appeals from justices of the peace to the circuit court the defendant there should be entitled to a trial by twelve men.

So, a trial by a jury of six under the provisions of the New Jersey seizure laws was held unconstitutional in the unreported case of *Holmes v. Walton*, cited in *State v. Parkhurst*, 9 N. J. L. 549.

And under the New Jersey laws of June 5, 1782, a demand for £8 must be tried by a jury of twelve, and a verdict of six will therefore be reversed, even though the parties consent to a trial by six. *Parker v. Munday*, 1 N. J. L. 70. This decision is based on the fact that the statute expressly says that the jury must consist of twelve men.

So, in *Briant v. Russell*, 2 N. J. L. 135, the court ordered the judgment reversed on certiorari as the record showed that the cause was tried by eleven jurors.

And in *Mitten v. Smock*, 3 N. J. L. 470, it is held that a verdict rendered by six jurors is invalid, even if the parties consent.

Again, the court reversed the judgment in *Ashcroft v. Clark*, 5 N. J. L. 577, as the demand was for over \$50 and the trial was by a jury of six men.

Prior to the New York Constitution of 1846, replevin was one of the causes of action in which a justice of the peace had no jurisdiction, and which was only cognizable by a court of record and a jury of twelve; and therefore under the New York Laws of 1860, giving jurisdiction in justices' courts wherein the jury is limited to six men, if a jury is demanded by a defendant in an action of replevin, the justice must dismiss such action as he is without jurisdiction, and cannot summon a jury of six. *Baxter v. Putney*, 37 How. Pr. 140, 143.

So, in *Knight v. Campbell*, 62 Barb. 16, 26, which was an action of a similar nature, the same question arose, and it was stated that as justices' courts were a well-known and estab-

lished part of the judicial system at the adoption of the Constitution of New York, it was scarcely possible, and quite improbable, that the Constitution was not intended to embrace juries in justices' courts as "heretofore used."

A judgment was reversed where the case had been tried by eleven jurors, in *Whitehurst v. Davis*, 3 N. C. (2 Hayw.) 113.

A verdict of less than twelve jurors in the county court in a contested will case, although not void, is erroneous, and may be appealed from, where the record shows only eleven jurors. *M'Donald v. M'Donald*, 5 Yerg. 310.

Upon a petition by an insolvent debtor under chapter 143 of the Washington Code, for his discharge, which is objected to on the ground of fraud, a jury must be composed of twelve men, and a verdict rendered by six men or any number less than twelve is of no effect whatever; and § 2033, which provides for submission of such a question to a jury of less than twelve, is unconstitutional. *Thomas v. Hilton*, 8 Wash. Terr. 365, 367.

In this case, however, there was a dissenting opinion by Justice Langford, to the effect that the section in question provided that the trial should be by a jury of not less than six, and did not in terms provide that the jury should be of six, and that by construing the section to mean that the trial might be by six jurors, unless twelve were demanded, the section might stand with the Constitution, as the statute was capable of two different constructions, one of which was consistent with the Constitution and the other not, and therefore the consistent construction ought to stand.

And the Wisconsin statute, giving the county court jurisdiction, and providing for a jury of six, is unconstitutional and void, as the constitutional right to a trial by a jury of twelve extends to cases within the jurisdiction of the county court, and cannot be waived either directly or indirectly. *May v. Milwaukee & M. R. Co.* 3 Wis. 219; *Norval v. Rice*, 2 Wis. 22.

In *Tredymmock v. Perryman*, Cro. Car. 259, it was held that a custom to try causes in an inferior court by six jurors instead of twelve was bad. In this case the action was in debt.

And the same decisions are arrived at in construing the provisions of the 7th Amendment to the Constitution of the United States relating to trial by jury in civil cases.

The Arizona statute of 1891 (Sess. Laws 1891, p. 71, § 1) has been held to conflict with U. S. Rev. Stat. § 1868, which authorizes in the territories a commingling of common law and chancery jurisdiction in the territorial courts, and a uniform course of proceeding in all cases legal or equitable, and also provides that "no person shall be deprived of the right of trial by jury in cases cognizable at common law." It was also said to be in conflict with the 7th Amendment to the Constitution, which provides that "in suits at common law where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved," as that means twelve jurors and unanimity in finding a verdict. *Carroll v. Byers* (Ariz.) 36 Pac. 499.

The Montana statute of January 15, 1869, which provides that "in all civil cases, if three fourths of the jurors agree upon a verdict, it shall stand, and have the same force and effect as if agreed upon by the whole of the jurors," was held unconstitutional in *Kleinschmidt v. Dunphy*, 1 Mont. 118, as in conflict with the provisions of the United States Constitution relating to the trial by jury of suits at common law where the value is over \$20. This decision was reversed on other grounds in *Dunphy v. Kleinschmidt*, 11 Wall. 610, 20 L. ed. 223.

But a similar territorial statute authorizing

a verdict by the concurrence of nine or more members of the jury was afterwards held by the Supreme Court of the United States to violate the constitutional right to a trial by a jury. *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079, Reversing 10 Utah, 147.

And in cases where the legislature has conferred jurisdiction upon inferior courts to try civil causes by a jury of less than the common-law number, it will be found that the provisions thus made must be strictly complied with, and they will not be taken as conferring jurisdiction or power to try with a jury of less than twelve, upon courts not expressly named or designated by the statute giving the power.

In *Helvenstine v. Yantis*, 88 Ky. 695, it was held that the Kentucky act of February 11, 1880, providing "that juries in justices', police, and quarterly courts may consist of six men," did not embrace county courts, and therefore the county judge erred in forcing a defendant to be tried with six jurors for violation of the local-option law, but as the error was judicial, and entitled the appellant, under § 362 of the Kentucky Criminal Code, to an appeal to the circuit court, where the case would be tried *de novo* by twelve jurors, it would not be treated as void in a proceeding to enjoin its enforcement.

In *Jackson v. J. A. Coates & Sons* (Tex. Civ. App.) 43 S. W. 24, the court held that where the Constitution prescribes that the jury shall be composed of a certain number of men, and does not give authority for a verdict by a less number, the trial court has no right to authorize such a course over the protest of either of the parties litigant.

So, such statutes have in some cases been construed as meaning a jury of the number specified therein, and no more nor less.

In *Rhodes Burford Furniture Co. v. Mattox*, 135 Ind. 372, 376, it is said that a trial before a justice of the peace in a civil cause with a jury of twelve instead of six, as required by Ind. Stat. § 299, *Elliot's Supp.*, is an irregularity, and therefore an error.

Where a sealed verdict by six jurors was returned, but one of them failed to appear when court convened, the court held that except by consent the verdict could only be rendered by a full jury, and that the verdict of the five jurors was not valid, and could not be received by the court. *Bishop v. Mugler*, 33 Kan. 145. In this case a mandamus to compel the justice was refused.

VI. The power of the legislature.

a. General doctrine.

The control of the legislature over the number of jurors requisite to form a legal verdict depends upon the question whether the right to a trial by a jury of twelve men in the particular case existed at the date of the adoption of the state Constitution, and also upon the provisions of the state Constitution regarding the same. The Constitution in some states gives express power to the legislature, and makes provision for the number of jurors requisite to constitute a jury, and to render a valid verdict.

The general doctrine, however, would seem to be that, if the case is one in which the defendant had at the time of the adoption of the state Constitution a legal right to be tried by a common-law jury of twelve men, then the legislature cannot by any legislative enactment interfere with or abridge the right which was fully secured to him by the common law at the time of the approval of the state Constitution, and which right was further guaranteed to him by such Constitution. If, on the other hand, the right to a trial by a common-law jury of twelve men was not so secured to him, and did not ex-

let at the time the state Constitution was adopted, then it is within the power of the state legislature to control and make provisions for regulating the trial by jury in such cases, and any statutes or enactments dealing with the number and agreement of jurors in such cases will be upheld.

And in deciding upon questions involving such a right the Constitution itself must be looked to as the paramount law, and such an operation must be given to the acts of the legislature as shall accord with its clear and obvious import. *Carson v. Com.* 1 A. K. Marsh. 290.

The above statement of the extent of the legislative power is fully supported by the Opinion of the Justices, 41 N. H. 550, 551, wherein it is stated that the legislature has no power so to change the law in relation to juries, and to provide that petit juries may be composed of a less number than twelve, nor to provide that a number of the petit jury less than the whole number can render a verdict, in any case, where the Constitution gives to the party a right to a trial by jury.

It is further supported by the ruling of the court in *People v. Kennedy*, 2 Park. Crim. Rep. 312, 318, and in *People v. Carroll*, 8 Park. Crim. Rep. 22, 24, wherein it is said that it is no answer to say that his offense did not exist at the time the Constitution took effect, but had been since created by statute, and if the offense be such that it would have been entitled to a trial by jury, if created before the Constitution was adopted, he cannot be deprived of the same right when created afterwards.

In passing upon the constitutionality of the Ohio act of March 14, 1853, relating to a jury of six in the probate court, the court, in *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671, 685, stated that whenever the Constitution names and establishes institutions or proceedings, its true characteristics and essential features must be sought from the system of law from which it is taken, and it cannot be materially changed by the general assembly; and further, that it is beyond the power of such assembly to impair the right, or to materially change the character of the right, to trial by jury as provided for by the state Constitution.

In this case the court declared the above-mentioned statute unconstitutional, and the conviction of the defendant of the offense of assault and battery by a jury of six was therefore set aside.

These principles were further upheld by the same court in the later case of *Lehman v. McBride*, 15 Ohio St. 573, 680.

And in such cases any act of the legislature which provides for a trial by any other than a common-law jury of twelve men is unconstitutional, and any act which requires or authorizes such trial is a violation of one of the essential elements of the jury referred to in, and secured by, the Constitution. *McGill v. State*, 34 Ohio St. 228, 254.

The same in effect are the decisions in *Stokes v. People*, 53 N. Y. 164, 172, 13 Am. Rep. 492, and *Plimpton v. Somerset*, 33 Vt. 283, 293.

The same construction has been placed upon the legislative power to abridge the number of jurors by the cases of *State v. Cox*, 8 Ark. 436; *State v. Morrill*, 16 Ark. 384, 410; and *Cairo & F. R. Co. v. Trout*, 32 Ark. 17, 25, in which the court declared that the Constitution used the word "jury" in its common-law sense, and that the number cannot be abridged by the legislature.

So, in securing the rights of trial by a jury, the Iowa Constitution gives no authority to the legislature to provide for a less number than twelve jurors. *Eshelman v. Chicago, R. I. & P. R. R. Co.* 67 Iowa, 296, 43 L. R. A.

So, the provision in the Ohio Constitution was intended to limit the power of the legislature with reference to interference with the right of trial by jury, and prohibited it from depriving the accused of the right to have a jury of twelve impartial men to pass on his guilt or innocence. *Dailey v. State*, 4 Ohio St. 57, 59.

The same declaration of the legislative power is to be found in the following cases: *Kleinschmidt v. Dunphy*, 1 Mont. 118, 131; *Com. v. Shaw*, 1 Pittsb. 492; *Emerick v. Harris*, 1 Binn. 424; *Baxter v. Putney*, 37 How. Pr. 140, 143; *Dater v. Loomis*, cited in this case and unofficially reported; *Byrd v. State*, 1 How. (Miss.) 163; *Carpenter v. State*, 4 How. (Miss.) 163, 84 Am. Dec. 116.

So, the state of Utah did not acquire, upon its admission into the Union, the power to provide, in respect of felonies committed within its limits while it was a territory, that they should be tried otherwise than by such a jury as is provided by the Federal Constitution. *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061.

Yet, the legislature has the general power to constitute new tribunals, and to provide new modes of trial for future cases, provided the right of trial by jury such as the Constitution intends is secured to everyone in the court of last resort in every case where it is guaranteed by the Constitution, and has not been waived by the party himself. Opinion of the Justices, 41 N. H. 550, 551.

And any legislation which does not rob it of any of its essential elements or ingredients cannot be said to infringe thereon. *Dowling v. State*, 5 Smedes & M. 664, 685.

But, in those cases which formerly were not triable by jury, if the legislature provides for such a trial subsequently, they may doubtless create, for the purpose, a statutory tribunal composed of any number of persons, and no question of constitutional power or right can arise. *Re Ferrier*, 103 Ill. 867, 874, 42 Am. Rep. 10, Quoting *Cooley*, Const. Lim. p. 319.

So, in *Tims v. State*, 26 Ala. 165, 168, which involved the power of the legislature to declare a certain misdemeanor triable in a justice's court, the court supported the doctrine that the constitutional provisions had no application to cases which were unknown either to the common or statute law at the time the state Constitution was adopted.

And in such cases a trial by jury different from that contemplated by the Constitution may be provided for. *Com. v. Byers*, 5 Pa. Co. Ct. 295.

In mere cases of misdemeanor the legislature may provide for a prosecution in a summary manner, and without the formality of an indictment, and the accused may waive a jury or agree to a certain number. *State v. Mansfield*, 41 Mo. 470.

But a contrary opinion would seem to have been formed by the court in *People v. Johnson*, 2 Park. Crim. Rep. 322, wherein the legislature are said to have no power to interfere with the right of trial by a jury of twelve in cases of misdemeanor.

So, it is competent for the legislature to create new tribunals without common-law power, and to authorize them to proceed without a jury, but a change in the forms of action will not authorize submitting common-law rights to a tribunal in which no jury is allowed. *Montgomery & F. R. Co. v. McKenzie*, 85 Ala. 546, 549.

So, the legislature may provide for a less jury than twelve in county and other inferior courts in cases of misdemeanors, as provided in the Georgia Constitution of 1868. *Allen v. State*, 51 Ga. 264.

And under the provisions of art. 1, § 9, of the

Iowa Bill of Rights, the legislature may provide for a jury of less than twelve in inferior courts, even upon appeal. *Higgins v. Farmers' Ins. Co.* 60 Iowa, 50, 51.

Again, in minor offenses, as shown in § 124, La. Const., triable summarily before a recorder, magistrate, or justice of the peace, and in other cases, the legislature has power to act except in cases where the Constitution provides otherwise: and further, that the legislature has power to cause a jury of twelve persons to be sworn before the recorder for the trial of minor offenses, for the reason that it is in accordance with the common law, and the general provisions of art. 103 of the Constitution of Louisiana. *State v. Gutierrez*, 15 La. Ann. 190.

So, under the Michigan Constitution the legislature may authorize a trial by a jury of less number than twelve, but it cannot delegate such power to the court. *McRae v. Grand Rapids*, L. & D. R. Co. 93 Mich. 399, 17 L. R. A. 750.

In a case wherein the justices had refused to try a case to recover a penalty of \$100 before a jury of six upon the ground that the defendant had demanded a jury of twelve and the act gave him no power to empanel such a jury, and that the defendant was entitled to a full jury of twelve, the court in granting a mandamus to compel the justice to try the case before a jury of six said that in its opinion the legislature could, without violating the provision of the New York Constitution, give courts of justices of the peace jurisdiction of actions in which the amount claimed did not exceed \$100, other than such as those courts had jurisdiction of when the New York Constitution of 1846 was framed, or when it was adopted, and provide for a compulsory trial at the option of either party, by a jury of six, of such additional actions committed to the jurisdiction of courts of justices of the peace: and the legislature could also extend the jurisdiction of the assistant justices' courts in the city of New York by amending the Code so as to give such courts jurisdiction of similar actions for similar amounts, and provide for a compulsory trial by a jury of six, at the option of either party, and the legislature constitutionally, by the act relating to the district courts of the city of New York, provides for compulsory trials by a jury of six at the option of either party as to actions within the jurisdiction of such courts in which penalties, debts, damages, or other amounts claimed did not exceed \$100, and irrespective of the question whether such district courts should be regarded as new inferior courts of local civil jurisdiction, established under the Constitution of 1846, or as substantially the same courts as the former assistant justices' courts. *People, Metropolitan Bd. of Health, v. Lane*, 55 Barb. 168, 176, 177.

A similar question as to the constitutionality of the New York statute of 1860 arose in the case of *Crouse v. Walrath*, 41 How. Pr. 86, an action of replevin before a justice of the peace, in which the defendant, after issue joined, demanded a jury of twelve men. The court held that under subdiv. 10, § 53, N. Y. Code Proc. the justice had jurisdiction, and that it could not be successfully claimed that if the legislature had the power to enlarge the jurisdiction of justices' courts in its discretion, from time to time, to any amount, and to give such courts jurisdiction in all civil actions so that causes might be tried before a justice of the peace, when a jury of twelve men is not called for, that in an action for the delivery of personal property of the value of \$100, or under, the section of the Constitution (§ 2, art. 1) is violated, because the cause must be tried, if it can be tried in justices' court, by a jury of six men, for the reason that the Constitution vested the power 45 L. R. A.

in the legislature to establish, in their discretion, the jurisdiction, and the manner of the proceedings in justices' courts in all cases, where not prohibited from so doing, and therefore the section referred to was not intended to limit the power to that class of cases where justices' courts had jurisdiction by law at the time of the adoption of the Constitution.

And a similar opinion was passed by the court in the case of *Knight v. Campbell*, 62 Barb. 16, 20, 27, 28, wherein the question of the power of the legislature to enlarge the jurisdiction of a justice and deprive the defendant of the right to have his cause tried by a jury of twelve men and compel him to be tried by a jury of six men was raised. The court held that the power of the legislature was general and unlimited with reference to subjects of legislation, especially where such power had not been abridged by the state or Federal Constitution.

The South Carolina act of December, 1866, which directs "that the juries in the district court shall consist of one jury of eight jurors at each quarterly session, and the venire therefor shall consist of a panel of sixteen," is constitutional and within the power of the legislature as delegated by the Constitution. *State v. Starling*, 15 Rich. L. 120, 135.

In a case wherein it was contended that the right of trial by a jury secured by the Constitution meant a trial by a common-law jury of twelve men, and that the legislature had not any power to provide for the trial of a person charged with any criminal offense by a jury composed of any less number than twelve, the court stated that in determining what the several constitutional provisions referred to meant, and keeping in mind the fact that the present Constitution was not the beginning of the law of the states, but that it assumed the existence of a well-understood system, still to remain in force, excepting in so far as it was altered by the provisions of the Constitution of 1868, it was but natural to inquire what was the system previously in existence so far as the right of trial by jury was concerned, and whether any alterations therein had been made by the provisions of that Constitution, and as, under the Constitution that previously existed in that state, the general assembly had power to determine the number of persons who shall constitute a jury in the inferior and district courts, and pursuant to such a power did, by acts of the legislature of 1865-66, provide for juries of less than twelve in district courts, the court held that the provisions of the Constitution were not invalidated, and further, that the general assembly had power to provide for the trial of any person accused of an offense within the jurisdiction of the trial justice by a jury of less than twelve. *State v. Williams*, 40 S. C. 373.

And the legislature may provide for a jury of less than twelve in inferior courts, wherein a jury is not required at common law, and where an appeal lies from such courts to courts of common law wherein a jury must be on hand, and no constitutional provisions are infringed. *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671, 675, 677.

So, the legislative power to reduce the number of jurors from twelve to six in justices' courts, as provided in the Ohio act of March 4, 1876, cannot be questioned, as the constitutional provisions in reference to the trial by jury do not apply to trials before justices of the peace, and the method of procedure in such courts is therefore one over which the legislature has control. *Warner v. Baltimore & O. R. Co.* 81 Ohio St. 265, 268.

The legislature of Pennsylvania has by local laws provided for trial by jury different from

that contemplated by the Constitution in cases relating to the liquor law (Act May, 1861, Pamph. Laws, 682, act 1871, known as the Mercer County Liquor Law), and such acts have been upheld. *Com. v. Byers*, 5 Pa. Co. Ct. 295.

b. Under state Constitutions.

The Constitution of some of the states gives express power to the legislature to deal with the question of jury trials, and to prescribe rules and regulations for the holding of the same, and for the verdict of the jury in such cases.

In the Constitution of Colorado there is a provision that the jury, "in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law." *Mills's (Colo.) Anno. Stat.* § 296, p. 195.

And a provision is to be found in the amended Constitution of Florida of 1875, art. 5, § 38, by which the number of jurors in any court may be fixed by law, but shall not be less than six in any case.

Under this provision a jury of six on a conviction of larceny was held constitutional in *Gibson v. State*, 16 Fla. 291.

So, the Constitution of Georgia, by art. 6, § 18, gives power to the general assembly to "prescribe any number, not less than five, to constitute a trial or traverse jury in courts other than the superior and city courts." *Code* 1895, vol. 2, § 5876.

And a provision is also contained in the Constitution of Illinois that "the trial of civil cases before justices of the peace by a jury of less than twelve men may be authorized by law." *Const.* 1870, art. 2, § 5.

Again, the Iowa Constitution provides that the "general assembly may authorize trial by a jury of a less number than twelve men in inferior courts." *Bill of Rights*, art. 1, § 9.

And although the Constitution of Kentucky, by § 7 of the Bill of Rights, provides that the ancient mode of trial by jury shall be held sacred and the right thereof remain inviolate, yet it is subject to such modifications as may be authorized by Congress.

So, La. Bill of Rights, art. 7, provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy public trial by an impartial jury, except that, in cases where the penalty is not necessarily imprisonment at hard labor or death, the general assembly may provide for the trial thereof by a jury less than twelve in number."

The Declaration of Rights of Massachusetts, art. 12, provides that the legislature shall not make any law that shall subject any person to a capital or infamous punishment, except for the government of the army and navy, without trial by jury. It would seem that under such a provision the legislature could not control the number or agreement of jurors necessary in such cases at common law.

And by article 15 of the Declaration of Rights of the same state power is given to the legislature in cases arising on the high seas, and such as relate to mariners' wages, to alter the law regarding the trial by jury in such cases if they find it necessary so to do.

By art. 4, § 46, of the Constitution of Michigan it is provided that a legislature may authorize a trial by a jury of a less number than twelve men.

Art. 1, § 4, of the Constitution of Minnesota, as amended November 4, 1890, provides that the legislature may provide that the agreement of five sixths of any jury in any civil action or proceeding, after not less than six hours' deliberation, shall be a sufficient verdict therein.

So, by the Constitution of Missouri a jury 43 L. R. A.

on the trial of criminal or civil cases in courts not of record may consist of less than twelve men as may be prescribed by law.

And by the Constitution of Montana provision is made that "in all civil cases, and in all criminal cases not amounting to felony, upon default of appearance or by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived, or a trial had by any less number of jurors than the number provided by law." *Declaration of Rights*, art. 3, § 23.

Again, the Nebraska bill of rights provides that "the legislature may authorize trial by a jury of a less number than twelve men, in courts inferior to the district court." Art. 1, § 6.

Power is given to the legislature by a law passed by a two-thirds vote of all the members elected to each branch thereof to require a unanimous verdict notwithstanding the provisions of the state Constitution of Nevada relating to majority verdicts in civil cases as contained therein. *Nev. Declaration of Rights*, art. 1, § 3.

The Constitution of New Hampshire expressly prohibits the legislature from making "any law that shall subject any person to a capital punishment (excepting for the government of the army and navy, and the militia in actual service) without trial by jury." *N. H. Const. Bill of Rights*, art. 16. It would seem that this provision would also bar the legislature from making any law in any way interfering with the number or agreement of jurors in such cases.

By art. 20 of the same, the legislature may, if it shall think fit, alter the method of procedure in cases arising on the high seas, and such as relate to mariners' wages. The article in question providing that in all other cases the right of trial by jury shall be held sacred.

The Constitution of New Jersey, *Declaration of Rights*, art. 1, § 7, provides that "the legislature may authorize the trial of civil suits, when the matter in dispute does not exceed \$50, by a jury of six men."

And art. 1, § 7, of the Constitution of North Dakota, *Declaration of Rights*, declares that "a jury in civil cases in courts not of record may consist of less than twelve men, as may be prescribed by law."

Section 7 of art. 9 of the Constitution of South Carolina of 1865, after preserving the right to trial by jury, states that "the general assembly shall have power to determine the number of persons who shall constitute the jury in the inferior and district courts."

So, the Constitution of Texas, art. 1, § 15, gives the legislature power to pass such laws as may be needed to regulate the same and to maintain its purity and efficacy.

And *Tex. Const.* art. 5, § 13, provides that "in civil cases, and in trials of criminal cases below the grade of felony in the district courts, the legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict."

Again, *Wash. Const.* art. 1, § 21, provides "that the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto."

VII. The question of consent and waiver.

a. General doctrine.

In the consideration of the question of the validity of a verdict of less than the common-law number of jurors the point has often been raised as to whether or not the fact that the

defendant waived a trial by the full jury of twelve and consented to a verdict by less than the constitutional number of jurors will render the trial and the verdict rendered thereat valid and constitutional.

In criminal cases the trend of the decisions leads to the conclusion that in capital cases and felonies there can be no waiver of the right, and the consent of the defendant to be tried by less than the common-law number cannot bind him. (See *c. infra*.) This conclusion is also borne out by the constitutional and statutory provisions of many of the states of the Union whose Constitutions and statutes make special provision for such cases. See cases in *b. infra*.

There are, however, some few cases wherein the consent of the defendant to a verdict by less than the common-law number of jurors in a case of felony has been held to bind him when entered on the record, but it may be doubted whether such cases can be considered good law inasmuch as they place no distinction between crimes of the higher grade on the trial of which the party was entitled to a jury of twelve men at common law, and by the state Constitution, which made the right to trial by jury inviolate, and misdemeanors. Such cases seem to base their opinion upon the ground that there is no distinction, and that if the consent of the defendant in a case of misdemeanor is binding upon him the same result must follow his consent in cases of felony. See Iowa cases *infra, c.*

Yet in cases of misdemeanor and other crimes of a lower grade the decisions show that there may be a waiver of a trial by a full jury of twelve men, and that the defendant's express consent to a verdict by a less number of jurors will bind him when accepted and consented to by the court and prosecution. The Constitutions and statutes of many of the states make express provision for such a verdict, and if the conditions are strictly observed the verdicts rendered under such laws are constitutional and will be upheld.

So, in minor offenses the jurisdiction in which is given to justices of the peace and a jury of less than twelve, the courts have held that such juries do not contravene the provisions of the state Constitutions, and that the consent of the defendant will bind him. In such cases, however, as in others, it has been held that it must be shown that the right to be tried by a jury of less than twelve did not exist at common law, or was not a right to which the defendant was entitled under some state law existing prior to the adoption of the state Constitution. See *Com. v. Saal*, 10 Phila. 496, *infra, d.*

In civil cases the rule would not seem to be so stringent, and a defendant may be allowed to waive a hearing by a full jury of twelve men, and to consent to a trial and verdict by a less number provided his assent is shown to have been given thereto. There must, however, be a consent shown. See *c. infra*.

As to consent to proceed with less than the full jury in cases of absent, sick, or unqualified jurors, see *Tram Lumber Co. v. Hancock*, 70 Tex. 312; *State v. Kaufman*, 51 Iowa, 579, 83 Am. Rep. 148, 149; *Prentice v. Chewing*, 1 Rob. (La.) 71, 72; *Com. v. Dailey*, 12 Cush. 80; *Territory v. Ah Wah*, 4 Mont. 149, 47 Am. Rep. 341; *Sillsby v. Foote*, 14 How. 219, 14 L. ed. 394; *Com. v. Shaw*, 1 Pittsb. 492; *Com. v. Byers*, 3 Pa. Co. Ct. 295; *Glindrat v. State*, 3 Tex. App. 573; *People v. Deegan*, 88 Cal. 608; *State v. Allen*, 46 Conn. 531, 548; *McCampbell v. State*, 9 Tex. App. 124, 35 Am. Rep. 726; *infra, VIII. b.*

b. Constitutional and statutory provisions.

The state Constitutions which make express 43 L. R. A

provisions for the waiver of a jury of twelve in cases therein mentioned are as follows:

The Arkansas Constitution, art. 2, § 7, of the Declaration of Rights, provides that "the right of trial by jury shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law."

A clause is contained in the Constitution of California, art. 1, § 7, with respect to civil actions and cases of misdemeanors, whereby the jury may consist of twelve, or of any number less than twelve, upon which the parties may agree in open court.

So, the Constitution of Kansas, ed. 1897, vol. 2, chap. 103, § 119, p. 485, contains a provision with regard to civil actions whereby the parties may agree to a less number than six, which is the number of jurors requisite to try a cause in that court upon a demand for a jury by either party.

And by art. 6, § 27, of the Michigan Constitution the right of trial by jury remains, but is deemed to be waived in all civil cases unless demanded by one of the parties in such manner as shall be prescribed by law.

Again, under § 4, art. 1, of the Bill of Rights of Minnesota a jury trial may be waived by the parties in all cases in the manner prescribed by the law.

So, a similar provision is to be found in § 3, art. 1, of the Declaration of Rights of Nevada, as to waiver of a jury in all civil cases in the manner to be prescribed by law.

And art. 1 of the Constitution of Utah, § 10, declares that a jury in civil cases shall be waived unless demanded.

In Indiana, however, whenever the right to trial by jury under art. 1, § 5, of the Constitution is claimed by either party, the court is bound to grant it, and therefore a waiver of such right can only take place where both parties consent. *State v. Mead*, 4 Blackf. 309, 30 Am. Dec. 661.

And the Constitution of Pennsylvania does not permit a waiver of the constitutional right to a trial by a jury of twelve in either civil or criminal cases, and no consent can alter or modify the known, certain, uniform, permanent, prescribed rules of trials in criminal cases, and therefore, to try a case with eleven or thirteen jurors is to create a new tribunal unknown to the Constitution or law, and this no counsel, or citizen, or court, or all three, can do. *Com. v. Shaw*, 1 Pittsb. 492. To the same effect, *Mitten v. Smock*, 3 N. J. L. 470; *Briant v. Russell*, 2 N. J. L. 35.

With respect to a statutory provision, however, it has been said that a defendant in a criminal action may waive the benefit of a statutory provision made for his benefit, and with the consent of the state and court may waive a statute made for his benefit, and silence will constitute such waiver or consent, and therefore a trial by eleven jurors with such consent is not unconstitutional. *State v. Kaufman*, 51 Iowa, 579, 33 Am. Rep. 148, 149.

The statutes of several of the states make provision for consent to try with a less number of jurors than twelve.

In Arizona under Rev. Stat. 1887, title 39, chap. 1, § 2165, p. 384, in civil cases the parties may consent to try with a less number than twelve and not under three, the consent to be entered by the clerk in the minutes of the trial.

And § 2166 of the same statute makes a similar provision for a jury in courts of justices of the peace.

So, under the Revised Statutes of Arkansas, Sandels & Hill's ed. 1894, § 4349, in cases before justices of the peace, if a jury is demanded

by either party the justice must order the same to be impeached, and such jury shall be composed of six jurors, but a less number may be agreed upon by the parties.

And by § 2219 of Mansfield's (Arkansas) Digest, provision is made for the trial of cases other than felonies, by agreement of the parties, by a jury of less than twelve.

By § 2376 of the Code of Criminal Procedure (Ark. Stat. 1884) it is provided that issues of law and fact may be tried by the justice, unless the defendant demands a trial by jury, in which case the same shall be tried by a jury of twelve men unless the defendant shall consent to be tried by a less number.

By the Code of Civil Procedure of California (3 Deering's Anno. Codes & Stats. § 194, p. 60) the jury in civil actions and in cases of misdemeanor may consist of twelve or of any number less than twelve upon which the parties may agree in open court.

So, by the Penal Code of the same state (4 Deering's Anno. Codes & Stats. § 1042, p. 225), issues of fact may be tried by a jury, unless a trial by jury be waived in criminal cases not amounting to felony by the consent of both parties expressed in open court and entered in the minutes, and in cases of misdemeanor the jury may consist of twelve, or any number less than twelve, upon which the parties may agree in open court.

Under the General Statutes of Connecticut of 1888, title 18, chap. 76, § 1103, p. 258, a legal verdict may be given by any number of jurors not less than nine in any civil cause in which the parties agree in writing before such verdict is rendered that such portion of the jury may render it.

So, under Idaho Rev. Stat. ed. 1887, title 3, § 3939, a trial by jury in the district court shall consist of twelve, and in probate and justices' courts of six, men, unless the parties to the action or proceedings agree upon a less number.

And by § 7781, chap. 6, of the same statutes (Penal Code) issues of fact must be tried by a jury unless a trial by jury be waived in criminal cases not amounting to a felony by the consent of both parties expressed in open court and entered in its minutes, and in cases of misdemeanor the jury may consist of twelve or any less number than twelve upon which the parties may agree in open court.

So, under § 48, § 13, art. 5, chap. 79, Starr & C. (Ill.) Anno. Stat. vol. 2, ed. 1896, relating to trials before justices of the peace, the number of jurors shall be six or any greater number not exceeding twelve as either party may desire.

And by Ind. Rev. Stat. vol. 1, Meyers' Anno. ed. § 521, relating to the Code of Criminal Procedure, in a trial by jury in civil actions, the parties may determine the number of jurors by agreement, and in case of their disagreement the number shall be twelve. Under this section, however, the number shall not be less than three.

And by § 1488 of the same statutes, relating to proceedings before justices of the peace, the number may be less than twelve by consent of the parties.

So, under Mo. Rev. Stat. ed. 1889, vol. 2, § 6262, p. 1480, relating to the practice in justices' courts, a jury is to be composed of six unless the parties agree to a less number, in which case the jury is to consist of the number agreed upon not exceeding six.

And by § 2690 of the Code of Montana relating to proceedings in justices' and police courts, the defendant is entitled to a jury of six, but may consent to a less number.

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And under § 319, Anno. Comp. Stat. ed. 1897, § 7044, Crim. Code Neb. in cases relating to the criminal procedure before magistrates, if the defendant consent, a cause may be tried by a jury of any number of men not more than two nor less than six, to be selected as therein stated.

And under § 972, Code Crim. Proc. Neb. Comp. Stat. 1897, § 6495, Anno. ed. in civil actions either party may demand a jury which shall be composed of twelve men unless the parties agree to a less number.

The Code of Civil Procedure of Nevada with reference to proceedings in civil cases and justices' courts (Nev. Gen. Stat. ed. 1885, § 3568) provides that the jury, by consent of the parties, may consist of any number not more than twelve or less than four.

And by the justice's Code of North Dakota (Rev. Stat. 1895, § 6686) the jury may be composed of six or any number less than six if the parties shall agree.

Under § 139, N. Y. Rev. Stat. ed. 1896, Birds-eye's Anno. ed. p. 1801, vol. 2, in proceedings before justices, the parties may elect to try the cause by a less number than six jurors at any time before a witness is sworn.

So, by Ohio Rev. Stat. § 6547, with respect to a trial before justices of the peace, a jury shall be composed of six, unless the parties agree on a less number.

And in the trial of civil cases before justices of the peace, under Okla. Stat. § 4737, ed. 1893, in all civil actions the jury shall be six, unless the parties agree to a less number.

And by S. C. Rev. Stat. ed. 1895, § 885, in civil cases the parties may agree on a jury. When they do not agree, and also in criminal cases, a jury shall be selected in the manner pointed out by the section, six jurors constituting the number.

Under art. 3227, chap. 11, title 62, Texas Rev. Stat. ed. 1895, p. 625, "the parties may by consent agree in a particular case to try with a less number" than twelve.

By Sayles's Texas Civ. Stat. vol. 2, title 57, chap. 11, art. 3100, a jury of less than twelve in district courts is allowed by consent.

By Utah Rev. Stat. ed. 1898, § 1205, a trial by jury, in every criminal case other than capital, and in civil cases in the district court, shall consist of eight jurors, provided that in civil cases and in cases of misdemeanor the jury may consist of any number less than eight upon which the parties may agree in open court, and the trial jury in a justices' court, both in criminal and civil cases, shall be four, or any number less than four upon which the parties may agree in open court.

And under § 1501, Hill's Anno. Code and Statutes of Washington, vol. 2, title 16, chap. 8, p. 593, relating to the practice in criminal actions in justices' courts, the defendant or the state may demand a jury which shall consist of six or a less number agreed upon by the state and accused.

And by § 1510 of the same statutes with respect to the trial of civil actions in justices' courts a jury is to be composed of six unless the parties agree upon a less number.

c. In cases of felony.

In the leading New York case upon the question of the right of a prisoner to waive his constitutional right to a full jury in cases of felony, and in those cases in which the right was guaranteed to him by the Constitution, the court stated that criminal prosecutions involve public wrongs, a breach and violation of public rights and duties, which affect the whole community considered as a community, in its social

aggregate capacity, and the end such suits have in view is the prevention of similar offenses, not atonement or expiation for crime committed, and the penalties or punishments, for the enforcement of which they are a means to the end, are not within the discretion or control of the parties accused, for no one has a right by his own voluntary act to surrender his liberty or part with his life; the state, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away "without due process of law" when forfeited as they may be as a punishment for crimes. *Cancemi v. People*, 18 N. Y. 128, 137.

In that case the people contended that the defendant might waive his constitutional right to a jury of twelve, but the court pointed out the wide and important distinction which existed between civil suits and criminal prosecutions, as to the legal right of a defendant to waive a strict substantial adherence to the established, constitutional, statutory, and common-law mode and rules of judicial proceedings, and observed that such distinction arose from the great difference in the nature of such cases, in respect to the interests involved, and the objects to be accomplished.

So, in *Territory v. Ah Wah*, 4 Mont. 149, 47 Am. Rep. 341, which was a case of felony, the court said that if a deficiency of one juror might be waived, there would appear to be no good reason why a deficiency of eleven might not be, and it was difficult to say whether upon the same principle the entire panel might not be dispensed with, and the trial committed to the court alone, yet it would be a highly dangerous innovation in reference to criminal cases upon the ancient and invaluable institution of trial by jury, and the Constitution and laws establishing and securing the mode of trial, for the court to allow of any number short of the full panel of twelve jurors, and such an act could not be tolerated.

And the courts have denied the right in such cases upon the ground that the substantial constitution of the legal tribunal and the fundamental mode of its proceeding are not within the power of the parties. Upon this ground, therefore, the verdict in the case of felony where the jury, though by the consent of the accused, consists of less than twelve, is void. *People v. Lyons* (Ill.) 5 Crim. L. Mag. 674, 676.

So, if, with the consent of the court and prosecution, the defendant might consent to a trial with one juror more than the constitutional jury, and if by such acts he might have a trial with one juror less, yet in either case there would be a failure of jurisdiction because jurisdiction attaches and makes valid a verdict when rendered by a jury, and a jury is of twelve men. *Territory v. Ah Wah*, 4 Mont. 149, 47 Am. Rep. 341.

In this case it is stated that as the denial of the right to consent or to waive a full jury in such cases is based upon the fact that as jurisdiction comes by following the law, and disorder and uncertainty follow a departure therefrom, it follows that neither the prosecution nor the defendants by any act of their own, can change or modify the law by which criminal trials are controlled.

So, the denial of the right arises from the fact that the substantial constitution of the legal tribunal, and the fundamental mode of its proceeding, are not within the power of the parties. *Cancemi v. People*, 18 N. Y. 128.

And it is further based upon the theory that it is the duty of the courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent

he may be in raising the objection; it is in such cases, emphatically, that consent should not be allowed to give jurisdiction. *Territory v. Ah Wah*, 4 Mont. 149, 173, 47 Am. Rep. 341. To the same effect, *People v. O'Neill*, 48 Cal. 258; *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116; *Jackson v. State*, 6 Blackf. 461; *Brown v. State*, 16 Ind. 496; *Bowles v. State*, 5 Sneed, 300; *Bell v. State*, 44 Ala. 393; *Williams v. State*, 12 Ohio St. 622; *Allen v. State*, 54 Ind. 461; *State v. McClear*, 11 Nev. 39, 60; *Hill v. People*, 16 Mich. 351, 357, 358.

Again, the courts have refused the right, owing to the principle that when issue is joined upon an indictment the trial must be by the tribunal, and in the mode, which the Constitution and laws provide without any essential change, and the public officer prosecuting for the people has no authority to consent to such a change, neither has the defendant; and further, upon the ground that criminal prosecutions proceed on the assumption of a forfeiture of the liberties and lives of the citizens by due process of law, which, to sustain them, must be ascertained and declared as the law has prescribed. *Cancemi v. People*, 18 N. Y. 128, 138.

For the reasons expressed above, the weight of authority holds that in felony, the constitutional right to a trial by a common-law jury of twelve cannot be waived, even by consent, and a verdict by a jury of less than that number must be set aside as a nullity. *Territory v. Ortiz*, 8 N. M. 154; *Cancemi v. People*, 18 N. Y. 128; *State v. Cox*, 8 Ark. 436; *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671; *Brazier v. State*, 44 Ala. 387; *State v. Mansfield*, 41 Mo. 471; *Hill v. People*, 16 Mich. 351; *People v. O'Neill*, 48 Cal. 257; *Brown v. State*, 16 Ind. 496; *Allen v. State*, 54 Ind. 461; *State v. Van Matre*, 49 Mo. 268; *State v. Meyers*, 68 Mo. 266; *State v. McClear*, 11 Nev. 41; *Williams v. State*, 12 Ohio St. 622; *Murphy v. Com.* 1 Met. (Ky.) 365; *Tyra v. Com.* 2 Met. (Ky.) 1; *Opinion of the Justices*, 41 N. H. 550; *Dowling v. State*, 5 Smedes & M. 664; *State v. Everett*, 14 Minn. 447; *People v. Deegan*, 88 Cal. 608, dissenting opinion of De Haven, J.; *People v. Lyons* (Ill.) 5 Crim. L. Mag. 674; *Com. v. Shaw*, 1 Pittsb. 492; *Hunt v. State*, 61 Miss. 577, 580; *Byrd v. State*, 1 How. (Miss.) 163; *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116; *Lewis v. Garrett*, 5 How. (Miss.) 434.

So, such consent upon a trial for murder will not give the court jurisdiction, or authorize a substantial change in its fundamental mode of proceedings which can be neither enlarged nor restricted, even though the defendant may waive his right of challenge to the jury. *People v. Guidici*, 100 N. Y. 503.

And, under a plea of not guilty in a prosecution for a felony it is not competent for the prisoner to consent to dispense with a jury of twelve men, as, in the absence of a jury, the court in such an issue has no jurisdiction. And it cannot sit as a substitute for the constitutional tribunal of twelve men, as such a jury was the only one known to the common law in such cases. *People v. Lyons* (Ill.) 5 Crim. L. Mag. 674.

So, it is not in the power of one accused of felony by consent expressly given, or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt instead of the constitutional jury of twelve. *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061.

And the consent of the defendant, indicted for murder, to the withdrawal of one juror, and to the rendering of a verdict by the remaining eleven jurors, cannot lawfully be recognized by the court, and is a nullity. *Cancemi v. People*, 18 N. Y. 128, 138.

So, in *Allen v. State*, 54 Ind. 461, a conviction of larceny by a jury of ten, where two of the jurors had been discharged with the defendant's consent, was overruled, as the trial of a criminal cause by a jury consisting of less than twelve is unauthorized by law, and the verdict in such a case is void. The court followed its prior decision in *Brown v. State*, 16 Ind. 496, and relied upon the authority of *Hill v. People*, 16 Mich. 351.

And in *Hill v. People*, 16 Mich. 351, 357, 358, a conviction of murder was set aside as one of the jurors was an alien, and not a citizen of the United States or of the state,—which fact was unknown to the defendant or his counsel until after the verdict was rendered,—upon the ground that the defendant could not waive such constitutional right, and that the case must be taken as though it had been a trial by eleven jurors, and that it was the court's duty to see that such constitutional rights, especially in a criminal case, were not violated, no matter how negligent the defendant might have been in raising his objection.

Again, in *State v. Mansfield*, 41 Mo. 470, 474, a conviction of felony was set aside as one of the twelve men called to try the case failed to answer on the next morning, and it was stated that he was sick, although it was then agreed, the prisoner consenting, that the trial should proceed with the eleven jurors who rendered the verdict.

So, in *Territory v. Ah Wah*, 4 Mont. 149, 47 Am. Rep. 341, the prisoner was held not to be bound by his consent to be tried by the remaining eleven jurors on a trial for murder, where one of the twelve jurymen was excused on account of sickness in his family.

And in *Arnold v. State*, 38 Neb. 752, 754, it is stated that the consent of the prisoner cannot change the law; that the rights given him by statute he cannot waive, and, even by agreement of the state's prosecutor, the tribunal which the law provides for the trial of the issue cannot be set aside and some other tribunal substituted.

In *State v. Allen*, 46 Conn. 531, 548, it is said that even if the defendant, upon a trial for murder, can under any circumstances consent to allow the case to proceed with a jury of eleven, and thus make the verdict binding and effectual, it must be made with the consent and approval of the prosecution, otherwise the verdict of eleven jurors will be no verdict at all. The question whether the consent of counsel for accused and of the prosecution would be sufficient to uphold a verdict in a capital case by less than a full panel was, however, not expressly decided in this case.

In the above case, a prosecution for murder, defendant's counsel asked for a suspension of the trial after witnesses had been examined, in order that the question as to the disqualification of one of the jurors, by reason of his having expressed an opinion as to the guilt of the prisoner, might be determined. The court found the disqualification justified, and the defendant then offered to waive such disqualification and to proceed with eleven jurors. The action of the court below in discharging the jury was upheld, as the person disqualified thereupon ceased to be a juror, and the number was reduced to eleven, and the record did not show that the offer of the counsel of the accused to proceed with the eleven jurors was accepted by the state. Without such consent at least the court intimated that eleven jurors could not render a verdict.

In a case where there were thirteen jurors in the box, and the defendant when he discovered the same objected to proceed, and the court 43 L. R. A.

ordered the thirteenth juror to retire, whereupon the case was submitted to the remaining twelve, the verdict of the twelve jurors was upheld as they were accepted by the defendant and the thirteenth juror was one stricken out by the defendant. *Davis v. State*, 9 Tex. App. 634.

But in *State v. White*, 33 La. Ann. 1218, wherein the defendant was convicted on a charge of stabbing with intent to kill and murder, it was held that the constitutional provisions guaranteeing the trial by jury might be waived by the defendant.

And the same conclusions were reached in the case of *State v. Askins*, 33 La. Ann. 1253.

The last two cases, however, were both decided upon the theory that although a defendant in a criminal action had, under the Constitution of that state, the right to a trial by an impartial jury,—that is a jury of twelve men as at common law,—yet in cases where the penalty was not necessarily hard labor or death, a trial by a less number than twelve might be provided for by the state legislation, and also upon the ground that the Constitution contained no language by which the legislature were precluded from providing any other mode of trial at the option of the accused. See *State v. White*, 33 La. Ann. 1220.

The court upheld a conviction upon an indictment for assault with intent to rape by a jury of eleven in a case where one of the twelve jurymen impaneled was excused on the second day on account of serious illness, and, with the consent of the defendant duly recorded on the record, the trial proceeded under an agreement, also made on the record, that the verdict of the eleven jurors should "be as valid and binding as though rendered by the full jury." *State v. Grosshelm*, 79 Iowa, 75, 77.

In this case the court followed its previous decision in *State v. Kaufman*, 51 Iowa, 578, 33 Am. Rep. 148, and distinguished the case from *State v. Carman*, 63 Iowa, 130, 50 Am. Rep. 741; and *State v. Larrigan*, 66 Iowa, 426, upon the ground that the two latter cases were authority for the rule that a jury cannot be waived in a criminal case for the reason that the statute provides that issues of fact in such cases shall be tried by a jury, and for the reason that the essentials of a legal jury were not considered in those cases.

The case of *State v. Kaufman*, 51 Iowa, 578, 33 Am. Rep. 148, which was relied upon in the above case of *State v. Grosshelm*, 79 Iowa, 75, 77, was one of forgery, in which a juror was taken sick and the defendant's consent to be tried by the eleven remaining jurors, with the consent of the state and the court, was held to bind him.

In this case the court relied upon the cases of *Com. v. Dalley*, 12 Cush. 80; *Murphy v. Com.* 1 Met. (Ky.) 365; and *Tyra v. State*, 2 Met. (Ky.) 1,—wherein the court upheld convictions for misdemeanors by a jury of less than twelve upon the defendant's consent to be so tried, and observed that it was unable to see how it was possible to draw a distinction in that respect between misdemeanors and felonies, because the Constitution did not recognize any such distinction.

This decision would seem to be in direct opposition to the majority of the decisions upon the question, and to the contrary to the construction generally placed upon the meaning of the words "shall remain inviolate" as used in the Constitution of the states of the Union, according to which the term has been declared to mean that the right should remain the same as it was at common law at the time of the adoption of such Constitution, and that in cases where, by such law, the defendant was entitled

to a full jury of twelve men, he was still to be held entitled to such a jury, and that a conviction by a less jury could not bind him, although in cases where he was not so entitled by law he might waive such right and consent to a less jury than twelve, thus generally drawing a distinction between felonies and misdemeanors in this respect.

The case of *State v. Carman*, 63 Iowa, 130, 50 Am. Rep. 741, which was distinguished by the court in the case of *State v. Grosshelm*, 79 Iowa, 75, 77, was a conviction of assault with intent to murder, in which a jury trial was waived by the defendant; but the court set aside the conviction and remanded the cause for a new trial upon the ground that the defendant could not waive the rights guaranteed to him by the Constitution. The opinion in chief in that case does not, however, pass upon the number of jurors necessary to secure a conviction, but in the dissenting opinion of Justice Seever on page 133, the case of *State v. Kaufman*, 51 Iowa, 578, 33 Am. Rep. 148, is relied upon, and comments are made upon the question of the defendant's right to consent to a less jury than twelve.

In the case of *State v. Larrigan*, 66 Iowa, 426, also cited and distinguished by the above case of *State v. Grosshelm*, a conviction by the court of a felony was reversed by the court on the ground that the right to be tried by a jury of twelve men could not be waived in such a case.

And in *Alfred v. State*, 6 Ga. 483, a criminal proceeding in the nature of a felony, and a capital offense committed by a slave, his master, who was acting as his counsel, upon his trial was allowed to waive the number of jurors required by the statute to be impaneled, and agree that the first twelve jurors answering to their names should try the cause.

d. In misdemeanors.

In cases of misdemeanor a distinction has been made between those cases and felonies, and the rule in such cases would seem, to be that the defendant may, by his express consent, waive a jury of twelve, and accept the verdict of a jury of a less number, for the reason that the right to trial by a full jury of twelve was not in all such cases fully guaranteed to him by the Constitution, as it did not exist as an absolute right at common law. This is so especially in petty offenses triable in justices' courts under statutes giving jurisdiction to such courts. There must, however, be a waiver of the right, and the defendant's consent to such jury must be shown.

This distinction has been recognized by the courts in the various decisions below, and was also pointed out by the court in *State v. Mansfield*, 41 Mo. 470, 474.

In the case of *Stell v. State*, 14 Tex. App. 59, a case of aggravated assault and battery, the verdict in the court below was reversed, where there was nothing indicating a waiver, or consent on the part of the defendant to be tried by a full jury of six in the county court, as provided for in § 17, art. 4, of the state Constitution, and his motion for a new trial showed that he did not consent, as he made it one of the grounds thereof.

A jury may be waived in trials for misdemeanors, and the defendant may consent to be tried by less than twelve jurors, and an agreement to a trial by a jury of less than twelve in a trial for a misdemeanor is valid, and a judgment on the verdict is not erroneous. *Darst v. People*, 51 Ill. 286, 2 Am. Rep. 301; *Tyra v. Com.* 2 Met. (Ky.) 1, 2; *Murphy v. Com.* 1 Met. (Ky.) 365; *State v. Mansfield*, 41 Mo. 470.

But, even in cases of misdemeanor where the 43 L. R. A.

right has not been waived in any respect, and a jury is impaneled to try the cause, it must be a constitutional and a legal one composed of the number required by the state Constitution, and the record must show that fact. *Stell v. State*, 14 Tex. App. 59; *Marks v. State*, 10 Tex. App. 334.

An agreement by a defendant to be tried by a jury constituted of a less number than twelve in cases of misdemeanors where the penalty is merely a fine is not inconsistent with any rule of law or with public policy, neither does it tend to defeat public justice, but, on the contrary, tends to promote it by facilitating the despatch of business in court, and prevents unnecessary and embarrassing delay. *Murphy v. Com.* 1 Met. 365; *Tyra v. Com.* 2 Met. (Ky.) 1, 2.

In the case of *Tyra v. Com.* 2 Met. (Ky.) 1, the record showed that the defendant, indicted for maliciously stabbing with intent to kill, was found guilty of a misdemeanor by a jury of eleven with the consent of the prisoner, although under § 258 of the Criminal Code he might have been found guilty either of the felony as charged, or of any lower degree of that offense. The court refused to reverse the conviction under § 334 of the Criminal Code of that state, although it was contended that the record presented a case of felony and not of misdemeanor, especially as no objection was made in the court below.

In this case the court laid down the above rule with respect to misdemeanors, and stated that it existed whatever might be the rule in cases of felony, and that therefore the rule contended for, which was that in cases of felony the prosecution and the defense could not agree to a verdict by less than a full number of jurors, could not properly apply in that case.

So, it has been stated that there is no sufficient reason in principle for denying the defendant, except in criminal cases of the highest grade, the power to waive his right to be tried by a jury of twelve, when he does so deliberately with the knowledge of his counsel, and no advantage is taken of him to induce his action. *Com. v. Sweet*, 4 Pa. Dist. R. 136.

An argument in favor of the defendant's right to waive a full jury of twelve in cases of misdemeanor is found in the fact that a prisoner waives his right to a trial by jury of twelve when he pleads guilty to the indictment, and thereby produces a result which is certainly disastrous to him, whereas by consenting to submit his case to a jury of even less than twelve he preserves his chance for a favorable verdict, and he should therefore in such cases be treated as a reasonable being, responsible for his acts, and permitted the free action of his judgment, and held accountable. *Com. v. Sweet*, 4 Pa. Dist. R. 136.

So, no departure from established forms of trial in criminal cases, even in prosecutions for misdemeanor, can take place, as by waiving a full jury of twelve and consenting to be tried by eleven jurors without permission of the judge. *Com. v. Dalley*, 12 Cush. 80, 83.

An agreement of the parties that the jury after agreeing on their verdict may seal the same and separate, where only eleven jurors return such verdict, is a waiver of all exceptions because of such sequestration, and places the cause in the same situation as though the twelve jurors had delivered it. *Woods v. Van Buren County Comrs.*, Morris (Iowa) 441.

The parties upon an indictment for betting on an election may agree, after the jury have been sworn, to one of the jurors being withdrawn, and to submit the case to the remaining eleven, and the validity of it cannot be questioned. *Murphy v. Com.* 1 Met. (Ky.) 365.

In *Com. v. Sweet*, 4 Pa. Dist. R. 136, the court upheld a conviction for a misdemeanor in obtaining money under false pretenses by eleven jurors, where one of the twelve jurors, upon consultation of counsel and with the consent of defendants, was excused by the court.

The above case was said not to be distinguishable from the prior case of *Lavery v. Com.* 101 Pa. 560, in which the conviction of the defendant by a justice of the peace and a jury of six under Teller's act (act May 1, 1861), was, upon certiorari, held legal, as the defendant could avail himself of the privilege of the statute, and demand a trial by a justice and a jury of six, rather than in a court of quarter sessions with a jury of twelve, and that under such act the jury of six was not a violation of the constitutional provision that "the trial by jury shall be as heretofore," and that the act of assembly which gave such jurisdiction did not authorize a trial by a jury except upon demand, which demand was held to be a waiver of a right of trial by a jury of twelve.

The cases of *Com. v. Shaw*, 1 Pittsb. 492, and *Com. v. Byers*, 5 Pa. Co. Ct. 295, were, however, excepted to by the court in that case although the court stated that the opinions of the judges in those cases were entitled to great respect, and if there were no opposing decisions the court would hesitate before expressing a contrary one, but an examination of the authorities cited in such case showed that only one case was in point, namely the New York case of *Cancemi v. People*, 18 N. Y. 128, 135, 138. The court further pointed out that in none of the other authorities was the power to waive the constitutional right considered, and that the point decided by them was that a verdict by a greater or less number than twelve was not such a verdict as was guaranteed by the law, it not appearing in any of such cases that the accused consented.

So, the verdict of eleven jurors, upon a conviction for a misdemeanor in assaulting an officer and aiding a prisoner to escape, taken by consent of all parties and the court, and so shown on the record, was upheld in *Com. v. Dailey*, 12 Cush. 80, in which case a juror was discharged owing to sickness in his family.

And in *State v. Borowsky*, 11 Nev. 119, 127, wherein the defendant was convicted of misdemeanor in the office of public administrator, the court relied upon the above case of *Com. v. Dailey*, 12 Cush. 80, and sustained the theory that, although the defendant was entitled to be tried by a jury of twelve if he demanded such a jury, yet that by consent he might be tried by a jury of less than twelve, upon a charge of misdemeanor, although his consent would not work a waiver of a jury trial.

Again, it has been said that if a party goes to trial without objection before a justice of the peace and six jurors in criminal proceedings, two days after the jury are struck, he cannot afterwards complain of the proceedings. *Griffen v. Com.* 1 Wilcox (Pa.) 261, 8 Brightly's Digest, pt. 1, p. 4210.

So, a defendant in misdemeanor before a justice of the peace may waive the right to a trial by a jury of twelve, and subject it to a decision of six men, and even to that of a justice of the peace himself; but in all cases where he may require it, it is the duty of a justice to impanel an even jury of twelve men for the trial of a cause. *State v. Cox*, 8 Ark. 436, 447.

In passing upon the 11th section of the Arkansas statute of December 16, 1846, giving jurisdiction to justices of the peace and limiting the number of a jury to six men, the court in the above case stated that the constitutional provision secured the right of trial by jury to twelve

according to the known technical meaning of the term, of which right the defendant could not be deprived, except by his consent, but he might waive the right and submit to a decision of six men, and even to that of the justice himself; but that in all cases where he required it, it was the duty of the justice to impanel an even jury of twelve. The question, however, did not properly present itself in that case, and the court stated that its remarks were made for the guidance of justices.

From the above *dictum* of the court it would seem that it would be unconstitutional for the court to try the defendant under the act by a jury of six men in cases where he demanded a full jury of twelve, but that in cases where he waived his right and consented to a jury of six, his consent would bind him, and therefore the conviction by such jury would not be contrary to the provisions of the Constitution. The court upheld the constitutionality of the act in so far as it gave jurisdiction to the justices of the peace in cases therein mentioned. *State v. Cox*, 8 Ark. 436, 447. In this case the defendant was charged with assault and battery.

In *Warwick v. State*, 47 Ark. 568, it was held that § 2219 of the Arkansas Statutes was not unconstitutional, in so far as it provided for a trial by less than twelve jurors upon the giving of consent, and therefore in the case of a misdemeanor a verdict rendered by less than twelve jurors after an agreement to abide by their finding should be allowed to stand.

And there was held to be no error upon a trial in the county court by a jury of six for an aggravated assault, where by agreement of the parties one of the jurors was excused on account of his wife's sickness, and a verdict was rendered by five jurors only. *Gindrat v. State*, 8 Tex. App. 573. This case was decided under § 19 of the act to regulate grand juries and juries in civil and criminal cases in the state of Texas, Gen. Laws 15th Legislature, 82.

Again, the voluntary consent of a defendant, tried in a municipal court for assault and battery, to a jury of eleven will be upheld, where he waives a jury of twelve, and there is no omission or neglect on the part of the state to furnish such a jury if demanded, even though the record shows no reason why a jury of eleven was agreed upon. *State v. Sackett*, 39 Minn. 69.

In *Kneeland v. State*, 62 Ga. 395, 397, the defendants, tried in a circuit court for keeping a faro table, demanded jury trials. The usual jury in such court was impaneled, and five were left as a traverse jury by whom the prisoners were found guilty. The act regulating the practice in the city court did not require a trial by jury, but if the defendant required it, it was his privilege to demand it, and in such case the act provided only for a jury of five men to be stricken from a jury of twelve. The act was passed prior to the Georgia Constitution of 1877, which by the 18th section of the 3d article thereof, prohibits a jury of less than twelve men. The trial was had subsequent to the Constitution of 1877, going into effect by reason of its ratification, and no law had been passed by the general assembly to carry it into effect by any practical machinery providing for a jury of twelve. The court held that the defendants' demand for a jury trial must be understood as the demand for that sort of jury which the court could give them, and that when they had their rights passed upon by such a jury of their own seeking and choosing, and the issue was found against them, it would be allowing them to speculate upon the chances of the trial sought by themselves if they were permitted to object to the jury of their own choice.

But in the case of *Com. v. Saal*, 10 Phila. 496, wherein the defendant claimed a full jury of twelve, a conviction upon an information for violation of the liquor laws tried before a justice and a jury of six without the defendant's consent under the Pennsylvania statute, was set aside as unconstitutional as contrary to the provision of the bill of rights, as prior to the adoption of the state Constitution he was entitled to a jury under the colonial laws.

Yet it must affirmatively appear that the defendant consented to be tried by a less jury than that required by the law, even though he may have objected to take the case from them, as his actions may amount to nothing more than a mere waiver not sufficient to constitute an agreement to be tried by a less number than twelve. *Warwick v. State*, 47 Ark. 568, wherein defendant was convicted of participating in the offense of selling intoxicating liquors to a minor.

In the above case, the bill of exceptions showed that the defendant, when asked if he would agree to try the cause with a less number of jurors than twelve, declined to make the agreement, and a full jury was ordered into the box but by mistake a jury of eleven were sworn without his objection. The mistake was discovered while the jury were being instructed, whereupon the court ordered another juror into the box for the purpose of completing the panel and wanted the case gone over again. To this the defendant objected, and the court then directed the jury of eleven to retire and consider the verdict.

So, a waiver of a jury of twelve by a defendant's attorney in a trial for malicious trespass, without the consent of his client who was present in court, was held a nullity in *Brown v. State*, 16 Ind. 496, as such waiver could not bind the defendant.

e. In civil actions.

In considering the right of a defendant to waive a full jury and consent to a verdict by a less number than twelve, a distinction is drawn between criminal actions and civil suits, upon the ground that civil suits relate to and affect, as to the parties against whom they are brought, only individual rights which are within their individual control, and which they may part with at their pleasure. So, the law recognizes the doctrine of waiver to a great extent in civil suits, in some instances even to the deprivation of constitutional private rights. *Cancemi v. People*, 18 N. Y. 128, 137.

And a departure from legal rules in the conduct of civil suits with the consent of a defendant is a voluntary relinquishment of what belongs to the defendant exclusively, and there is manifest propriety in the law allowing such consent to have the effect designed by it in most cases, as to matters within the jurisdiction of the court. *Ibid.*

And therefore it has been held that in civil cases the parties may waive the right to trial by a jury of twelve. *Marlin v. Stockbridge*, 14 Tex. 165; *Flint River S. B. Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248, 260; *Scott v. Russell*, 39 Mo. 407; *Brown v. Hannibal & St. J. R. Co.* 37 Mo. 298.

And it is competent for the defendant to waive the right of a trial according to the common law, even if without such waiver he would be considered as entitled to it. *People v. Murray*, 5 Hill, 468, 472. In this case the defendants had acted under a state statute, and could not therefore object to the unconstitutionality of its provisions relating to the assessment of the damages incurred through their acts.

So, in an action before a justice where a trial 43 L. R. A.

proceeds with a jury of less than twelve men, and no exception is taken or motion in arrest made, the point is waived. *Sappington v. Elrod*, 9 Mo. App. Appx. 581.

And an agreement by the parties in a justice's court for the trial of a cause by a jury of less than six jurors is good, though not made until after the return of the venire, and when the jury is drawn, if the parties proceed to trial pursuant to such agreement. *Carman v. Newell*, 1 Denio, 25.

Where it was shown that after the jury were impaneled one was excused on account of sickness, with the consent of all parties, the court refused to find any error. *Tram Lumber Co. v. Hancock*, 70 Tex. 812.

So, in *Cravens v. Grant*, 2 T. B. Mon. 117, an action for deceit in the sale of a mare, there was held to be no error in a verdict by eleven jurors, as the parties had assented to try the cause by eleven jurors only, after one had been withdrawn, and their assent was apparent as well from the entry of withdrawal as from that of the subsequent proceedings had on the trial, although had there been no such assent the verdict would have been erroneous.

And in *Roach v. Blakey*, 89 Va. 767, an action in ejectment, in which the record showed that the trial by eleven jurors was by consent of parties in open court, the court refused to hear the defendant's claim that he was entitled to have twelve persons on the jury as by consent he waived this right and consented to a trial by eleven jurors.

Yet the trial court has no authority in law to withdraw a juror during the progress of the trial, and continue the trial with the remaining eleven jurors, without the consent of all the parties. *Cloud County Comrs. v. Morgan* (Kan. App.) 52 Pac. 896.

And the provisions of the New Jersey statute relating to the trial of small causes, the 59th and 60th section of which provide, in effect, that where property levied upon is claimed by any person, other than the defendant, by notice in writing delivered to the constable, the latter must delay the sale for ten days, so that within the period the claimant may apply to a justice for a venire to summon a jury of six lawful men as jurors to try the claimant's right to such property, and the verdict of such jury is to be a protection to the constable from any action in the taking and seizing of such property, are constitutional in respect to such jury, and such procedure does not deprive the plaintiff of his trial by a constitutional jury of twelve men, as the statute offers the parties a mode of trial at once inexpensive and facile, which neither the one nor the other was compelled to resort to: but the parties can waive such rights and at their option accept such method of litigation, and in such event the rule *volenti non fit injuria* applies. *Berry v. Chamberlain*, 53 N. J. L. 463.

In civil cases the Indiana statute (2 Rev. Stat. § 308, p. 106) authorizes the parties to agree upon a less number, and a jury consisting of twelve may be waived. *Brown v. State*, 16 Ind. 496; *Durham v. Hudson*, 4 Ind. 501.

In *Kreuchi v. Dehler*, 50 Ill. 176, 178, the court construed a statute providing for a jury of six on a trial of the right of property before a justice as absolutely providing that number only in cases where the parties were not present to agree to a less number, and as not intended to require them to have at least six, or to prevent their excusing a juror by consent after the trial had commenced.

And where a statute provides for a jury of more than six, and also that by consent a jury may be composed of less than that number, there is no reason why the parties may not

agree to a jury of more than six. *Rhodes Burford Furniture Co. v. Mattox*, 135 Ind. 372, 376.

Where, however, a verdict is rendered in a justice's court by twelve jurors instead of six, as provided by the statute, if a party against whom such errors may have been committed sees fit not to appeal from the justice's judgment, he must be deemed to have waived all such errors, and if instead of so appealing he seeks to enjoin the judgment he stands in no better attitude than if he had consented to each and every one of the irregularities complained of. *Rhodes Burford Furniture Co. v. Mattox*, 135 Ind. 372.

So, if in an action in assumpsit the record shows a trial by eleven instead of twelve jurors, and the defendant and his counsel were present at the impaneling of the jury and during the trial, and made no objection, and neglected to mention the fact in their motion for setting aside the verdict and granting a new trial, even if there are but eleven jurors, the defendant will be taken as having consented to that number, and his consent in a civil cause will cure the error. *Durham v. Hudson*, 4 Ind. 501, 504.

And a similar decision was arrived at by the court in *Mitchell v. Stephens*, 23 Ind. 466, a suit brought before a justice and tried by a jury of eleven, in which the record showed that the issues were joined and the causes submitted to a jury of eleven, but in the motion for a new trial this was not assigned as a cause.

So, even if it be true that the record does not show a submission by the consent of the parties to a jury of eleven, still the full jury may be waived by an error to assign it as and for a new trial. *Durham v. Hudson*, 4 Ind. 501; *Mitchell v. Stephens*, 23 Ind. 466.

When the objection to a jury of less than twelve jurors is first made upon appeal it must be taken that the parties waived such a jury. *Mari'n v. Stockbridge*, 14 Tex. 165.

So, if, in a civil action, the judgment recites only eleven jurors as rendering the verdict, and it is only signed by the foreman and not by the eleven, if no objection is made to the form of the verdict or to the manner of signing it in the court below, or insisted upon as a ground for a new trial, the question cannot be considered upon appeal for the first time, as the proper place to make the objection is in the court below. *Flanagan v. Pearson*, 61 Tex. 302.

And in an action in a justice's court if the return set forth that "defendant asked for a venire which was issued and returned with the names of the jurymen personally summoned (six names being given)," but only five persons appeared and were sworn as a jury to try the cause "by the agreement of the parties," the court will presume that the venire issued for twelve men, although only six are returned, and the defendant, by reason of his agreement, will be estopped to deny the question and the authority of the jury to try the case. *Clague v. Hodgson*, 16 Minn. 320.

Again, the court of law commissioners is a court of record having common-law jurisdiction, and proceeds according to the course of the common law, and in trials in that court a party is entitled to a jury of twelve men when he demands it, but if the case proceeds with a less number, and he takes no exception on that ground, he cannot afterwards avail himself of that error, except by motion in arrest of judgment within the time prescribed by law or by the rules of court. *Vaughn v. Scade*, 30 Mo. 600, 604.

So, in *Huron v. Carter*, 5 S. D. 4, 8, wherein the city charter gave the police exclusive jurisdiction over offenses against the ordinances of 43 L. R. A.

the city, and also allowed an appeal in such cases as were tried without a jury, and in no others, an action, brought for the violation of a city ordinance relating to health, in which by an agreement in open court between the parties the case was with the court's consent tried by a jury of six selected from twelve names provided by the court, was considered as a civil one in which it was competent for the parties to agree to a jury of less than the regular number, although the law could not compel a litigant to accept less than a constitutional jury.

And in a case of a civil action on a promissory note where the record recited that a jury of twelve good and lawful men appeared, but eleven only were named, and the parties made no objection to the verdict but received it as a good and lawful one, the court refused to notice the objection and affirmed the judgment. *Foster v. Van Norman*, 1 Tex. 636.

Yet it is stated that in civil cases, in the absence of waiver, the defendant is not to be held responsible for the right construction of the jury in point of numbers, and is not to be charged with the fault of the proper officer in that respect. *Cowles v. Buckman*, 6 Iowa, 161.

So, it is settled that even in civil cases consent will not confer jurisdiction of the subject-matter; and where such jurisdiction exists, a change, by consent, of the mode of proceeding, may be so extensive as to convert the case from a judicial proceeding into a mere arbitration. *Cancemi v. People*, 18 N. Y. 128, 136.

And in *Territory v. Ah Wah*, 4 Mont. 149, 47 Am. Rep. 341, it is said that by the consent of the court, prosecution, and defendant, a criminal trial ought not to be converted into a mere arbitration, although in civil cases the Montana statute expressly provides that, in case a jurymen becomes sick and is excused, the trial, with the consent of the parties, may proceed by the remaining eleven jurymen; yet even in civil actions this cannot be done except by virtue of a statute authorizing it, and for this reason the statute was enacted, and in the absence of such a statute consent would not confer jurisdiction.

Again, in an action in assumpsit tried by a jury of six in conformity with the Wisconsin county court act, § 16, chap. 86, Rev. Stat. the defendant cannot avail himself of the objection that the same is unconstitutional, as by the 17th section of the act the selection of the jurors is given to both parties in the manner prescribed, and if either party refuses or neglects to take part in choosing the jurors the court or the clerk may act for such party, and especially is such the case where it is not shown that the defendant objected to the jury; and in such case the court will presume that he took part in the selection, and if he does not demand a jury, and does not participate in selecting it, it is incumbent upon him to show such a state of facts, and in the absence of any objection or refusal it must be presumed that he consented to submit the case to the jury allowed by the statute. *Millett v. Hayford*, 1 Wis. 401.

Yet, even though under a statute providing for a jury of six in a justice's court, and for a jury of less than six in cases of consent, it may not be true that the parties may not agree to a jury of more than six, and that notwithstanding an agreement to a jury of more than six the jury might not be a legal jury, it amounts only to an error in the proceedings, and does not affect the jurisdiction; but whether such a verdict is erroneous or not, or even void, is not material, and the court will not decide the question for the reason that it does not affect the jurisdiction. *Rhodes Burford Furniture Co. v. Mattox*, 135 Ind. 372.

And the court refused a new trial and con-

sidered the defendant's conduct as a waiver of a jury in an action before a justice of the peace, in which, after an adjournment only five jurors answered, the other being sick, and the defendant refused to try the case before the remaining jurors, objected to a new venire, and refused a talesman, whereupon the justice dismissed the five jurors, and defendant declined a new venire, and requested an adjournment owing to the absence of witnesses whose attendance he had made no effort to procure. *Babcock v. Hill*, 35 Barb. 52.

Yet it has been held that it must be shown that there was an agreement or consent to have the action tried by a jury of less than twelve, and that there was a waiver of the full jury of twelve. *Van Sickle v. Kellogg*, 19 Mich. 49, 52.

And if a jury of twelve in a civil action is not waived by consent recorded the judgment will be set aside. *Scott v. Russell*, 39 Mo. 407; *Brown v. Hannibal & St. J. R. Co.* 37 Mo. 298.

So, consent is the only thing that will waive the verdict of a full jury. *Bishop v. Mugler*, 33 Kan. 145, 147.

It has been stated that the substantial constitution of the legal tribunal and the fundamental mode of its proceeding are not within the power of the parties, and for this reason the provision was inserted in the New York Constitution to the effect that "a jury trial may be waived by the parties in all civil cases and the manner prescribed by law," in order to authorize even the legislature to confer a right to dispense with that mode of trial. *Cancemi v. People*, 18 N. Y. 128.

It is to be regarded as in the province of the court and its officers to impanel a full jury, and when a party is asked if he has any objection to the jury it refers to the persons constituting it, and as to challenges, and he should not be held responsible for the right constitution of the jury in point of numbers, and he is not to be charged with the fault of the proper officer in that respect; and therefore the defect of only eleven jurors upon the panel is to be regarded as fatal in criminal cases without hesitation, and the same rule will apply in civil cases unless the right has been waived. *Cowles v. Buckman*, 6 Iowa, 161, an action upon a promissory note.

The objection to a jury of less than twelve is not waived by a defendant by a motion for judgment upon a special verdict, especially where the defendant objected to the jury at the proper time, because of the absence of a juror, and his objection was overruled, as he was not then required to abandon the defense, but was authorized to contest it even before an unlawful jury, and to insist upon all objections raised upon the trial. *Eshelman v. Chicago, R. I. & P. R. Co.* 67 Iowa, 296.

There is no valid agreement to try an action upon an attachment bond by less than a full jury where it is shown by the bill of exceptions that both parties agreed to try a case with ten jurors, and in another place that the plaintiff demanded a full jury unless the defendant would consent to try with the eleven who were present, and also that the court ordered a new jury to be struck and organized after filling up the panel to two full juries or twenty-four names, and in such a case, in summoning additional jurors to complete the panel before the process of rejection or striking out commences, the court commits no error. *Adams v. Thornton*, 82 Ala. 260, 263.

So, the consent of the adverse party to a jury of less than twelve must be express and entered at the time in the minutes of the court, and cannot be inferred from the mere absence of the adverse party, and his absence is a consent under 43 L. R. A.

the statute to a trial by the court but nothing further, and therefore the court will reverse the judgment and order a new trial in a civil action in which the plaintiff is not present, and the defendant, who pleads a set-off, consents to a trial with four jurors. *Gillespie v. Benson*, 18 Cal. 409, 411. *Ayres v. Barr*, 5 J. J. Marsh. 286, to the same effect.

And where, in an action in a justice's court for the recovery of a sum of money, the parties consented to take a majority verdict, the express consent of both parties was not shown by the return of the justice, which only showed that "at the suggestion of the counsel for the defense the counsel for the plaintiff consented to accept a majority verdict." The court reversed the judgment as there was no agreement or consent shown on the part of defendant's counsel to accept such a verdict, neither was there any such consent shown on the part of the counsel for plaintiff,—especially as the return also showed that the consent was obtained in ignorance of certain facts in possession of defendant and unknown to plaintiff or his counsel. *Snow v. Hardy*, 3 Minn. 77, 80.

There are authorities that hold that the defendant's consent to be tried by a less jury than twelve cannot prevail over the express words of the legislature.

In *Falkenburgh v. Cramer*, 1 N. J. L. 81, the court reversed the judgment upon the ground that the consent of the parties could not avail against the express words of the legislature, in a cause removed to the supreme court by certiorari, on the return of which it appeared that the demand was for more than \$11, and a venire had issued for a jury of twelve men, and at the trial six of the jurors only appeared and were sworn by the consent of the parties, and the plaintiff recovered a verdict for \$8.

So, in *Parker v. Munday*, 1 N. J. L. 70, the court reversed the judgment entered upon a verdict in a justice's court by a jury of but six men sworn to try the cause by consent of the parties, upon the ground that by the act of assembly of June 5, 1782, a demand for £6 was to be tried by a jury of twelve men, and that the proceeding was therefore contrary to the express provisions of the law, and that the consent of the parties could not cure the want of jurisdiction or supersede the express words of the act of assembly.

And a similar decision was rendered by the court in the case of *Mitten v. Smock*, 3 N. J. L. 470, a civil action for debt in which a jury of twelve was moved for, ordered, and duly summoned, but upon the trial the parties consented to have the case tried by six, for the reason that the parties could not by consent change the legal mode of trial, and dispense at their pleasure with the law, although they might have legally left their cause to the reference of six or any other number, but as this was not done it was a trial by jury, the legal number of which could not be dispensed with even by consent.

Some old authorities, however, seem even to deny the right of a party to waive his right to a full jury and to consent to a less jury than twelve even in civil actions.

In *Norval v. Rice*, 2 Wis. 22, it is said that the common-law right of trial by jury of twelve cannot be waived either directly or indirectly, and if a trial by jury is demanded and refused the right is not waived by the subsequent trial by the court.

So, upon the authority of the above case the court, in *May v. Milwaukee & M. R. Co.* 3 Wis. 219, a civil action in the county court by a jury of six men, upheld the defendant's claim to be tried by a jury of twelve, as the Constitution guaranteed him such right, and the statute

which gave the county court jurisdiction and provided for a less number of jurors was unconstitutional and void, and as the right could not be waived either directly or indirectly.

The fact that the defendant has demanded a jury of twelve is decisive, and a verdict rendered by a less number is no waiver of his objection to such verdict upon appeal. *May v. Milwaukee & M. R. Co.* 3 Wis. 219.

1. As affecting appeal jury.

Jurisdiction conferred upon justices' courts in criminal causes to try offenses before a justice himself or before him and a jury of six does not entitle the defendant to a jury upon appeal where he has waived his right in the court below, and the Constitution does not secure such right. *Wanser v. Atkinson*, 43 N. J. L. 574.

And if the record shows that the verdict was rendered by a jury of more than twelve without objection in the court below it will be taken to be waived upon appeal. *Ross v. Neal*, 7 T. B. Mon. 407, 408.

So, if the objection to the jury in a civil case is first made in the court upon appeal, the party must be taken to have waived a jury of twelve. *Marlin v. Stockbridge*, 14 Tex. 165.

The express language of the New Jersey Constitution does not require the legislature to furnish a trial by jurors to suitors on appeal from justices' courts, in actions brought under the New Jersey statutes for the trial of criminal causes, which give a right to trial either before the justice himself or before a jury of six, where they have chosen to try their cause without a jury in the first instance. *Wanser v. Atkinson*, 43 N. J. L. 571, 574.

In an action brought before a justice for damages for cattle killed, and appealed to the circuit court, where a verdict for plaintiff was rendered by a jury of six, and defendant moved for a new trial on the ground that such trial was without consent, and no consent appeared on the record, the court allowed the defendant's objection on motion in arrest of judgment, as such consent when given must always be entered on record, as on appeal from justices' courts to courts of common law, the parties are entitled to a trial by twelve men unless the right is expressly waived. *Brown v. Hannibal & St. J. R. Co.* 37 Mo. 298, following *Vaughn v. Scade*, 30 Mo. 600.

When an appeal lies from a justices' court to a district court where the defendant has a right to a full jury of twelve a legislative enactment giving the justice power to try the case with a jury of six is not unconstitutional. *Collier v. Territory*, 2 Okla. 444. *Work v. State*, 2 Ohio St. 296, 308, 59 Am. Dec. 671, and *Emerick v. Harris*, 1 Binn. 416, to the same effect.

But where a defendant, prosecuted before a justice of the peace under Minn. Stat. §§ 68, 69, chap. 13, for obstructing a highway, demanded a jury of twelve, but the only trial permitted before the justice was a trial by a jury of six men, and the defendant was, under the Laws of 1867, chap. 81, permitted to appeal to the district court and there obtain a jury of twelve men only upon entering with surety into the recognizance therein mentioned, it was held that he was deprived of the constitutional right of trial by jury. *State v. Everett*, 14 Minn. 489, 442.

Yet if upon a trial the jury did not really consist of twelve men, and the defendant in the court below did not intend to waive his constitutional rights, he should reserve the point in the mode pointed out by law, and he will then be entitled to the consideration of the court upon appeal. *Larillian v. Lane*, 8 Ark. 372, 375.

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So, if there is judicial error in allowing a case to be decided in the county court by a jury of six under the Kentucky statute of February 11, 1880, the remedy is by appeal to the circuit court where the case will be tried *de novo* before a jury of twelve. *Helvenstine v. Yantis*, 88 Ky. 695.

The fact, however, that the defendant has demanded a jury of twelve in a county court is decisive, and a verdict rendered by a less number is no waiver of his objection to such a verdict upon appeal. *May v. Milwaukee & M. R. Co.* 3 Wis. 219; *Norval v. Rice*, 2 Wis. 22.

The question of a jury trial on appeal as satisfying the constitutional right of trial by jury will be found discussed in *note* to *Miller v. Com. (Va.)* 15 L. R. A. 441.

VIII. Absent, sick, or unqualified juror.

a. Constitutional and statutory provisions.

Express provision is made by the Constitution of some states with reference to the mode of procedure to be adopted in case of a trial by less than the full number of jurors where the number has been reduced by the sickness of one or more of the jurors.

An express provision to this effect is to be found in the Constitution of the state of Texas, Rev. Stat. art. 5, § 13. This provides that "when, pending the trial of any case, one or more jurors not exceeding three may die or be disabled from sitting, the remainder of the jury shall have the power to render the verdict, provided that the legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict."

So, by express provision contained in the Codes and statutes of some states the verdict of the remaining jurors is rendered valid.

By § 4391, title 8, chap. 4, Idaho Rev. Stat. the court may order a juror to be discharged if, after the impaneling of the jury and before verdict, he becomes sick so as to be unable to perform his duty and the trial may proceed with the other jurors or another may be sworn, and the trial begin anew, or the jury may be discharged, and a new jury then or afterwards impaneled.

And a similar provision is to be found in § 3713, title 19, chap. 9, Iowa Anno. Code, ed. 1897, p. 1444, except that in such cases the continuance of the trial by the remaining jurors must be by consent entered by the court or shorthand reporter as a part of the record, otherwise the jury shall be discharged.

And in Michigan, under the act of 1861, § 1, if from any cause subsequent to the impaneling of a jury any of the jurors are unable to attend, the court may enter that fact upon their journal or docket, setting forth the cause of such inability, and the proceeding shall then continue in the same manner, and with the same effect, as if the whole panel were present, provided that the number of jurors so absent shall not be greater than three in a jury of twelve.

In *McKae v. Grand Rapids*, L. & D. R. Co. 98 Mich. 399, 17 L. R. A. 750, however, the above statute was held unconstitutional, as art. 4, § 46, of the state Constitution did not authorize the making of contingencies in which a jury might consist of less than twelve in the court's discretion.

Section 1086, Montana Anno. Code, vol. 3, ed. 1895, p. 264, also contains provisions similar to those of the Idaho and Iowa statutes when a juror cannot perform his duty, and the trial may proceed with the other jurors, or another juror may be sworn and the trial begun anew, or the jury may be discharged and a new jury then or afterwards impaneled.

The North Dakota Code of Criminal Procedure, §§ 8213, 8226, and the Code of Civil Procedure, § 5489, also contain like provisions, except that the sections of the Criminal Code do not provide for the continuance of the trial by the remaining jurors.

And the Code of Civil Procedure of Nevada (Nev. Gen. Stat. ed. 1885, art. 2, § 3188, p. 789), contains a similar provision.

Again, § 199, Hill's Anno. Laws of Oregon, ed. 1892, p. 297, contains a similar provision for the discharge of the jury under like circumstances; and unless the parties agree to proceed with the other jurors a new juror may be sworn and the trial begun anew, or the jury may be discharged and a new jury then or afterwards formed.

And a provision to the like effect is found in Texas Rev. Stat. ed. 1895, title 62, chap. 11, art. 3229, with reference to trials pending in the district court where one or more of the jurors not exceeding three die or are disabled from sitting; but in such a case the verdict of the remainder of the jury shall be signed by every remaining member. 2 Sayles's Civ. Stat. art. 3101, title 57, chap. 11.

The provisions of the Iowa Code which authorize a verdict by the eleven remaining jurors in such cases have been held unconstitutional. See *infra*, b.

b. Decisions of the courts.

It has been held that the whole trial, and not merely a part thereof, must be by a jury of twelve. *Com. v. Byers*, 5 Pa. Co. Ct. 295.

So, § 2793 of the Iowa Code, which authorizes a verdict from eleven out of twelve jurors when the jury has been reduced to that number by sickness, has been held to be in conflict with the Constitution, § 9 of the Bill of Rights of the state. *Eshelman v. Chicago, R. I. & P. R. Co.* 67 Iowa, 296; *Kelsh v. Dyersville*, 68 Iowa, 137. See, however, *State v. Kaufman*, 51 Iowa, 579, 33 Am. Rep. 148, and *State v. Grosshelm*, 79 Iowa, 76, *infra*.

The above section of the Code makes no provision for consent, but expressly declares that the "trial shall proceed with the remaining jurors." It is therefore to a certain extent imperative and unlike the provision contained in the amended Code of 1897, which provides for the continuance of the trial with the consent of the parties.

In *Eshelman v. Chicago, R. I. & P. R. Co.* 67 Iowa, 296, the record showed that, after the evidence and the arguments of counsel were submitted, the jury were permitted to separate until the beginning of the week, when one of them was sick and unable to attend court, and was discharged. The court against defendant's objection submitted the cause to the remaining eleven jurors. It was held that the court erred in submitting the cause for the verdict of eleven jurors. In this case the action was civil to recover compensation for cattle killed upon the defendant's railroad.

And a similar decision was rendered in the case of *Kelsh v. Dyersville*, 68 Iowa, 137, an action to recover damages for injuries sustained through a defective sidewalk, where after the court adjourned and the jurors were again called into the box, one of their number was so sick as not to be able to perform his duties, and was discharged, and the trial proceeded with eleven jurors over the defendant's objection.

So, the court has held that the moment a juror is withdrawn there is a mistrial unless the parties consent to his place being filled. *Prentice v. Chewning*, 1 Rob. (La.) 71, 72, an action on promissory notes in which the record showed that one of the jurors was sick, and that 43 L. R. A.

the court, against the defendant's wishes, substituted another juror in his place, and the evidence already taken was read to him instead of the trial commencing *de novo*.

And where, after the jury had rendered a sealed verdict, one of the jurors became insane, and only eleven jurors appeared in court when the sealed verdict was opened and delivered, a new trial was ordered, as a jury in a court of record must consist of twelve men. *Norvell v. Deval*, 50 Mo. 272, 11 Am. Rep. 413, an action for assault and battery.

In Montana it has been held that, in the absence of a statute providing that in civil cases a sick juror may be excused, and that the defendant may consent to a trial by the remaining eleven jurors, such trial cannot be allowed. *Territory v. Ah Wah*, 4 Mont. 149, 47 Am. Rep. 341.

And a conviction for murder by eleven jurors will be set aside and a new trial ordered when one is removed owing to sickness, even though the prisoner consented to be tried by eleven jurors. *Territory v. Ah Wah*, 4 Mont. 149, 47 Am. Rep. 341.

Again, the court ordered a new trial in *Den, Denman, v. Baldwin*, 3 N. J. L. 501, an action of ejectment, tried by a jury, where, upon their retiring to deliberate, one jurymen was taken seriously ill, and was not able to deliberate or assist in the deliberations of the remainder of the jurymen, as it was in effect a trial by eleven jurymen.

So, in *Com. v. Shaw*, 1 Pittsb. 492, the court arrested the judgment upon a verdict of eleven jurors against the defendant convicted in the court of sessions of an attempt to kidnap a negro, where one of the jurors was taken sick, and by consent of counsel the court allowed the trial to proceed with the remaining eleven jurors, as contrary to the Constitution and laws.

And in *Com. v. Byers*, 5 Pa. Co. Ct. 295, an indictment for forgery, where a sick juror was excused and the defendant consented to proceed with the trial by the remaining eleven jurors with the sanction of the commonwealth, but upon conviction he contended that his trial was a nullity and contrary to his constitutional right, the court upheld his contention upon the ground that he could not waive his constitutional rights.

A similar decision was also rendered by the court in *Jackson v. J. A. Coates & Sons* (Tex. Civ. App.) 43 S. W. 24, an action in the county court on an itemized verified account submitted to a jury of six in which as one was discharged owing to sickness a verdict was, over defendant's protest, rendered by the remaining five, as the law did not sanction the action of the court in discharging the juror and forcing the issues to be decided by five men as a jury, as § 17, art. 5, of the Constitution provides that a jury in the county court shall consist of six, but there is no provision made for verdicts being rendered by less than six.

In *Com. v. Gibson*, 2 Va. Cas. 70, the verdict in a case of felony was declared to be a nullity where it was agreed upon, reduced into writing in the jury room, and read in court as the verdict, and the jury stated that it was their verdict, and the same was amended in open court in an immaterial point, but before the amendment was read one of the jurors was taken sick, and retired to the jury room, and the amended verdict was read without the knowledge of the remaining jurors or of the court of his retirement, and only the eleven agreed to such verdict.

The case of *State v. Mansfield*, 41 Mo. 470, was also one in which the court reversed the conviction of a felony by a jury of eleven, where one of the jurors was discharged owing to sick-

ness and the trial proceeded before the remaining eleven jurors.

Rut the defendant's consent to be tried by a jury of less than the common-law number was held to bind him in a case where, with his consent, a sick juror was discharged, and, with the like consent, and that of the court, the trial was resumed and concluded by eleven jurors. *State v. Kaufman*, 51 Iowa, 579, 38 Am. Rep. 148, 149. This case was followed by the court in the later case of *State v. Grossheim*, 79 Iowa, 76, where the defendant consented to the trial being continued by the remaining eleven jurors upon one juror being taken sick. The agreement that the verdict of the eleven jurors should "be as valid and binding as though rendered by the full jury" was entered on the record.

And under circumstances showing that after the trial had commenced, and the evidence had been given to the jury, one of the jurors was withdrawn at his request, by consent of defendant's counsel, the district attorney, and the court, on account of the dangerous sickness of his father, and the verdict was returned by the remaining eleven, which facts were all stated on the record, the court refused to set the verdict aside, as the question did not affect the jurisdiction of the court. *Com. v. Dalley*, 12 Cush. 80. In this case the defendants were convicted in the municipal court of an assault upon an officer and aiding a prisoner to escape.

So, where, after the plaintiff's counsel had begun his opening address to the jury, and before any evidence had been given, a juror became ill, and applied to be, and was, discharged from the panel on account of physical inability to sit for the residue of the trial, and the court ordered another juror to be drawn and sworn, and the trial proceeded, to which proceeding plaintiff assented, but the defendant objected and excepted to the order of the court, it was held not to be erroneous for a presiding judge to proceed in such manner, especially as it was the practice in the courts of the state of New York to so treat such a withdrawal of a juror when the presiding judge, in his discretion, has thought proper to do so, and that under the act of July 20, 1840 (5 Stat. at L. 394), a circuit court might properly conform to that practice, although such practice must be confined to cases like the one then before the court, in which it was apparent that the party objecting received no injury. *Silsby v. Foote*, 14 How. 219, 14 L. ed. 394, an action upon the case for a violation of a patent right.

The ground of the decision in the above case was that the defendant could not be supposed to be prejudiced by the failure of the twelfth juror to hear a part of the opening argument for the plaintiff, as no evidence had been given, and the defendant did not make known to the court that he desired to attempt to exercise any right of challenge of the other eleven jurors, to which he might have resorted if any cause existed, the matter in the case resting in the discretion of the court whether the withdrawal of the juror should be treated merely as an occasional vacancy, or as the breaking up of the panel, and in the exercise of such discretion the court committed no error.

A somewhat similar decision was rendered in *Ray v. State*, 4 Tex. App. 450, a conviction of murder in the second degree in the district court, where before any evidence was introduced by either party the defendant consented to discharge a sick juror and have another called in his place, but as it was found by a physician that unless he became worse he would be able to sit, the trial proceeded until such juror became worse and was discharged by the court, which also refused the defendant's request for 43 L. R. A.

the discharge of the whole jury, and overruled his objection to be tried by eleven men, as there was no error in overruling such objection.

Again, where the record, in the manner prescribed by § 19 of the Texas Laws of the 15th Assembly relating to jury trials, showed the consent of the parties to proceed with the trial in the county court of one accused of an aggravated assault before a jury reduced to five by reason of sickness in the family of one juror, the court affirmed the verdict, as there was no error shown. *Gindrat v. State*, 3 Tex. App. 573.

And in *Tram Lumber Co. v. Hancock*, 70 Tex. 312, no error was found in the fact that the court proceeded to try the cause by eleven jurors when after the jury were impaneled one of them was excused by consent of all parties on account of serious illness in his family.

The discretion, as to the discharge of a juror by reason of sickness, vested in the court by the Texas statutes regulating grand juries, and juries in civil and criminal cases in the courts of that state, is one within the sound discretion of the court, and will not be questioned upon appeal unless an abuse of such discretion appears. *Ray v. State*, 4 Tex. App. 450.

The case of *Babcock v. Hill*, 35 Barb. 52, was also one in which one of the jurors failed to appear after an adjournment of the court owing to sickness, and in which the defendant's actions were taken as amounting to a waiver of his right.

The same result is found in cases of absent jurors.

Thus, in *Steck v. State*, 28 Ark. 113, the point was the right of a court to discharge a juror, and order a new panel, when by reason of the sickness of a witness with the consent of parties the jury were permitted to disperse, and when again called together it was found that all did not appear, the court upholding the constitutionality of such proceedings and the power of the court to impanel a new jury. Although in this case the question as to the validity of a verdict as found by less than the full number of jurors was not strictly passed upon by the court, yet the case is here cited as upholding the right of a court, in cases where the whole number of the jury is not present, to dispense with them and impanel a new jury. It would therefore seem to hold that the principle that a verdict by less than the number of jurors impaneled to try the cause would not be upheld.

So, in *State v. Hall*, 9 N. J. L. 819, a new trial was ordered where after a jury had retired to consider their verdict, upon which they were unable to agree, and were sent to their room to further deliberate thereon, one of them left the room without permission, and returned home, eleven only remaining.

In *People v. Deegan*, 88 Cal. 608, the defendant, convicted of larceny, sought a new trial upon the ground of intoxication of a juror, and the opinion of the court intimated that if the juror was in an intoxicated condition at the trial, the objection subsequently raised was waived because not made before the retirement of the jury to consider their verdict. From this opinion, however, *De Haven, J.*, dissented, and stated that whatever might be the rule in civil cases in which only the parties thereto were interested in the verdict, the principle of waiver of the right to object to misconduct which would disqualify a juror for the performance of his duties as such had no application to a criminal trial for felony, as the Constitution guaranteed to the defendant the right to a trial by twelve competent jurors, and his express consent to be tried by a less number would not bind him, and that there must be this number of competent jurors throughout the trial.

In *Dayton v. Church*, 7 Abb. N. C. 367, the court reversed the judgment as that of eleven jurors where one of the jury in an action upon a contract failed to appear, and was personated by another who answered to his name and served, of which fact the parties had no knowledge.

Somewhat similar in their nature are the English cases of *King v. Tremaine*, 7 Dowl. & B. 684, and *Norman v. Beaumont*, Willes' Rep. 484, in both of which the verdict was set aside upon the ground that one of the jurors personated another and thereby caused a mistrial. It does not expressly appear, however, whether the question of number was raised.

In another case, however, the court refused to set aside a verdict rendered by a jury where one personated his father. *Hill v. Yates*, 12 East, 229.

So, in *Pennell v. Percival*, 13 Pa. 200, it is said that where a juror, after being sworn, fails to appear, the course the court ought to pursue is obvious, either to compel his appearance, or dismiss the jury and impanel another to try the cause.

Where during the examination of witnesses for the prosecution upon a trial for murder it was discovered that one of the jurors was disqualified by reason of his having expressed an opinion as to the guilt of the accused, the court discharged the jury after ascertaining the facts of such disqualification, and the proceedings of the court below in so discharging the jury were upheld, as the court's announcement of such disqualification reduced the number to eleven, which number could render no verdict without the consent of both the defendant and the prosecution. *State v. Allen*, 46 Conn. 531, 548.

And in *Younger v. State*, 2 W. Va. 579, 98 Am. Dec. 791, upon an indictment for felony the court set aside the verdict as not rendered by a full jury of twelve, although the record showed that the jury were properly sworn, as the fact appeared that the one signing the verdict was not one of the jurors named as having been sworn, and it was not averred that he had been sworn.

Again, in *McCampbell v. State*, 9 Tex. App. 124, 35 Am. Rep. 726, wherein the defendant was convicted of theft, the court reversed the judgment, and remanded the cause upon the ground that five of the jurors who tried the case could not speak the English language, and were accepted by the court over his objections and challenges.

In *Foreman v. Hunter*, 59 Iowa, 550, wherein the defendant had been committed by a justice of the peace and convicted upon a judgment on an information for violating the liquor laws and tried before a jury, two of whom were aliens, the court refused a writ of habeas corpus, although it was conceded that it was the duty of the state to put legal jurors in the box to try a cause, yet the judgment rendered by such disqualified jurors was held only erroneous, and not void.

And in a case where a verdict was objected to as that of eleven jurors upon the ground that a member of the jury was also a witness before the grand jury and his name was indorsed upon the indictment as such, and his relation to the case was known when he was accepted as a juror, and neither party asked any questions concerning his qualifications to sit, and at the conclusion of the examination of a witness the court, after asking if any of the jurors had any personal knowledge respecting the fact in controversy, directed such juror to be sworn as a witness, which was done against objections and his testimony was taken, the court affirmed the judgment, as there was no force in the claim 43 L. R. A.

that because the juror took the witness stand and gave testimony, the proceeding was a trial by eleven jurors, for the reason that the testimony was as much to the juror who was a witness as to the others, and the purpose was to have all act upon sworn evidence and evidence that was the same. *State v. Cavanaugh*, 98 Iowa, 688, 691.

In *State v. Johnson*, 11 Nev. 148, defendant was indicted for murder, and the jury were impaneled under the Nevada act of November 26, 1861, which was approved on March 2, 1875, and regulated proceedings in criminal cases in courts of justice. It was shown that nine of the jurors drawn had formed and expressed opinions as to the guilt or innocence of the defendant, and the court followed the principles laid down in the prior case of *State v. McClear*, 11 Nev. 39. In this case, however, it does not appear whether objection was taken to the number of jurors or to their agreement upon the verdict.

IX. Showing of the record.

a. In criminal cases.

1. In general.

The record in felony cases must show that the verdict was rendered by a jury of twelve, and the court will look into the record, and if error appears will reverse the judgment. *State v. Van Matre*, 49 Mo. 288; *State v. Mansfield*, 41 Mo. 470, 474; *Rex v. St. Michael*, 2 W. Bl. 719; *Dixon v. Richards*, 2 How. (Miss.) 771; *Jackson v. State*, 6 Blackf. 461; *Brown v. State*, 8 Blackf. 561.

The record must show that the jury was a legal one. *Stell v. State*, 14 Tex. App. 59.

So, if it appear that less than twelve or more than that number were sworn, and delivered the verdict, it is error. *Com. v. Shaw*, 1 Pittsb. 492; *Doebler v. Com.* 3 Serg. & R. 237; *King v. St. Michael*, 2 W. Bl. 719; *Com. v. Byers*, 5 Pa. Co. Ct. 295.

And the above rule implies that the trial—the whole trial, and not a part—must be by twelve jurors. *Com. v. Byers*, 5 Pa. Co. Ct. 295.

And when a juror withdraws from the trial the fact must be noted of record, as the record must show that the twelve jurors were sworn, and that neither less nor more than twelve delivered the verdict. *Com. v. Shaw*, 1 Pittsb. 492.

In *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116, a prosecution for perjury, the verdict of eleven jurors was set aside and a new trial ordered, as the record showed that the issue was submitted to eleven persons impaneled and sworn as a jury, which verdict could not be considered as that of a jury upon which the court was warranted in pronouncing a judgment.

So, in *Hunt v. State*, 61 Miss. 577, a trial of felony, the court reversed the judgment and remanded the case for a new trial, as the record entry made by the clerk affirmatively showed that the defendant was tried by a jury of good and lawful men, but named only eleven men as composing the panel.

Again, conviction for assault and battery shown by the record as by "a jury of good and lawful men" naming one "and four others" without disclosing how such a jury was impaneled, was declared unconstitutional in *Stell v. State*, 14 Tex. App. 59.

And where it is shown by the record that a prisoner was only tried by a jury of eleven, and the clerk of the court attempts to explain such error by parol evidence by showing that the judge omitted the name of the twelfth juror from the record, such error is not sufficient to entitle the prisoner to be discharged

upon habeas corpus, but he will still be held for a new trial upon the same indictment; and in such a case parol evidence cannot be given to prove that the trial was by a jury of twelve. *Scott v. State*, 70 Miss. 247.

In *State v. Meyers*, 68 Mo. 266, wherein defendant was indicted in the circuit court, under § 35, art. 2, chap. 42, Wag. Stat., for embezzling certain United States bonds, the judgment was reversed as the record showed that only eleven jurymen were present when the verdict of the jury was received by the court, which was a fatal defect. *State v. Mansfield*, 41 Mo. 470, followed.

So, in *Bowles v. State*, 5 Sneed, 860, upon an indictment for murder, where the conviction was manslaughter, the court reversed the judgment as the record showed the jury consisted of that number only, and the case was not one of a mere clerical error in the transcript of the record, the omission existing in the original entry.

Again, a verdict of murder in the second degree was reversed in *Rich v. State*, 1 Tex. App. 206, 210, wherein the record showed that a certain jury were impaneled, but eleven names only appeared, and the presumption was that the trial was not by a whole jury.

In *Huebner v. State*, 3 Tex. App. 458, upon a verdict of guilty of theft in proceedings in the district court, where the record showed that twelve jurors came, etc., but only named eleven, the court reversed the judgment and remanded the cause for a new trial, as, where the record sets forth the names of the jurors, and upon examination there are less than twelve, unless such record discloses that a less number than twelve were accepted by both parties, or that one or more of the jury were excused under some subdivision of the law, it is fatal to the judgment.

So, in *Marks v. State*, 10 Tex. App. 334, a conviction in the county court of an aggravated assault, the court reversed the judgment and remanded the case for a new trial, as the recital of the judgment showed that the defendant pleaded not guilty, and also that there was a jury who were also impaneled and sworn according to the law, but only mentioned one juror, as the record must show that when one accused of crime is tried by a jury the jury is a legal one.

And in *Jester v. State*, 26 Tex. App. 869, a conviction of burglary, where the record showed that the defendant was tried by a jury of six, the conviction was set aside, as the trial was not in accordance with law as declared by art. 5, § 13, of the Constitution, and art. 595 of the Code of Criminal Procedure of that state.

Again, the record of a trial by a jury of six under the Pennsylvania act of May 1, 1861, must show how the jurors were impaneled, that they were selected in the manner required by the statute, and that they were citizens having the qualifications of electors. *Laughney v. Com.* 4 Lanc. L. Rev. 298, 3 Brightly's Digest, pt. 1, p. 4210.

The justice's record of a trial in a criminal proceeding before him and six jurors on a charge of assault should show each step taken on the trial, and pursue strictly the act of assembly. *Agnew v. Com.* 4 Pa. Co. Ct. 75, 3 Brightly's Digest, pt. 1, p. 4211.

Yet the record of a conviction before a justice of the peace and six jurors need not show affirmatively that the jurors were in no wise of kin to the parties, nor in any manner interested. *Griffen v. Com.* 1 Wilcox (Pa.) 261, 3 Brightly's Digest, pt. 1, p. 4210.

The case of *Com. v. Morey*, 10 Phila. 460, involved the question of the mode of procedure 43 L. R. A.

in cases before justices of the peace with a jury of six men, and as to what the record in such cases must show, but it did not pass further upon the constitutionality of the statute.

Yet the conviction of one accused of assault and battery by a jury of six under the Pennsylvania statute, May 1, 1861, which changed the mode of criminal procedure in certain counties and gave jurisdiction to a justice of the peace and a jury of six, was upheld, although the record showed that he demanded a jury of twelve. *Lavery v. Com.* 101 Pa. 560.

So, in *State v. Ball*, 27 Mo. 324, in which the defendant was convicted of murder, the fact that the entry showed and stated that the jury were "twelve good and lawful men," and the names were given, the name of one being inserted twice, was looked upon as a clerical error which could do no harm, upon the ground that it showed a trial by thirteen jurors.

In *Townsend v. State*, 132 Ind. 315, a case of conviction of assault and battery with intent to commit a felony, and of the crime of malicious mayhem, a new trial was sought upon the ground that during the progress of the cause two of the twelve jurors were discharged by the court by reason of illness, and the verdict was rendered by the remaining ten. The clerk's entry signed by the presiding judge showed that twelve jurors were impaneled, and no reference was made in the motion for a new trial to any affidavit in support of the charge. The bill of exceptions showed that the defendant filed his motion and reasons for a new trial, and on the pages of the record there was what purported to be an affidavit in support of the reasons for a new trial copied by the court into the record, and the affidavit appeared in the record in no other manner. The court held that the affidavit, not being embraced in the bill of exceptions, could not be considered, and that the court had no means of knowing whether it was ever presented to the court in support of the motion for a new trial, or that the court ever saw it, and that in order to authorize that court to consider it, it should be embodied in a proper bill of exceptions and signed by the judge. The judgment was therefore affirmed and the motion dismissed.

2. Consent.

So, if the record does not show that the defendant, in a criminal prosecution, consented to a jury of six, the court will reverse the judgment and remand the case for a new trial, as, in criminal cases, under the Constitution of Missouri the defendant has a right to twelve jurors, and so in civil cases either party has a right to a jury of twelve. *State v. Van Matre*, 49 Mo. 268.

The above case was a prosecution for assault and battery before a justice of the peace, appealed to the common pleas where the defendant was tried by a jury of six without his consent being shown on the record, and the court reversed the judgment and remanded the case for a new trial, as in criminal cases the court will look into the record, and if an error appears will reverse the judgment, and also upon the ground that under the Constitution of the state the defendant in a criminal case had a right to the panel of twelve jurors, so in civil cases either party had the right in common-law courts to demand a jury of twelve, and such was the settled law of the state.

Where upon a trial for murder the record did not show that the offer of the defendant to continue the trial with eleven jurors was accepted by the state, the proceedings in the court below in discharging the jury were upheld upon the ground that such offer must be consented to

by the state, otherwise eleven jurors would not render a valid verdict. *State v. Allen*, 46 Conn. 531, 548.

And where the record did not show that the parties in a trial for theft agreed to accept the verdict of a jury of less than twelve jurors, or that one or more of the jurors were excused under some rule of law, the court reversed the judgment and remanded the case for a new trial. *Huebner v. State*, 3 Tex. App. 458. In this case the record showed that twelve jurors came, etc., but named only eleven.

But where, upon a trial in the county court of one accused of an aggravated assault, it was shown that the parties agreed to continue the trial before a jury of five instead of six, owing to sickness in the family of one juror, the court affirmed the judgment as the record showed no error. *Gindrat v. State*, 3 Tex. App. 573.

And in *Com. v. Dalley*, 12 Cush. 80, the verdict was upheld, as the record of the municipal court showed the consent of all parties, and of the court, to a verdict by eleven jurors.

Again, in *State v. Sackett*, 39 Minn. 69, the defendants waived a jury of twelve upon a charge of assault and battery in the municipal court, and agreed to try the case before a jury of eleven. The court affirmed the conviction, and upheld the constitutionality of the trial, although the record did not show why a jury of eleven was agreed upon, as it did not appear that there was any omission or neglect on the part of the state to furnish an impartial jury of twelve if the defendants had chosen to avail themselves of it, and as the agreement on their part was wholly voluntary.

b. In civil cases.

And with reference to the showing of the record in civil actions it has been held that it must show a legal jury of twelve men. *Norval v. Rice*, 2 Wis. 22; *Dixon v. Richards*, 2 How. (Miss.) 771.

With respect to such actions it has been said that in all trials in courts of record it is the constitutional right of a party to demand a jury of twelve men, and if no exceptions are taken to the action of the court in proceeding to trial with a less number the party may still take advantage of the error by a motion in arrest of judgment and a defect will not be considered as waived or consent presumed unless entered of record. *Scott v. Russell*, 39 Mo. 407, 409; *Vaughn v. Scade*, 30 Mo. 600.

And it has been held that the term "jury" is well understood to be twelve men, and when the record shows that a jury of good and lawful men came to try the issue joined, it is as well understood as if it gave the names of the jurors, at least in civil cases. *Foot v. Lawrence*, 1 Stew. (Ala.) 483.

In the above case, an action upon a covenant, it was assigned as error that the record only showed that a jury was duly sworn and did not afford evidence that there were more than eleven jurors to try the issue between the parties, but the court affirmed the verdict as the record showed a trial by "a jury of good and lawful men," and it was therefore to be presumed that twelve men constituted the jury.

In *Larillan v. Lane*, 8 Ark. 372, 375, the record stated that twelve good and lawful men returned the verdict, but upon inspection it appeared that there were but eleven names recorded. The court affirmed the judgment, as the legal presumption was that the statement on the record that there were twelve men upon the jury was true, and that the clerk omitted to place their names upon it, and in such a case the statute was explicit that no such mistake should cause a reversal of the judgment. 43 L. R. A.

So, in *Hitchcock v. Caruthers*, 82 Cal. 523, 526, a new trial was sought in an action for slander tried with only eleven jurors, and the court stated that it would not presume the extraordinary spectacle of a court compelling a party to go to trial against his consent with less than twelve jurors, upon a record which not only failed to show any objection or exception on the point, but which stated that "a jury of eleven persons was regularly impaneled and sworn to try the said action."

Where the record showed that there were twelve, and gave a number of names as composing the twelve, but the clerk in making up the record might by accident have omitted one, or might not have done so, the court held that such a presumption could not be allowed to prevail against the positive statement of the record, and it was therefore to be understood there were twelve jurors. *Durham v. Hudson*, 4 Ind. 501.

So, in *Foster v. Van Norman*, 1 Tex. 636, an action in the district court on a promissory note, the court affirmed the judgment although it was alleged that the record showed the names of but eleven jurors, and it stated that the parties appeared by their attorneys and thereupon came a jury of twelve good and lawful men, upon the ground that after verdict under such circumstances it was a fair inference that there were in truth twelve jurors on the jury, but that the clerk in entering the names omitted one, and as the parties did not object to the jury and received it as a good and lawful one, after verdict and judgment, without any objection at the time.

And in *Marlin v. Stockbridge*, 14 Tex. 165, an action of trespass to try title, the court overruled the defendant's objection that the names of but eleven jurors were recited in the entry of the verdict, holding that it was entitled to no weight as it was a mere clerical omission, and even if it were not such an omission the parties might waive the right to a trial by a jury of twelve. In this case the court further stated that in civil cases, especially after a trial when the objection was first made in the court upon appeal, the parties ought to be held to have waived a full jury.

Where the record showed a consent to a verdict of eleven jurors in a civil action the court refused to reverse the judgment and to order a new trial. *Roach v. Blakey*, 89 Va. 767.

But in *Oldham v. Hill*, 5 J. J. Marsh. 300, as it was shown on writ of inquiry that only nine jurors were sworn, and there was no waiver on the record, express or implied, of the objection to the number, the court reversed the judgment.

So, where the record only showed that the case was tried before a jury of eleven the court reversed the judgment on certiorari. *Briant v. Russel*, 2 N. J. L. 135.

And where the record showed that, upon the jury being polled, eleven answered and found a verdict for the defendant, that one was in favor of the plaintiff, which matter was entered of record, the court held that the proceedings as fully set out in the record showed that the judgment was entered on the verdict of eleven jurors, and it was therefore reversed. *Scott v. Scott*, 110 Pa. 387, 390.

Again, in *Wolfe v. Martin*, 1 How. (Miss.) 30, 31, an action of assumpsit, the court reversed the judgment and ordered a new trial as the record showed that the case was tried by thirteen jurors instead of twelve, upon the ground that there is no jury for the trial of issues known to the Constitution and laws of that state except that which consists of "twelve good and lawful men who were tried, elected, and sworn."

As to the showing of the record in cases of

absent, sick, or unqualified jurors, see *Gindrat v. State*, 3 Tex. App. 573; *Eshelman v. Chicago*, R. I. & P. R. Co. 67 Iowa, 296; *Prentice v. Chewing*, 1 Rob. (La.) 71, 72; *Com. v. Dalley*, 12 Cush. 80; *Younger v. State*, 2 W. Va. 579, 98 Am. Dec. 791, *supra*.

X. Distinction between courts of record and not of record.

The degree of the court has also been made a question for consideration in determining the constitutionality of a verdict by a less number of jurors than those constituting a jury at common law.

If the court is one of record, it has been generally held that it has only jurisdiction over the offense triable therein by a jury of twelve men, as that number constituted the legal jury in those courts at common law, and therefore a verdict in those courts by a less number of jurors is unconstitutional. *Norrell v. Deval*, 50 Mo. 272, 11 Am. Rep. 413; *Hill v. People*, 16 Mich. 351, 355; *Vaughn v. Scade*, 30 Mo. 600, 604; *State, Kansas City Auditorium Co., v. Allen*, 45 Mo. App. 551, 566; *Baxter v. Putney*, 37 How. Pr. 140, 143; *People v. Luby*, 56 Mich. 551; *Dawson v. Horan*, 51 Barb. 459, 464, 466; *Knight v. Campbell*, 62 Barb. 21, 25; *People, Metropolitan Bd. of Health, v. Lane*, 55 Barb. 168, 178; *Foster v. Kirby*, 31 Mo. 496, 498.

So, the provisions of the New York Constitution must be taken as meaning a jury of twelve in all courts of record. *People, Metropolitan Bd. of Health, v. Lane*, 55 Barb. 168, 178; *Baxter v. Putney*, 37 How. Pr. 140, 143.

In *People v. Luby*, 56 Mich. 551, a conviction in the recorder's court of a criminal assault and battery by a jury of six, after a demand of a jury of twelve, was quashed, as twelve is the constitutional number of jurors in that state, even though the Constitution made an exception for courts not of record, as the state statute (Local Acts 1883, No. 337, pp. 676, 694), creating the recorder's court of Kalamazoo, expressly declared the court to be a court of record.

If, however, the court is one of inferior degree, not of record, in which the defendant was not entitled to the right by the common law as it existed at the date of the state Constitution, it has generally been held that such courts may have jurisdiction over the offense with a less number of jurors than required at common law. These latter courts have in most cases acquired the right to try the matters assigned to them before a jury of less than twelve by the express provision contained in the state Constitution, or under statute passed either before or after the adoption of such Constitution, and therefore for this reason the right to a full jury of twelve cannot be said to have existed at the time of the adoption of the state Constitution. *Dawson v. Horan*, 51 Barb. 459, 464, 466; *Knight v. Campbell*, 62 Barb. 21, 25; *Hill v. People*, 16 Mich. 351, 355; and cases *ubi supra*.

In courts not of record it is competent for the legislature to provide for a jury of less than twelve men, and power is given to the legislature by the Missouri Constitution to so provide. *State, Kansas City Auditorium Co., v. Allen*, 45 Mo. App. 551, 566.

The Constitutions of some of the states make express provision for a jury of less than twelve in courts not of record.

The Colorado Constitution declares that there may be a jury of less than twelve in criminal cases in courts not of record. 1 Mills's Anno. Stat. Colorado, § 296, p. 195.

A similar provision is to be found in the Missouri Constitution in criminal and civil cases in courts not of record.

No court recognizes the fact that in all courts 43 L. R. A.

not of record a jury may consist of less than twelve, except in cases where it requires such a jury. *State, Kansas City Auditorium Co., v. Allen*, 45 Mo. App. 551, 566.

So, a like clause is to be found in art. 1, § 7, of the North Dakota Constitution in civil actions in courts not of record.

And art. 1, § 21, of the Constitution of Washington provides for a like jury in courts not of record.

The New York statute of 1861, § 53, extending the jurisdiction of justices' courts and a jury of six in actions of replevin, is constitutional, although it transfers such cases from courts of record and a jury of twelve. *Knight v. Campbell*, 62 Barb. 16, *McMullin, P. J.*, dissenting.

XI. Jury of more than twelve.

Upon the question of the validity of a jury of more than twelve, the opinions of the courts show that the number of the jurors may be rectified and their verdicts set aside upon prompt application being made, but that the right may be waived by not excepting at the proper time, in the court below.

In *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116, it is said that at common law the number of the jury for the trial of all issues involving the personal rights and liberties of the subject could never be less than twelve, though there are some precedents that show that a verdict by a greater number would not on that account be void.

And in 2 Hale, P. C. p. 296, it is stated that if thirteen are by mistake sworn the swearing of the last of the thirteen is void, and the other twelve should serve.

From the case of *Bullard v. State*, 38 Tex. 504, 19 Am. Rep. 30, wherein the defendant was convicted of horse stealing by a jury of thirteen, it would seem that if more than the legal number of jurors are permitted to deliberate on the verdict it should be set aside and a new trial granted, when the mistake that there are more than the requisite number of jurors sworn is discovered; that the practice in the English courts has been to allow the last juror sworn to be discharged from the panel, and the case to proceed where the mistake is discovered before the jury retire to consider the verdict, but in Texas the courts have held that where the fact is discovered before the verdict is rendered the cause should be withdrawn from the jury, and a lawful jury impaneled and sworn to try it, or if the last juror sworn can be pointed out he can be dismissed from the panel, and the trial proceed by the legally constituted jury.

By the Constitution and laws of the state of Mississippi there is no jury known upon the trial of issues in civil cases in that state other than a jury of twelve good and lawful men, tried, elected, and sworn, and therefore a verdict in assumpsit by thirteen jurors will be reversed and a new trial ordered. *Wolfe v. Martin*, 1 How. (Miss.) 30, 31.

If a party has more than twelve jurors, and alleges that the verdict is liable to be influenced by at least one more person than the law allows to be in the jury room acting upon the case, such an exception to the verdict if taken in the inferior court will vitiate the verdict, but where such exception is taken for the first time in the court above it must be taken as a waiver. *Ross v. Neal*, 7 T. B. Mon. 407, 408; *Berry v. Kenny*, 5 B. Mon. 120, 122.

Where, in a prosecution for an assault with intent to murder, thirteen jurors were sworn and placed in the jury box, and after evidence had been given by the state, the defendant declined to proceed upon discovering the error,

and the court ordered the thirteenth juror to retire, and the case was submitted to the remaining twelve, the judgment was affirmed, as the thirteenth juror, the one dismissed by the court, was one whom the defendant had stricken from the list, and the remaining jurors were accepted by him. *Davis v. State*, 9 Tex. App. 634.

So, where, during the examination of the first witness, it was found there were thirteen in the box, and twelve of the same jury were afterwards re sworn under the direction of the judge, and the case recommended over the objection of the defendant's counsel, but it did not appear that the jury who tried the cause were not the twelve who first answered to their names, the court refused a *venire de novo*. *Muirhead v. Evans*, 6 Exch. 447, 2 Lowndes, M. & P. 294, 20 L. J. Exch. N. S. 211, 15 Jur. 385.

And in *Tillman v. Allles*, 5 Smedes & M. 378, 48 Am. Dec. 520, in an action upon a note, a jury of thirteen was held not ground of error, the court stating that although a verdict of a less number than twelve in issues of that kind would be void, yet a verdict of a greater number than twelve was not so on that account.

But in *McCormick v. Brookfield*, 4 N. J. L. 69, 72, it is said that if there were fourteen men to be sworn on a jury, and to render a unanimous verdict, no hesitation would be felt in setting it aside for the reason that twelve only are to be sworn on a jury, and because the two who had been improperly sworn might have influenced the rest and procured a verdict which they would not otherwise have rendered.

And in *Whitehurst v. Davis*, 3 N. C. (2 Hayw.) 113, the court reversed the judgment rendered upon the verdict of a jury of thirteen and ordered a new trial upon the ground that any innovation amounting in the least degree to a departure from the ancient mode of trial by jury might cause a departure in other instances, and in the end endanger or pervert the institution of trial by jury from its usual course.

Again, in *State v. Hudkins*, 35 W. Va. 247, the court set aside a verdict of thirteen jurors as shown by the record, and ordered the new trial of one charged with throwing stones and other missiles at a railroad car, as under art. 3, § 14, of the Bill of Rights, "trials of crimes and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offense was committed, unless upon petition of the accused, and for good cause shown, it is removed to some other county," and for the reason that even if the benefit of this provision could be waived by the prisoner in a felony case, such waiver would have to appear clearly and affirmatively by the record.

In *King v. Fitch*, Cro. Car. 414, which was an action for waste in which upon a writ of inquiry thirteen jurors were returned to be sworn, it was held that on an inquest of office there might be more or less than twelve jurors.

XII. The question of demand of jury of twelve.

Generally it may be said that the right to demand a trial by a jury of twelve is based upon the same doctrine as the right to a trial by such a jury, namely the common-law rule and the provisions contained in the state Constitutions.

In cases, therefore, where the common law and state Constitutions have secured the defendant the right absolutely and without demand, as in capital offenses and cases of felony, it would seem to follow as a natural consequence that the defendant would have the same right upon demand. And the same rule would seem to prevail in some courts with respect to trials for misdemeanors.

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There are also decisions in favor of the defendant's common-law and constitutional right upon his demanding such a trial in justices' courts, although other cases hold that he is only entitled to such a jury as the court has power to impart in such cases.

And with respect to civil cases some courts uphold the right to a full jury upon demand, especially in courts of record and in cases where the right existed prior to the adoption of the state Constitution. Yet decisions are to be found wherein the right to a full jury of twelve upon demand has been denied, in actions of replevin, where jurisdiction has been given to inferior courts and a less jury, and in actions before justices of the peace under state statutes relating to summary procedure, and in other actions in superior courts.

In some cases the failure to make the demand for a full jury of twelve has been taken to be a waiver of the constitutional right in civil cases.

In criminal cases it has been held that the defendant's demand for a jury must be taken as a demand for a full jury of twelve men as guaranteed to him by the common law and the state Constitution. *State v. Van Matre*, 49 Mo. 268.

In *People v. Carroll*, 3 Park. Crim. Rep. 22, a conviction of assault and battery before a justice of the peace, whether the defendant elected to be so tried or not, was reversed, as the statute was unconstitutional as depriving the defendant of his right to a full jury of twelve upon demand. *People v. Kennedy*, 2 Park. Crim. Rep. 317.

And it has been held that a defendant on a trial for a misdemeanor is entitled to a jury of twelve if he demands the same. *State v. Borowsky*, 11 Nev. 119, 127; *Com. v. Dailey*, 12 Cush. 80; *State v. Cox*, 8 Ark. 436, 447.

With reference to a demand of a jury of twelve in a justice's court, it has been said that in all cases where a prisoner requires it, it is the duty of a justice to impanel an even jury of twelve men for the trial of the case, even though under the state statute the justice may have jurisdiction with a jury of six, but the prisoner may waive the right to a trial by a jury of twelve and subject the case to a decision of six men, and even to the justice of the peace himself. *State v. Cox*, 8 Ark. 436, 447.

In the above case a conviction of assault and battery in a justice's court by a jury of six was set aside, as the act giving jurisdiction to such court made such a jury compulsory even after a demand for a jury of twelve.

So, the mere fact that the defendant, in proceedings before a justice of the peace and a jury of six, has a right of appeal to the district court and to a trial by a jury of twelve, does not affect his constitutional right to a full jury upon demand in the court below. *State v. Everett*, 14 Minn. 439, 444,—a prosecution before a justice of the peace for obstructing a highway, under §§ 68, 69, of Minn. Gen. Stat. chap. 13.

The defendant's demand for a jury in inferior courts, such as city courts, is to be taken as a demand for that kind of a jury which the court has power to give, and in such cases, when the case is passed upon by a jury of their own selection, they cannot object to a verdict found against them by such a jury, for the reason that they cannot speculate on their chances of success. *Kneeland v. State*, 62 Ga. 395, 397.

And the Pennsylvania act of 1861, giving jurisdiction to a justice of the peace and a jury of six, does not authorize a trial by a jury except upon demand, and a demand for a jury under the statute will be deemed a waiver of the right

to a full jury of twelve. *Lavery v. Com.* 101 Pa. 560; *Com. v. Sweet*, 4 Pa. Dist. R. 136.

So, in prosecutions under the Iowa laws of 1858, relating to Intemperance, the constitutional provision was construed as meaning that the defendant was not entitled to a jury of twelve at all times and under all circumstances, nor for all offenses in the first instance nor in all courts, but only upon demand. *State v. Beneke*, 9 Iowa, 203, 206.

Section 702 of the New York Code of Criminal Procedure provides that before the court hears the testimony upon the trial, the defendant may demand a trial by jury, and § 107 of the same provides that, upon a plea other than a plea of guilty, if the defendant 'does not demand a trial by jury, the court must proceed to try the issue.

In *People v. Cook*, 45 Hun, 84, 87, the defendant was convicted of petit larceny upon a judgment of the court of sessions which affirmed a judgment of the court of special sessions held by a police justice. The court held that, the defendant not having demanded a trial by jury, the proceedings without a jury were authorized by the provisions of the act.

And either party has a right to demand a jury of twelve in civil cases, under the Constitution of Missouri. *State v. Van Matre*, 49 Mo. 268.

So, he is entitled to a full jury in cases in the court of law commissioners upon demand. *Vaughn v. Scade*, 30 Mo. 600, 604.

So, in *Scott v. Russell*, 89 Mo. 407, a civil action in the circuit court, it was held that the jury must be twelve if demanded. To the same effect, *Brown v. Hannibal & St. J. R. Co.* 37 Mo. 298; *Aka v. Anderson*, 34 Mo. 74; *Henning v. Hannibal & St. J. R. Co.* 35 Mo. 408.

And the fact that a defendant has demanded a jury of twelve in the county court is decisive. *May v. Milwaukee & M. R. Co.* 3 Wis. 219; *Norval v. Rice*, 2 Wis. 22.

If a jury of twelve men is demanded by a defendant in an action of replevin in the justice's court it must be granted, as, prior to the New York Constitution of 1846 and the Laws of 1860, the action was only triable by a full jury of twelve. *Baxter v. Putney*, 37 How. Pr. 140, 143.

In *Dater v. Loomis*, cited in *Baxter v. Putney*, 37 How. Pr. 140, 141, and unofficially reported, in speaking of the jurisdiction of justices' courts it is said, there is no doubt as to the power of the legislature to enlarge the jurisdiction of justices of the peace to any amount it may deem proper. These courts will have full power to hear, determine, and try all such cases, unless either of the parties shall demand a trial by jury. That done, it may not be in the power of a court to proceed, as it cannot impanel a jury of twelve men, but until that objection is taken the court may proceed and its judgment will be unquestionably valid.

The case of *Crouse v. Walrath*, 41 How. Pr. 86, which was also an action of replevin in a justices' court with a jury of six, would seem, however, to be contrary to the holding of the above case of *Baxter v. Putney*, 37 How. Pr. 140, inasmuch as the court affirmed the judgment and refused to set aside the verdict, although it was shown that the defendant demanded a full jury of twelve men, as the section of the Code giving justices of the peace jurisdiction was constitutional, and within the power of the legislature to enact.

But in *Miller v. Lampeon*, 66 Conn. 482, 488, the court upheld the constitutionality of a statute giving jurisdiction to a justice of the peace and a jury of six in summary proceedings between landlord and tenant, even though the de-

fendant demanded a full jury of twelve men and claimed them as his constitutional right.

And a state statute giving jurisdiction to the superior courts and a jury of six unless twelve is demanded, and the statutory provisions relating thereto are complied with, was upheld in *Connors v. Burlington, C. B. & N. R. Co.* 74 Iowa, 383.

So, in *Flint River S. B. Co. v. Foster*, 5 Ga. 194, 208, 48 Am. Dec. 248, it was held that if a defendant has a right to demand a full jury, and does not do so, the fault is his own, and he cannot afterwards be heard to complain.

The failure to demand a full jury of twelve is a voluntary waiver of the constitutional right to a jury of twelve in civil cases, as pointed out by the legislature, under the Michigan Constitution, although it was the intention of the Constitution to preserve to parties the right to have a jury in all cases where the right existed. *Tabor v. Cook*, 15 Mich. 322, 325; *Van Sickle v. Kellogg*, 19 Mich. 49, 52; *Paul v. Detroit*, 32 Mich. 108, 114; *Swart v. Kimball*, 48 Mich. 443, 448.

So, it has been held that under the New York act to extend the jurisdiction of justices of the peace, of April 10, 1818, where the demand exceeds \$25, either party has the right to demand that the jury shall consist of twelve, but he must make his demand for that purpose before the venire issues, in order that twenty may be summoned; if he waits until a venire is returned with twelve, six of whom are sworn, he is too late, and must conclude. *Strong v. Beardalee*, 18 Johns. 130.

Under the Constitution of Kansas the parties may agree to a jury of less than six in civil actions, which is the requisite number upon a demand for a jury. 2 Kan. Rev. Stat. 1897, chap. 103, § 119, p. 485.

And under art. 6, § 27, of the Michigan Constitution a jury is deemed waived in civil cases unless demanded.

So, the Constitution of Utah contains a similar provision.

The South Carolina Constitution of 1868, and prior laws, made provision for the trial of small misdemeanors, and petty offenses before a justice of the peace and a jury of six, and under them a defendant is not entitled to a full jury of twelve, even upon demand. *State v. Williams*, 40 S. C. 378.

And under the South Carolina act giving jurisdiction in a summary manner to justices of the peace over certain actions, and providing for the trial thereof by a justice and a jury of six, or by the justice himself in case a jury is not demanded, the justice has a right to try the defendant in the absence of such demand. *Ibid.*

In actions before justices of the peace, under Rev. Stat. Ark. 1894, § 4349, the justice must impanel a jury upon demand, and it must consist of six jurors, unless a less number be agreed to.

And in civil actions under the Nebraska statute of 1897, § 6495, the jury must be twelve if a jury be demanded.

Section 8 of the Colorado Statutes of 1874, February 13, makes provision for a full jury of twelve in the probate court upon a trial of all issues of fact before the calling of the cause and before a venire issues, upon payment of the fees herein stated. See No. 5 Min. Co. v. Bruce, 4 Colo. 293, 296, *supra*. Less than twelve in civil actions is valid.

XIII. Agreement of the jury.

a. Unanimity.

The question of the constitutionality of a verdict by less than twelve jurors will be found in

note to Jacksonville, T. & K. W. R. Co. v. Adams (Fla.) 24 L. R. A. 272.

In considering the validity of the verdict of a jury the question often arises, whether such verdict must be the unanimous conclusion of the whole jury, or whether the verdict of three fourths or of a majority of the jurors is valid and constitutional.

Blackstone and other writers define a verdict to be the unanimous decision of a jury; and further, a trial by a jury is a sacred right. Com. v. Byers, 5 Pa. Co. Ct. 295.

In 10 Bacon, Abr. title *Verdict*, p. 306, it is said, the "verdict is the unanimous decision made by a jury, and reported to the court, on the matters lawfully submitted to them in the course of the trial of a cause." Ford v. State, 12 Md. 514, 540.

From the earliest period down to the time of the adoption of the United States Constitution unanimity of twelve jurors alone constituted a legal verdict. Kleinschmidt v. Dunphy, 1 Mont. 118, 131.

The unanimity of twelve men in finding a verdict is an essential attribute to a verdict of a jury at common law. Carroll v. Byers (Ariz.) 36 Pac. 490; Work v. State, 2 Ohio St. 296, 59 Am. Dec. 871, 874; Harris v. People, 128 Ill. 585; Com. v. Shaw, 1 Pittsb. 492, 497; Com. v. Gibson, 2 Va. Cas. 70; Barlow v. Daniels, 25 W. Va. 512, 517; American Pub. Co. v. Fisher, 166 U. S. 484, 41 L. ed. 1079, Overruling same case, 10 Utah, 147; Bradford v. Territory, Woods, 1 Okla. 366, *supra*, II. b. 1; Chicago & N. W. R. Co. v. Dunleavy, 129 Ill. 132, 144; Maduska v. Thomas, 6 Kan. 153, 159; McGill v. State, 34 Ohio St. 228, 254; Com. v. Saal, 10 Phila. 496; Ford v. State, 12 Md. 514, 549.

In Springfield v. Thomas, 166 U. S. 707, 41 L. ed. 1172, it was held that the 7th Amendment of the Constitution secured unanimity in finding a verdict as an essential feature of a trial by jury in common-law cases, and that the act of Congress of September 9, 1850 (9 Stat. at L. 453, chap. 51, § 6), could not impart the power to change the constitutional rule, and could not be treated as attempting to do so.

So, in State v. Barker, 107 N. C. 913, 10 L. R. A. 50, it is said that a valid jury in that state consists of twelve men, and that the concurrence of a less number is unconstitutional.

In Ford v. State, 12 Md. 514, the verdict of murder in the first degree was set aside because the jury were not unanimous, as under art. 19 of the declaration of rights there must be unanimity in the verdict.

And in Chicago & M. L. S. R. Co. v. Sanford, 23 Mich. 418, 422, it was said that if the term "jury" as used in the Michigan Constitution authorizes anything else than a unanimous verdict it means what it does not signify in any part of the Constitution or in any of the old statutes of that state. This was a case of condemnation proceedings in which the verdict was rendered by eight only of the jurors.

The same doctrine was upheld by the court in State v. Holt, 90 N. C. 749, 47 Am. Rep. 544, 548, a conviction under §§ 2482, 2483, of the Code prohibiting cruelty to animals, in which there had been an agreement between the state and the defendant to submit the question to the judge, but the court was held not only irregular, but wholly without the sanction of the law, as there was no statute authorizing such procedure, and the state Constitution forbade it by reason of its provisions that no person should be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men in open court. This case, however, turned upon the question of the right to consent to a conviction by the court without a jury.

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So, in Mackey v. Ensenberger, 11 Utah, 154, 160, it is said that under the terms of the Constitution of that state, that the right of trial by jury shall remain inviolate, the verdict of a jury must be unanimous in order to be legal.

Art. 1, § 10, of the Constitution of Virginia provides that in all capital or criminal prosecutions a man hath a right, *inter alia*, "to a speedy trial by an impartial jury of his vicinage without whose unanimous consent he cannot be found guilty." Mays v. Com. 82 Va. 550. In this case, however, the defendant was indicted for violating a city ordinance relating to the sale of intoxicating liquors, and the question really turned upon the validity of the defendant's waiver of a trial by jury of matters of law and fact where no state statute provided for such a trial.

Under § 17, art. 13, of the Constitution of Texas, the verdict in the county court must be rendered as the unanimous verdict of the six jurors. Jackson v. J. A. Coates & Sons (Tex. Civ. App.) 43 S. W. 24; Marks v. State, 10 Tex. App. 334.

So, in an inquest of lunacy the unanimous verdict of twelve men is sufficient, although under the provisions of N. J. Laws 1887, Pamphlet Laws, 248, only twelve jurors are summoned. *Re Lindsley*, 46 N. J. Eq. 358.

In Temple v. Com. 14 Rush, 769, 771, 20 Am. Rep. 442, it is said that the defendant has a right not only to see and know that the whole jury is present assenting to the verdict, but also by polling, to demand face to face of each juror whether the verdict is his verdict, and to object to it unless each member of the jury shall answer for himself that the verdict is his. Although the question involved in this case was the right of the prisoner to be present when the jury returned their verdict, yet it is here cited as showing that he must be satisfied to know that the verdict is that of the whole jury, and not merely a portion.

So, a somewhat similar decision was arrived at in Maduska v. Thomas, 6 Kan. 153, 159, wherein the court stated that a party has in all cases a right to know whether a supposed verdict is the verdict of each juror, or of only one or more of the jurors, and even if §§ 283 and 284 of the Kansas Civil Code (Gen. Stat. 1868, p. 683), do not apply where the juror decided without retiring from the jury box, still the common law gives each party the right to know the verdict of each juror.

And in Dorr v. Fenno, 12 Pick. 521, 526, a case involving the question of a quotient verdict, it is stated that, even after the verdict has been affirmed and recorded, it may be important, to the due administration of justice, or to prevent unnecessary litigation, to ascertain whether certain points have been determined, and how they have been determined. It is not uncommon to have several grounds relied upon in a trial when it cannot be ascertained from the verdict itself upon which ground it was found. In such cases the court will make the proper inquiries of the jury, that if it appear to be found upon an illegal principle, or if the jury did not all agree upon any one ground, the verdict will be set aside.

But it has never been held that they must all reach their conclusions in the same way, and by the same method of reasoning. To require unanimity, not only in their conclusions, but in the mode by which those conclusions are arrived at, would in most cases involve an impossibility, and would be practically destructive of the entire system of jury trials. Chicago & N. W. R. Co. v. Dunleavy, 129 Ill. 132, 144.

So, it is not necessary that a jury, in order to find a verdict, should concur in a single view

of the transaction disclosed by the evidence, and if the conclusion may be justified upon either of two interpretations of the evidence, a verdict cannot be impeached by showing that part of the jury proceeded upon one interpretation, and the rest upon another. *Murray v. New York L. Ins. Co.* 96 N. Y. 614, 622, 48 Am. Rep. 658.

And, in *Henderson v. State*, 12 Tex. 525, 533, the court said that while the law respected individual judgment, and would not receive a verdict to which every juror has not yielded his voluntary consent, yet it could not prevent him from yielding, if he would, his own judgment, in deference to the opinions of his fellows. In this case the court passed upon and showed the old practice to compel the jury to agree, and to give a unanimous verdict.

Again, in *Bushell's Case*, Vaughan, 150, it is said that the legal verdict of the jury to be recorded is finding for the plaintiff or defendant, but that what they answer, if asked, to questions concerning some particular fact, is not of their verdict essentially, nor are they bound to agree in such particulars; if they all agree to find their issue for the plaintiff or defendant, they may differ in the motives therefor, as well as judges in giving judgment for the plaintiff or defendant, may differ in the reasons wherefor they give their judgment which is very ordinary.

In *State v. Harden*, 1 Bail. L. 3, upon an indictment for murder, by consent a sealed verdict was delivered to the judge at chambers by the foreman of the jury, and upon the poll of the jury in open court four of the jurors dissented from the verdict. The court held that the concurrence of the whole jury was necessary to a conviction in the most petty misdemeanor which falls under the cognizance of the court, and granted a new trial.

So, in *Devereux v. Champion Cotton Press Co.* 14 S. C. 396, a civil action for personal injuries, at the trial below "the jury had been authorized to seal up their verdict and render it next morning." Before rendering it the foreman stated that the jury had agreed on a verdict which had been sealed as directed, but subsequently in the morning some of them had notified him that they did not assent to the verdict. The court reversed the judgment, and ordered a new trial upon the ground that the only judgment that could be received was an open and public one, given and assented to in open court as the unanimous act of the jury.

And in *Weeks v. Hart*, 24 Hun, 181, a judgment was rendered in favor of the plaintiff upon the verdict of a jury which was entered after the jury were polled and one of them had stated that he was not satisfied with the verdict. The court reversed the judgment and ordered a new trial, as such expression of dissent before the entry of the verdict upon the record destroyed the unanimity which was essential to make the verdict valid.

Again, in *Rothbauer v. State*, 22 Wis. 468, a conviction of murder in the second degree, the court reversed the judgment upon the ground, *inter alia*, that upon the jury returning into court one of them made a statement to the effect that he had assented to the verdict, but it had been and still was his conviction that the verdict should be for manslaughter in the first degree, and not for murder, and that he had reluctantly assented to the verdict for the sake of an agreement, and that such juror, upon being polled, replied, "I assent to it as I stated before," and in answer to the court stated, "I assent to the verdict." The assent must be the assent of a mind to the fact found by the verdict.

But in *Clark v. Read*, 5 N. J. L. 486, the court refused to set aside the verdict rendered in the 43 L. R. A.

usual form as that of twelve jurymen, upon the ground that the justice added: "Some time after the jury was dismissed one of the jurors sworn stated he was not agreed to the verdict previous to judgment being entered,"—for the reason that a juror who came into court and publicly assented to the verdict given in by the foreman ought not afterwards to be permitted to gainsay or deny that assent so as to invalidate the verdict.

So, in *Henderson v. State*, 12 Tex. 525, 533, the court refused to consider the validity of a verdict upon a conviction of an assault with intent to murder, upon the ground that when the jury were polled one of them who had assented to the verdict said that he had doubts as to the intention of the defendant to kill at the time of the commencement of the assault, although he thought he did intend to kill before the assault was ended, but neither declined to consider the question further nor to disagree to the verdict.

And in *Jack v. State*, 26 Tex. 1, the court refused to set aside a verdict upon the ground that the jury were not unanimous, upon a conviction of murder, whereupon, the jury being polled, one of them remarked, in answer to the question whether the verdict was his or not, that he did not think the defendant ought to be hanged or punished with death.

Again, in *Suttrel v. Dry*, 5 N. C. (1 Murph.) 94, the court refused to set aside a verdict and grant a new trial upon the ground that, after verdict, one of the jurors swore that he did not assent to the verdict, as such a practice would open the door to corruption.

So, also, in *Williams v. State* (Tex. Crim. App.) 32 S. W. 533, the defendant was convicted of forging a check, and the verdict was as follows: "We, the jurors, find the defendant guilty." It was contended that such verdict did not purport to be the act of the entire jury for the reason that the word "jurors" was used instead of the word "jury," but the court upheld the verdict.

In some states the Constitution expressly provides for a unanimous verdict, and in others provision is made for the same in the Codes of Civil and Criminal Procedure; thus—

The Maine Declaration of Rights, art. 1, § 7, of the Constitution, provides by express stipulation that the verdict shall be unanimous in indictments and convictions. In this Constitution the word "indispensable" is used in connection with the question of unanimity of the jury.

And Md. Declaration of Rights, art. 21, expressly states that in criminal prosecutions the prisoner cannot be found guilty without the unanimous consent of the jury.

The Minnesota Statutes, ed. 1894, § 5597, chap. 71, p. 1522, of vol. 2, expressly provide the verdict of a petit jury in a district court must be unanimous in any civil or criminal actions or proceedings.

So, under Nevada Declaration of Rights, art. 1, § 3, the legislature has the power to provide for unanimity in a verdict in civil cases, although the article makes provision for a three-fourths verdict.

Section 9 of the Bill of Rights of North Carolina provides that no free man shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court as heretofore used. *State v. Moss*, 47 N. C. (2 Jones, L.) 66, 68. In this case, the act of North Carolina giving jurisdiction to the lieutenant of police to try causes of assault and battery without a jury was held unconstitutional.

By the Louisiana act 116 of 1890, p. 141, § 527, Garland's Rev. Code of La. ed. 1894, it is provided that after the reading of the ver-

dict he (the judge) shall ask the jury if the verdict has been agreed to, and if the foreman answers affirmatively he shall enter the verdict on the record of the court, unless one of the parties require that the jurors be called and each of them asked if he has agreed to the verdict, and if it appear that all the jurors have agreed to the verdict the same shall be recorded.

So, under § 8138 of the Code of Criminal Procedure of North Dakota the verdict of the twelve jurors must be unanimous.

And § 5159 of the Oklahoma Statute of 1898, p. 965, contains a similar provision.

Article 748, Tex. Code Crim. Proc. (Rev. Stat. 1895, title 8, chap. 6, p. 108), in defining a verdict, states that it must be concurred in by each member of the jury.

And arts. 3102, 3103, Texas Civ. Stat. (Sayles's Stat. vol. 2, title 57, chap. 11), provide that the jury in the county court and in courts of justice of the peace shall be six men whose verdict must be concurred in by all. Texas Rev. Stat. ed. 1895, title 62, chap. 11, art. 8230.

Under art. 1, § 10, Utah Const. Declaration of Rights, in criminal cases the verdict must be unanimous.

So, a like provision is contained in art. 10, chap 1, Vt. Const. Declaration of Rights.

b. Majority verdicts.

In considering the question of the agreement of the jury, and the unanimity of their verdict, some cases have turned upon the point whether or not a verdict of the majority, or three fourths or other proportion of the jury, would be valid and within the constitutional provisions.

Upon this question it has been said that it will be presumed that proper instructions are given to a jury, and that such instructions imply that a jury cannot act by a majority, and that each must act upon his own conviction. *Com. v. Ford*, 146 Mass. 131.

In *Carroll v. Byers* (Ariz.) 36 Pac. 499, which was a civil action, termed by the Arizona statute "claim and delivery," the verdict of the jury was signed by nine of them only, and entered upon the minutes of the court, and the record presented the question, whether or not in such a form of action unanimity was required of the jury in order to return a valid verdict. The court held that the defendant had been deprived of a right to the trial by a jury by the acceptance of the verdict of nine jurors, and that such verdict was contrary to the provision of the Constitution.

So, in *Welder v. Hunt*, 84 Tex. 44, as the jury in the district court failed to agree upon a verdict as usually required by law, the parties agreed to receive the opinions of the majority as the verdict, but the court set it aside as it could not be regarded as entitled to the sanctity ordinarily attached to verdicts of juries, and as it was not supported by the weight of evidence.

And in *Ryerson v. Kitchell*, 3 N. J. L. 551, the court reversed the judgment as unlawful, as the question had been left to the determination of two or more of their number who were to agree on the verdict, and if they could not so agree, they were to choose a third person as umpire, and two of the number retired and chose an umpire, and the verdict was then agreed upon and returned to the remaining jurymen, who returned the verdict in court according to the finding of such third man.

But in *Northern Bank v. Buford*, 1 Duv. 385, the action was on a protested bill of exchange, and it was objected *in limine* to the revisability of the judgment, that, the jury not being able to concur in a unanimous verdict, the parties made an agreement of record by which it was 43 L. R. A.

ordered that "the verdict of the majority of the jury" should "be made the judgment of this court." Under this, the majority returned a verdict on the judgment now sought to be reversed. The court held that considering the occasion, and presumed object of the order, it was disposed, in the absence of any other meaning of interpretation than the isolated entry itself, not to construe it as a submission to arbitrators, whose award, right or wrong, should be final, and perceived no reason for presuming any other object than to facilitate a verdict, by agreeing to dispense with a unanimous concurrence of the jury, and to let the finding by the agreed majority be in all respects as effectual as if the entire jury had concurred.

And in *Bowen v. Davis*, 48 Tex. 101, an action upon promissory notes, it was contended that judgment rendered upon a verdict of ten out of twelve jurors was invalid, but the court affirmed the judgment as the Texas statutes regulating grand juries and juries in civil and criminal cases, enacted August 1, 1876, only referred to cases decided after it became a law, as the 13th section of art. 5 of the Constitution of 1876, which provided that in civil and criminal cases below the degree of felony in the district court, nine jurors concurring might render a verdict, presented a rule which took effect immediately as the organic law of the state. In this case the Constitution took effect some months prior to the statute.

In some states the legislature has provided for majority verdicts, but such statutes have not always been held constitutional. In Utah there are a number of cases upholding the constitutionality of the statute of the territory making a verdict of three fourths of the jury in civil cases valid, but these cases would seem to be overruled by the decision of the United States Supreme Court in the case of *American Pub. Co. v. Fisher*, 166 U. S. 484, 41 L. ed. 1079, in which the court reversed the decision of the court below (10 Utah, 147) and declared the act unconstitutional. See these cases, *infra*.

The Declaration of Rights of California, art. 1, § 7, of the Constitution of that state, provides that "in civil actions three fourths of the jury may render a verdict."

By title 18, chap. 9, Anno. Code Iowa, ed. 1897, p. 1419, § 3699, relating to trial and judgment it is enacted that "the parties, at any time before the final submission, may agree to take the verdict of the majority, which agreement, being stated to the court, and entered upon the record, shall bind the parties, and in such case a verdict, signed by any seven or more, and duly rendered, when read and not disapproved by said majority, shall in every particular be as binding as if made by a full jury, or, when both parties require it, a struck jury may be ordered, whereupon eighteen jurors shall be called into the box, and the plaintiff first, and then the defendant, shall strike out one juror in turn until each has struck six, and the remaining six shall try the cause."

Section 248 of the Constitution of Kentucky gives power to the general assembly to provide that in any or all trials of civil actions in the circuit court three fourths or more of the jurors concurring may return a valid verdict, but such a verdict must be signed by all the jurors who agreed to it.

Under the provision of the above Constitution the state legislature passed an act (Ky. Rev. Stat. ed. 1894, chap. 74, art. 4, § 2268, p. 818), which re-enacts the Constitution.

So, Minn. Const. art. 1, § 4, of the Bill of Rights, as amended in November, 1890, gives power to the legislature to provide that the agreement of five sixths of any jury in civil ac-

tions or proceedings after not less than six hours' deliberation shall be a sufficient verdict therein.

Section 23, art. 3, of the Declaration of Rights of Montana provides that, in civil actions, and in all criminal cases not amounting to a felony, two thirds in number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all of such jury concurred therein.

And § 1084 of the Annotated Code of this state, vol. 3, ed. 1895, p. 263, provides that two thirds of the jury must agree upon a verdict.

So, the Nevada Declaration of Rights, art. 1, § 3 (Stat. of 1885, § 48, p. 24), makes provision in civil cases for a verdict of three fourths of the jury having the same effect as a verdict by the whole jury, provided the legislature by a law passed by a two-thirds vote of all the members elected to such branch thereof may require a unanimous verdict notwithstanding this provision.

But in *State v. Barker*, 107 N. C. 913, 919, 10 L. R. A. 50, it is said that, in that state, it had never been contended that a smaller number than twelve could make a constitutional petit jury, and therefore an act making the concurrence of nine jurors sufficient was unconstitutional.

So, the provisions of the territory of Oklahoma Civil Code, authorizing nine jurors to return a verdict where the panel consists of twelve persons, is in conflict with the Constitution and laws of the United States, and is therefore void. *Bradford v. Territory, Woods*, 1 Okla. 366.

Article 5, § 18, of the Constitution of Texas makes provision for a verdict concurred in by nine jurors in civil cases and in trials of criminal cases below the degree of felony in the district courts, such verdict to be signed by each member concurring therein.

Again, Texas Code Crim. Proc. art. 746, title 8, chap. 6, p. 103, Rev. Stat. ed. 1895, provides that in the county court in all criminal actions the jury of six must render a unanimous verdict.

Article 745, Texas Code Crim. Proc. (Tex. Rev. Stat. ed. 1895, title 8, chap. 6, p. 103), provides in cases of misdemeanor in the district court where one or more of the jurors have been discharged from serving after the cause has been submitted to them, if there be as many as nine of the jurors remaining those remaining may render and return a verdict, but in such case the verdict must be signed by each one of the jurors rendering it.

And in civil cases a three-fourths verdict may be rendered under art. 1, § 10, of the Constitution of Utah.

The question of the validity of a territorial statute providing for a verdict of three fourths of the jury in civil cases was raised in the case of *Hess v. White*, 9 Utah, 61, 24 L. R. A. 277. It was held that such a statute did not violate the clause of the Federal Constitution.

This case was followed by a long line of cases all of which upheld the constitutionality of the statute. *American Pub. Co. v. Fisher*, 10 Utah, 147; *Tucker v. Salt Lake City*, 10 Utah, 173, 179; *Fred W. Wolf Co. v. Salt Lake City Brewing Co.* 10 Utah, 179; *Riley v. Salt Lake Rapid Transit Co.* 10 Utah, 428; *Mackey v. Enzensperger*, 11 Utah, 154.

In *Mackey v. Enzensperger*, 11 Utah, 154, there was a dissenting opinion by Justice King, in which he considered that the case of *Hess v. White*, 9 Utah, 61, 24 L. R. A. 277, and the more recent decisions, and the act of the legislature of 1892, were in violation of the provisions of the 7th Amendment to the Constitution, and therefore void.

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And the court passed upon a similar question in *Leedom v. Earls Furniture & Carpet Co.* 12 Utah, 172; *Smith v. Salt Lake City R. Co.* 13 Utah, 33; *Pratt v. Parsons*, 13 Utah, 31; *Scott v. Provo City*, 14 Utah, 31.

But this long line of cases in the Utah courts have been reversed, as the case of *American Pub. Co. v. Fisher*, *supra*, was appealed to the United States Supreme Court, 166 U. S. 464, 41 L. ed. 1079, and there it was held that unanimity was one of the peculiar and essential features of trial by jury at common law, and the constitutional right of trial by jury was violated by a territorial statute authorizing a verdict by the concurrence of nine or more members of the jury.

In that case, however, the supreme court stated that in order to guard against any misapprehension, it was proper for it to say that the power of a state to change the rule in respect to unanimity of jurors was not before it for consideration.

This decision would therefore seem to place the above cases on the same footing with those of the Arizona and Oklahoma courts which declared the statutes of those states containing similar provisions unconstitutional. *Carroll v. Byers (Ariz.)* 86 Pac. 499; *Bradford v. Territory, Woods*, 1 Okla. 366.

Under art. 1, § 21, of the Constitution of Washington, Declaration of Rights, in civil cases in any court of record the legislature may provide for a verdict by nine or more jurors.

Upon the constitutionality of a verdict by less than all the jurors, see *note to Jacksonville, T. & K. W. R. Co. v. Adams (Fla.)* 24 L. R. A. 272. E. W.

City of KAYSVILLE, *Appt.*,

v.

Ephraim P. ELLISON, *Respt.*

(.....Utah.....)

*1. A municipality has no power to collect a tax upon property or business situated so that it cannot receive any protection or benefit from it, and the legislature cannot extend or maintain the limits of a city for such purpose, and which has such an effect.

2. Section 22 of article 1 of the state Constitution is a limitation on legislative authority, and embraces all kinds of private property, including money.

(December 8, 1898.)

APPEAL by plaintiff from a judgment of the District Court for Davis County in favor of defendant in a proceeding against him for violation of a city ordinance requiring him to obtain a license before doing business as a merchant. *Affirmed.*

The facts are stated in the opinion.

Mr. E. B. Critchlow, for appellant:

If deemed to be applicable to the case at bar, the doctrine of the cases of *People v. Daniels*, 6 Utah, 288, 5 L. R. A. 444, and *Ellison v. Linford*, 7 Utah, 166, ought to be re-examined and the cases disapproved.

*Headnotes by ZANE, Ch. J.

NOTE.—For municipal taxation of rural lands, see *note to Briggs v. Russellville (Ky.)* 34 L. R. A. 193; also *Farwell v. Des Moines Brick Mfg. Co. (Iowa)* 35 L. R. A. 63.

All lands within city limits are taxable by the city regardless of the question of protection or benefits.

Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; *Frankfort v. Scott*, 19 Ky. L. Rep. 1088; *Nicholasville v. Rarick*, 19 Ky. L. Rep. 1415; *Shepard v. Kaysville City*, 16 Utah, 340; *Ogden City v. Crossman*, 17 Utah, 66.

We have here the case of an exercise of power by a municipal corporation under a grant specific in its terms, which power is expressly conferred by laws ratified and adopted by the people of the state in adopting the Constitution.

Const. art. 24, § 3; *State v. Norman*, 16 Utah, 457.

The power of the city to pass the ordinance in question is given by the terms of 1 Comp. Laws 1888, § 1755, subsec. 89.

It is competent for the legislature to delegate to municipal corporations the power to make by-laws and ordinances, with appropriate sanctions, which when authorized have the force, in favor of the municipality and against persons bound thereby, of laws passed by the legislature of the state.

1 Dill. Mun. Corp. 4th ed. § 308; *Eureka City v. Wilson*, 15 Utah, 53.

Messrs. Brown & Henderson and Edward S. Ferry, for respondent:

The large cities as organized in Utah are illegal and contrary to the Constitution of the United States.

People v. Daniels, 6 Utah, 288, 5 L. R. A. 444.

The city of Kaysville had no jurisdiction over Mr. Ellison, nor power to collect taxes from him or his property nor from any person situated as he was.

Ellison v. Linford, 7 Utah, 166.

When the territory of a county has been distributed among *de facto* corporations, whether in regular or irregular forms, the law upholds the corporations to the extent to which they extend and exercise their powers. They are *de facto* corporations so far and have the power to act within themselves, and no further.

Clement v. Everest, 29 Mich. 20.

The creation of a new corporation out of an old one, as Layton was created out of the old city of Kaysville, if it ever had any legal existence, does not impose upon the new territory any part of the common debt, even where it is a common debt.

Laramie County Comrs. v. Albany County Comrs. 92 U. S. 307, 23 L. ed. 552.

Where the subject-matter of a litigation has once been finally passed upon by a court of competent jurisdiction it has become *res judicata* and binding upon the parties to the action, and the same matter cannot be subsequently opened to be considered by the same parties.

2 Van Fleet, Former Adjudication, § 569; *Cannon v. Nelson*, 83 Iowa, 242; *Dicken v. Morgan*, 59 Iowa, 160; *Lyman v. Faris*, 53 Iowa, 498; *Harmon v. Auditor of Public Accounts*, 123 Ill. 122.

The board of county commissioners of Davis county adopted a resolution in March, 1889, by the terms of which a portion of 43 L. R. A.

Kaysville city was set off into a precinct to be known as Layton precinct.

By this action a corporation at least *de facto* has existed for these eight years, and the validity of its corporate existence cannot be questioned.

Clement v. Everest, 29 Mich. 20.

Before the city would be allowed to exercise any jurisdiction over the precinct it must proceed directly to oust the precinct of its legal existence.

State v. Winter Park, 25 Fla. 371.

Zane, Ch. J., delivered the opinion of the court:

The defendant was charged with violating an ordinance of Kaysville city in doing business as a merchant without obtaining a license, tried before a justice of the peace, and fined in the sum of \$50, from which he appealed to the district court, which found him not guilty, and entered a judgment dismissing the suit. From this judgment the plaintiff has appealed to this court, and assigns it as error.

The limits of Kaysville city, fixed by an act of the legislature of the late territory of Utah, embraces 14,320 acres of land. The city, so far as indicated by dwellings or other buildings, or by streets, alleys, or lots, occupies but comparatively a small portion of the area, and has a population of 700. The defendant's store, where he was doing the business for which he was required to take out the license, is situated 2 miles away. Around this store, the railway station, and United States postoffice, near by, are a number of dwellings in which 400 people reside. The place is called Layton. On March 12, 1889, the board of county commissioners of Davis county, in which it is located, adopted a resolution creating Layton precinct, which elected a justice of the peace and a constable. No part of Layton is platted into blocks or lots, nor does Kaysville furnish it police protection, or expend any portion of its revenues for its benefit. The lands between Kaysville and Layton for the distance of about 2 miles are used for grazing or agricultural purposes. The money collected for licenses to merchants, which is, in effect, a tax upon their business, constitutes a portion of the revenues of Kaysville. The revenue from such taxes, whether upon the business or property of the people of Layton, is appropriated to the use and benefit of the people of Kaysville, and lessens the amount of their taxes. No part of such revenue is appropriated, as it appears from the evidence, for the benefit of the residents of Layton. This brings us to the question, Was Kaysville city authorized to require the defendant to pay the tax in dispute? In the case of *People v. Daniels*, 6 Utah, 288, 5 L. R. A. 444, the supreme court of the late territory held the assessment and collection of a tax upon a farm situated 2 miles from Moroni city, as indicated by buildings, streets, or other improvements, though within its limits as defined by its charter, when no part of its revenues went to benefit the farm or its occupants, was a violation of the last prohibition of article 5 of the Constitution of the United

States, as follows: "Nor shall private property be taken for public use without just compensation." That was a limitation upon the powers of the Federal government, and, of course, upon the territorial government, created by it, but not upon the states, and therefore not upon Utah since statehood; but § 22 of article 1 of the Constitution of this state declares that "private property shall not be taken or damaged for public use without just compensation." This is a limitation upon the state legislature, and, if it embraces all kinds of private property, as its language imports, without regard to its nature or form, it includes money; that being a species of property. The right of property in money is as valuable and important as that of real estate, and also requires protection. The real estate of the individual may be taken from him, and transferred to the public, for its use, by condemnation under the right of eminent domain, upon making just compensation; or it may be assessed under the taxing power, seized, sold, and transferred to another, and the money received may be taken by the public, and used in paying its officers, in making public improvements, or used for other public purposes. The method differs, but the effect upon the individual's right to his property is the same. By the former process the public gets the use of the individual's real estate; by the latter it gets the use of the money into which the individual's real estate is converted. The owner cannot be deprived of his property by either method without just compensation. By one method he is compensated in money, by the other he receives his compensation in the protection the state or city affords him in such benefits. When the land is taken by the public in pursuance of the right of eminent domain, compensation can be determined by the standard of market value. While there is no standard by which the pecuniary value of a just government to the individual can be accurately estimated, we know its benefits exceed in value the taxes he pays. That value compensates the individual for them. The merchant's business, as in this case, is not appropriated to the use of the public, but the money he pays for the license is. Undoubtedly Kaysville city has the power to require any merchant doing business within the range of its protection and benefits to pay for a license, but it has no authority to require those doing business outside of such limits to do so, when the sole purpose and effect of a tax upon their property or business is the lessening of the taxes of its people. A municipality has no power to collect a tax upon property or business situated so that it cannot receive any protection or benefit from it. In such case there is no compensation for the property taken, though it may be a species of property termed money. And the legislature cannot extend or maintain the limits of a city for such purpose, and which has such an effect.

From the evidence the probability is the defendant's business would be more valuable, and the people of Layton would be better off, if there was no such city as Kaysville. It may be said that the state has the power 43 L. R. A.

to collect a tax upon all the property within its limits, but in such case the state is supposed to give protection to all its people, and to benefit all the property within its borders. The same may be said of the county. But in this case the defendant, and others situated as he is, are included in its limits for the sole purpose of benefiting others. Their money is given to others without their consent, without any compensation in municipal benefits or otherwise. In the case of *People v. Daniels*, 6 Utah, 288, 5 L. R. A. 444, after quoting the provision of the Federal Constitution, and stating that it applies to that government, and to the territories, but not to the states, it was said: "The government may appropriate the property of the individual, when necessary, in one of three ways: First, by taking in the mode prescribed, after paying the owner for it; second, by estimating the benefits to the owner's property from the improvements to be made, and taking the amount estimated in money; third, by taking the property in the form of money by the methods of taxation for which the benefits of protection and other advantages are furnished by the government. The same principle underlies all these methods. When the property is taken under the right of eminent domain, the public pays the owner in money; when money is exacted by means of a special assessment, the owners are compensated in special benefits to their property by public improvements made in its expenditure; and when money is exacted by a general tax the payer is compensated in the benefits received from the government in any and all of the ways that a government may benefit society." Later, in the same opinion, is found the following: "But they also say that the constitutional provision in question has reference to the taking of private property for public use under the right of eminent domain. They concede, however, that taxation and eminent domain rest on the same foundation,—the principle of compensation,—and that such compensation in case of taxation is in benefits. The constitutional provision in question was designed, doubtless, to give effect to that principle; but, if the provision simply forbids the taking of private property for public use without just compensation, under the right of eminent domain, then its authors made the constitutional rule narrower than the principle upon which they intended to base it, because the principle requires compensation in all cases, whether real estate, money, or any other kind of property is involved; whether it is taken by the methods adopted under the right of eminent domain, or under the right of taxation, or by any other means. The principle lies deeper than mere forms or methods. It would be unreasonable to say that the authors of the provision in question intended to forbid the taking under one right without just compensation, and intended to allow such appropriation under another right; that they intentionally closed one gap, but intentionally left another down by which the same wrong, in effect, could be accomplished." The above case was relied upon and followed in *Ellison v. Linford*, 7 Utah, 166. The defendant in

the case at hand was plaintiff in that case, and the collector of this plaintiff was the defendant. The following authorities support the conclusions we have reached: *Bradshaw v. Omaha*, 1 Neb. 16; *Morford v. Unger*, 8 Iowa, 82; *Cheaney v. Hooser*, 9 B. Mon. 330; *Corington v. Southgate*, 15 B. Mon. 491; *Arbegust v. Louisville*, 2 Bush, 271; *Sharp v. Dunavan*, 17 B. Mon. 223; *Langworthy v. Dubuque*, 13 Iowa, 86; *Fulton v. Davenport*, 17 Iowa, 408; *Wells v. Weston*, 22 Mo. 384;

Bueli v. Ball, 20 Iowa, 282; *Decds v. Sanborn*, 26 Iowa, 419; *Deiman v. Ft. Madison*, 30 Iowa, 542. There is a conflict in the authorities which cannot be reconciled, but we are of the opinion those supporting the view we have taken rest upon better reason.

The judgment is affirmed with costs.

Barteh and Miner, JJ., concur.

Petition for rehearing overruled.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Wilson J. HAVER, *Plff. in Err.*,
v.
CENTRAL RAILROAD COMPANY.

(.....N. J.....)

A common carrier is liable for a malicious assault made by its employee upon a passenger.

(November 14, 1898.)

ERROR to the Supreme Court at Circuit in Hudson County to review a judgment in favor of defendant in an action brought to recover damages for an assault committed by defendant's employee upon plaintiff. *Reversed.*

Statement by **Depue, J.:**

The declaration in this case is in tort. It avers that the plaintiff boarded one of the trains of the defendant, the Central Railroad Company, a common carrier for the transportation of passengers and baggage between the city of Elizabeth and Bayonne, and that he did thereupon pay the said defendant his fare for passage; that while a passenger as aforesaid, and traveling in the train of the said company, he was then and there insulted and abused by one Simeon D. Apgar, a baggage master in the employ of the defendant, and with force and arms was, without cause or provocation, assaulted by the said employee of said company, whereby the plaintiff was injured, wherefore he claims damages in the sum of \$10,000. The facts as they appeared in evidence were that the plaintiff in December last took passage in the defendant's cars at Elizabethport for Bayonne, Bergen Point; that he took his seat in the passenger compartment of the baggage car; that the baggage master immediately demanded his fare, which the plaintiff refused to give to him, and so the baggage master passed along and called the conductor, and the conductor came in; that, as soon as the conductor came in, he paid him his fare. Then the plaintiff testified: "As I was paying my fare the baggage master stood by the door, and the conductor went out of the door; and he passed along and said, 'You son of a bitch! I am notioned to

punch the face off you;' and he grabbed hold of me and shook me, where I sat in the seat. The other passengers interfered, and he broke away from me. He was in the center. He tackled me again, and struck me with all the vengeance he had. I avoided the blow by keeping close to him, and he ran me along the aisle, and slammed me against the water cooler. Finally he let go of me, and threw me into the aisle of the car, against the other seats." On this evidence on the part of the plaintiff the court granted a nonsuit, whereupon the plaintiff sued out this writ of error.

Messrs. Roberson & Demarest for plaintiff in error.

Mr. John L. Conover for defendant in error.

Depue, J., delivered the opinion of the court:

A master is liable for the trespass of his servant committed within the scope of his authority, even though in exercising his authority he use unnecessary violence; but for a trespass committed by the servant wilfully, or of his own malice, under color of discharging the duties of his employment, or where he has gone beyond the line of his duty to commit a trespass, the master will not be liable. This rule of law, where the relation of master and servant exists, uncontrolled by other circumstances, is well settled. It was so decided by this court in *Brokaw v. New Jersey R. & Transp. Co.* 32 N. J. L. 328, 90 Am. Dec. 659. The action in that case was in trespass, for ejecting the plaintiff with force and arms out of the car of the railroad company "while he was traveling in said car," and the case was before the court on demurrer. Whether the plaintiff was lawfully a passenger in the company's car, and entitled to the privileges and protection due from the carrier to its passengers, does not appear in the case. The plaintiff in this case became a passenger in the defendant's car and at the time of this occurrence had paid his fare to the conductor, and was entitled to all the rights, privileges, and protection which the law accords to passengers, and subject to the duties and

NOTE.—As to the liability of a carrier for assault upon a passenger by its servant, see note to *Davis v. Houghtellin* (Neb.) 14 L. R. A. 737; also *St. Louis S. W. R. Co. v. Jones* (Ark.) 39 L. R. A. 784; *Baltimore & O. R. Co. v. Barger* 43 L. R. A.

(Md.) 26 L. R. A. 220; *Goodloe v. Memphis & C. R. Co.* (Ala.) 29 L. R. A. 729; and *Krants v. Rio Grande Western R. Co.* (Utah) 30 L. R. A. 297.

liabilities which the law imposes on a carrier for the safety of its passengers. The case now before the court depends, not upon the law of liability of a master for the acts of his servants, but upon the duty imposed on the railroad company in the carriage of the plaintiff as a passenger. The duty of a carrier of passengers is to safely and securely carry persons who bear to it the relation of passengers. The carrier is under obligation to use the utmost care and diligence in providing suitable and sufficient vehicles for the conveyance of its passengers, to carry the passenger therein to the end of his route, to protect him against assault and other ill treatment by those employed by and under the carrier's control while on the way, and to exercise the utmost vigilance and care in maintaining order and guarding the passenger against violence, from whatever source arising, which might reasonably be anticipated or naturally expected to occur in view of all the circumstances, and the number and character of persons on board. *Cooley, Torts*, p. 644; 5 Am. & Eng. Enc. Law, 2d ed. p. 541. In the application of this principle, the grade of the employee by whom the injury was done, or the scope of his employment, is immaterial. The courts of England seem to apply to such a situation the ordinary rule that prevails as between master and servant. *Allen v. London & S. W. R. Co.* L. R. 6 Q. B. 65; *Walker v. South Eastern R. Co.* L. R. 5 C. P. 640; *Eastern Counties R. Co. v. Broom*, 6 Exch. 314. In *Isaacs v. Third Ave. R. Co.* 47 N. Y. 122, 7 Am. Rep. 418, the court of appeals of New York held that the defendant was not liable for the act of the conductor in pushing a passenger from the car while it was in motion. The decision was put upon the ground that the act of the conductor was a wanton and wilful trespass, not in the performance of any duty to, or any act authorized by, the defendant, and therefore the defendant was not liable. This case was overruled in *Stewart v. Brooklyn & C. T. R. Co.* 90 N. Y. 588, 43 Am. Rep. 185. In that case the plaintiff, while a passenger on one of the defendant's street cars, was unjustifiably attacked and beaten by the driver, who also acted as conductor. It was held by the court that the rule relieving the master from liability for a malicious injury inflicted by his servant when not acting in the scope of his employment did not apply as between a common carrier of passengers and a passenger, and the principle was affirmed that a common carrier undertakes to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger. *Isaacs v. Third Ave. R. Co.* was set aside, in the decision of this case, on the ground that that case had been determined by the court upon the assumption that the rule of the master's liability for the assault of a servant committed upon a person to whom the master owed no duty was applicable to that case. *Stewart v. Brooklyn & C. T. R. Co.* was affirmed and followed in *Duicelle v. New York C. & H. R. R. Co.* 120 43 L. R. A.

N. Y. 117, 8 L. R. A. 224, in which it was held that, whatever be the motive that incites the servant to commit an unlawful and improper act towards the passenger during the existence of the relation of carrier and passenger, the carrier is liable for the act, and its natural and legitimate consequences. This liability was deduced from the obligation of the carrier to protect the passenger against any injury from negligence or wilful misconduct of its servants while it performed its contract to carry. In some of the cases, in defining the liability of a carrier of passengers for the wilful acts of his servants, the expression "within the scope of employment," or "in the line of duty," is used. Neither of these expressions, in the usual sense, is applicable to this subject, except as descriptive of circumstances under which the liability of the carrier is unchallenged. Thus in *New Jersey S. B. Co. v. Brockett*, 121 U. S. 638, 30 L. ed. 1050, the court held that a common carrier undertakes absolutely to protect his passengers against the misconduct or negligence of his own servant employed in executing the contract of transportation, and acting within the general scope of his employment. In that case the action was founded upon an assault committed by a servant upon a passenger in enforcing rules and regulations of the company, and consequently the act was done while the servant was acting within the general scope of his employment. The case did not call for the consideration of the liability of the master under other circumstances; and it will be observed that Mr. Justice Harlan, in delivering the opinion of the court, quotes with apparent approbation the principle adopted in *Stewart v. Brooklyn & C. T. R. Co.* 90 N. Y. 588-591, 43 Am. Rep. 185, that a common carrier is bound, as far as practicable, to protect his passengers, while being conveyed, from violence committed by strangers and copassengers, and undertakes absolutely to protect them against the misconduct of his own servants engaged in executing the contract. The expressions above quoted, used in the cases, seem to mean nothing more than that the carrier is not liable for the acts of the servant when he is off from the duties of his employment, and consequently not employed in executing the carrier's contract of transportation. In *Pendleton v. Kinsley*, 3 Cliff. 416, the suit was against the owner of a steamboat on which the plaintiff was a passenger. A dispute arose between the plaintiff and the clerk about the payment of fare. Subsequently the plaintiff was assaulted by the clerk on board the vessel, and during the same trip. The defense was that the clerk was not at the time of the assault acting in the course of his employment, and therefore the owner of the vessel was not responsible for his acts. Mr. Justice Clifford, in overruling the defense, said that "the principles of law applicable in litigations growing out of the relations of principal and agent or master and servant are not the principles which fully define the rights, duties, obligations, and liabilities of the parties to this controversy." Speaking of the defense, the learned judge

said: "Adjudged cases may be referred to which support that proposition without qualification, but they do not give full scope and effect to the obligation which the carrier assumes towards his passenger, nor to the rights and duties which those relations create and imply. Passengers do not contract merely for ship room and transportation from one place to another, but they also contract for good treatment, and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance, and for the fulfilment of those obligations the carrier is responsible as principal; and the injured party, in case the obligation of good treatment is broken, whether by the principal or his employees, may proceed against the carrier as the party bound to make compensation for the breach of the obligation." The above extract from *Pendleton v. Kinsley* is quoted with approbation in *Bryant v. Rich*, 106 Mass. 180-189, 8 Am. Rep. 311. The liability of the carrier in such cases rests upon the principle that he has engaged to perform certain duties, and has selected his own servants for the performance of those duties, and hence an assault by an employee is a breach of the duty of the carrier to his passenger. This subject is discussed by Mr. Elliott as follows: "There is much apparent conflict among the authorities upon this subject, but we think some of it is due to the use of the term 'scope of employment,' or 'line of duty' in a different sense in different cases, or to a failure to place the decision upon the correct ground. It is not merely a question of negligence in such cases, nor is it strictly a question depending upon the scope of the servant's particular employment. It is a question of the absolute duty of a railroad company to its passengers as long as that relation subsists, and a breach of that duty on its part, whether caused by the wilful act of an employee or not. . . . Either the company or the passengers must take the risk of infirmities of temper, maliciousness, and misconduct of the employees whom the company has placed upon the train, and to whom it has committed the discharge of its duty to protect and look after the safety of its passengers. A passenger has no control over them, and the company alone has the power to select and remove them. It is therefore but just to make the company, rather than the passengers, take this risk, and to hold it responsible." 4 Elliott, Railroads, § 1638. The cases on this subject in the courts of our sister states are not harmonious, but the great weight of authority is in favor of the doctrine declared by the New York cases which have been cited. The decisions are collected in an elaborate note to 5 Am. & Eng. Enc. Law, 2d ed. pp. 541-548. It is quite unnecessary to reproduce them here. The doctrine that a common carrier of passengers undertakes to carry a passenger safely and securely is nowhere impugned, and to apply to assaults upon a passenger by one of its employees the doctrine that rests solely upon the relation of principal and agent is to overlook the peculiar ob-

ligation that rests upon the carrier of passengers, and the liability which results from the failure to discharge that obligation. In actions against common carriers, the plaintiff may sue in assumpsit on the contract to carry, or in case on the common-law duty. 1 Saunders, Pl. & Ev. p. 325.

Under the evidence appearing on the record, the nonsuit should not have been granted, and the judgment should be reversed.

Frederick W. SCHMALZ, Suing for the Use of Union Hat Makers' Association of Newark, *Appt.*,

v.

Edwin WOOLLEY *et al.*, *Respts.*

(.....N. J.....)

- *1. The "Act to Provide for the Adoption of Labels, Trademarks, and Forms of Advertising by Associations or Unions of Workmen, and to Regulate the Same," passed in the year 1889, and the acts on the same subject passed in 1892 and 1895 (3 Gen. Stat. pp. 3678 *et seq.*), do not violate the constitutional interdict against the passage of special laws granting exclusive privileges.
2. The title of an act passed March 23, 1892, is, "A Further Supplement to an Act Entitled 'An Act to Protect Trademarks and Labels,'" *Held*, that the title constitutionally expressed the object of the law,—the protection of trademarks and labels,—although in fact there was no prior act entitled "An Act to Protect Trademarks and Labels."
3. According to general principles, a workman, or a number of workmen, engaged in the same branch of industry, and banded together for their mutual profit in the pursuit of their common vocation, may acquire a right of property in a trademark designed to distinguish their workmanship from that of other persons; and a trademark so owned is entitled to the same protection as other trademarks.

(November 14, 1898.)

A PPEAL by complainants from a decree of the Chancery Court sustaining a demurrer to a bill filed to enjoin defendants from wrongfully using the complainant's trade label. *Reversed.*

The facts are stated in the opinion.

Messrs. J. A. Beecher & Son, for appellant:

Independent of any statute, the facts shown by the bill entitle the complainant to relief on principles upon which equity ordinarily interferes in cases of this kind.

Hetterman Bros. v. Powers (Ky.) 39 L. R. A. 211.

The law may be justly invoked by organized labor to protect from piracy and intrusion the fruits of its skill and handiwork;

*Headnotes by DIXON, J.

NOTE.—For trademark or label of trade union, see note to *State v. Bishop* (Mo.) 29 L. R. A. 200; also *Glaser v. Hubbard* (Ky.) 39 L. R. A. 210; and *Tracy v. Banker* (Mass.) 39 L. R. A. 508.

and that brain and muscle may be the subject of trade-law rules as well as tangible property.

Strasser v. Moonelis, 23 Jones & S. 197; *People v. Fisher*, 50 Hun, 552; *Tracy v. Banker*, 170 Mass. 266, 39 L. R. A. 408; *State v. Hagen*, 6 Ind. App. 167; *Godillot v. Harris*, 81 N. Y. 263; *Carson v. Ury*, 39 Fed. Rep. 777, 5 L. R. A. 614; *Allen v. McCarthy*, 37 Minn. 349; *Cigar Makers' Protective Union No. 98 v. Conhaim*, 40 Minn. 243, 3 L. R. A. 125; *Cigar Makers' Union No. 6 v. Link* (Baltimore Cir. Ct. 1886); *Renkert v. Bamberger* (Ohio C. P. Hamilton County, 1887); *Bloete v. Simon*, 19 Abb. N. C. 88; *Hudson v. Bed-Rock Cigar Co.* (Cir. Ct. Kansas, 1887); *Meyer v. Haak* (Scott County Dist. Ct. Iowa, 1889); *Coyle v. Haight* (Ohio, Stark C. P. 1890); note to the case of *State v. Bishop*, 29 L. R. A. 200, 128 Mo. 373; *Perkins v. Roedel* (Buffalo Super. Ct. 1894); *Gilbrath v. Phillipson* (14th Jud. Dist. Ct. Dallas County, Tex. 1891); *Strauss v. Scheinmann* (Cir. Ct. Chancery Wayne County (Ohio) 1895); *Stirmel v. Berriman* (Cir. Ct. Cook County (Ill.) 1886); *Gaddes v. Waterhouse* (R. I. 1886); *Sacramento Cigar Makers' Union v. Poska* (1888); *Bulens v. Newman*, 10 Misc. 460.

An injunction will be granted to restrain the false and fraudulent use of a label irrespective of whether it is technically a trademark.

Coleman v. Flavel, 40 Fed. Rep. 854; *Trask Fish Co. v. Wooster*, 28 Mo. App. 408; *Miller v. Scheuer*, 45 U. S. App. 184, 74 Fed. Rep. 225, 20 C. C. A. 161; *Listman Mill Co. v. William Listman Mill Co.* 88 Wis. 334; *Reddaway v. Bentham Hemp-Spinning Co.* [1892] 2 Q. B. 639; *Cleveland Stone Co. v. Wallace*, 52 Fed. Rep. 431; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Anheuser-Busch Brewing Assn. v. Piza*, 24 Fed. Rep. 149; *Coats v. Holbrook*, 2 Sandf. Ch. 586.

It is not the corporate property of a corporation, but the common property of a voluntary association in which all its members are equally interested.

Browne. Trademarks, § 521.

A voluntary association can own property, in a certain sense, just as well as a partnership.

Mears v. Moulton, 30 Md. 142. See 2 Gen. Stat. § 325, p. 2588, § 343, p. 2592.

A man may have property in his body, life, fame, labors, and the like, and, in short, in anything that can be called his.

Millar v. Taylor, 4 Burr. 2303.

Injunctions against the counterfeiting or unauthorized use of trades union labels have been granted in—

Farmers' Loan & T. Co. v. Toledo, A. A. & N. M. R. Co. 67 Fed. Rep. 73; *Welch v. Maine C. R. Co.* 86 Me. 552, 25 L. R. A. 658; *Hetterman Bros. v. Powers* (Ky.) 39 L. R. A. 211; *Re Humboldt Lumber Mfrs. Assn.* 60 Fed. Rep. 428, Affirmed, 44 U. S. App. 434, 73 Fed. Rep. 239, 19 C. C. A. 481.

The Acts of 1889 (Pub. Laws, 107), 1892 (Pub. Laws, 187), 1895 (Pub. Laws, 270), and 1897 (Pub. Laws, 215, 3 Gen. Stat. 3678)—are constitutional, and of themselves entitle the complainants to the relief 43 L. R. A.

sought, and are only declaratory of the common law.

The Constitution leaves it to the judgment of the legislature as to what may be provided for by general laws.

Moore v. State, 43 N. J. L. 203; 39 Am. Rep. 558; *Cooley*, Const. Lim. 5th ed. p. 105, *87.

A class is complete, not only when it includes all the objects to which a common rule is to be applied, but when, as was said by Mr. Justice Knapp in *State, Randolph v. Wood*, 49 N. J. L. 88, it embraces all, and excludes none whose condition and wants render such legislation necessary and appropriate to them. The court takes judicial notice of general acts and their effects.

Atlantic City Waterworks Co. v. Consumers' Water Co. 44 N. J. Eq. 427; *Calvo v. Westcott*, 55 N. J. L. 78; *Field v. Silo*, 44 N. J. L. 355.

It seems impossible to suppose that any person who has a right to adopt a label as an individual, whether a working man, a manufacturer, an association, or a corporation, would wish to make any use of the acts in question when there would be no occasion for it, inasmuch as they are already sufficiently protected.

State, Rutgers, v. New Brunswick, 42 N. J. L. 51; *State v. Bishop*, 29 L. R. A. 200, and note, 128 Mo. 373; *Cohn v. People*, 149 Ill. 486, 23 L. R. A. 821; *Perkins v. Heert*, 5 App. Div. 335; *Bloete v. Simon*, 19 Abb. N. C. 88; *State, Harris, v. Herrmann*, 75 Mo. 340.

The acts in question are not unconstitutional on the ground that the original act of 1889 is defective in its title, or that those of 1892 and 1895 are defective in the same respect,—especially in view of the amendment of their titles by the act of 1897.

Atlantic City Waterworks Co. v. Consumers' Water Co. 44 N. J. Eq. 427; *Bradley & C. Co. v. Loving*, 54 N. J. L. 227; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97; *State, Walter, v. Union*, 33 N. J. L. 350; *Easton & A. R. Co. v. Central R. Co.* 52 N. J. L. 267; *Mortland v. State, Christian*, 52 N. J. L. 521; *Citizens' Street R. Co. v. Haugh*, 142 Ind. 254; *State v. Woolard*, 119 N. C. 779; *Kimberly v. Morris*, 10 Tex. Civ. App. 592.

Messrs. Guild, Lum, & Sommer, for respondents:

The averments of the bill would not, independent of the statutes, entitle the complainant to relief.

Schneider v. Williams, 44 N. J. Eq. 391; *Cigar-Makers' Protective Union v. Conhaim*, 40 Minn. 243, 3 L. R. A. 125; *Weemer v. Brayton*, 152 Mass. 101, 8 L. R. A. 640; *Mo-Vey v. Brendel*, 144 Pa. 235, 13 L. R. A. 377.

Chapter 73 of the Laws of 1889, p. 107, contravenes the provision of our state Constitution which prescribes that the legislature shall not pass private, local, or special laws granting to any corporation, association, or individual any exclusive privilege, immunity, or franchise whatever.

State v. Post, 55 N. J. L. 264; *State, Alexander, v. Elizabeth*, 56 N. J. L. 71, 23 L.

R. A. 525; *Sutherland*, Stat. Constr. § 127; *State, Rutgers, v. New Brunswick*, 42 N. J. L. 51; *State v. Julow*, 129 Mo. 163; 29 L. R. A. 257; *Coa v. Truitt*, 57 N. J. L. 635.

The acts of 1892 and 1895 are unconstitutional because the object is not expressed in the title.

Jersey City v. Elmendorf, 47 N. J. L. 283; *Falkner v. Dorland*, 54 N. J. L. 409.

The acts of 1892 and 1895, considered as supplemental to the act of 1889, are inoperative in so far as they attempt to extend the object of that act beyond the object stated in its title.

State, Dobbins, v. Northampton Twp. Committee, 50 N. J. L. 499; *Falkner v. Dorland*, 54 N. J. L. 409; *Coutieri v. New Brunswick*, 44 N. J. L. 58.

The action should have been instituted in the name of the United Hatters of North America.

Dixon, J., delivered the opinion of the court:

The bill in this case was filed in February, 1897, by the president of the Union Hat Makers' Association of Newark, for the use and benefit of all the members thereof, to enjoin the defendants from using a counterfeit trademark and label made in imitation of a trademark and label which had been adopted and filed by the said association in accordance with the provisions of the several acts of the legislature passed in the years 1889, 1892, and 1895 (3 Gen. Stat. pp. 3678 *et seq.*). The defendants demurred to the bill, and, the demurrer having been sustained, the complainant appeals.

The act of 1889 is entitled "An Act to Provide for the Adoption of Labels, Trademarks, and Forms of Advertising by Associations or Unions of Workmen, and to Regulate the Same." It provides (§ 1) that it shall be lawful for associations and unions of workmen to adopt, for their protection, labels, trademarks, and forms of advertisement, announcing that goods manufactured by members of such associations or unions are so manufactured; (§ 4) that every such association or union adopting a label, trademark, or form of advertisement, as aforesaid, shall file the same in the office of the secretary of state, by leaving two copies, counterparts, or facsimiles thereof, with said secretary; and (§ 5) that every such association or union adopting, etc., may proceed by suit in the courts of this state to enjoin the manufacture, use, display, or sale of any counterfeit of their label, trademark, or form of advertisement; and that all courts having jurisdiction thereof shall grant such an injunction. The demurrants do not deny that the bill presents a case in conformity with this act, except in this respect: That under the act the bill should be filed by the association, or all its members, and not by one member alone. In our opinion, the act empowers the association to proceed by suit, making it for this purpose a quasi corporation, and therefore does not of itself entitle a single member to maintain the action. But this objection is obviated by § 4 of the act of 1892, if valid, which provides for the

bringing of such proceedings in the name of any member duly authorized by the association or union for that purpose. We are therefore brought to the main question raised as to these statutes.

The demurrants contend that the act of 1889 violates that provision of the Constitution (art. 4, § 7, ¶ 11) which forbids the passage of private, local, or special laws granting to any association, corporation, or individual any exclusive privilege, immunity, or franchise whatever. Their position is that, as the privileges of this act are confined to associations or unions of workmen for the protection of goods manufactured by their members, and are not offered to other workmen who may not choose to form associations or unions, or to persons generally, the privileges are therefore exclusive, and the act is special. We do not agree to this conclusion. All the legislation of the state respecting societies, associations, and corporations is based upon the idea that privileges which are denied to single individuals may be conferred upon groups of persons; and nothing in the Constitution was intended to subvert this doctrine. If the legislature offers to any class of persons privileges peculiarly appropriate to their class, on condition that several of them shall unite for the purpose of accepting and exercising them, the Constitution will not thereby be infringed. The privileges of this act are offered to all workmen engaged in the manufacture of goods, who thus unite, and they relate to goods of every description manufactured by them. Certainly workmen engaged in the manufacture of goods constitute a distinct class of persons, and there is a manifest appropriateness in enabling any of them who comply with the act to provide and protect a mark distinguishing the products of their labor and skill. Nor is it at all necessary that a similar privilege should be given to those who are not workmen, but are only employers of workmen. Such persons stand in a different class with respect to the exercise of those faculties which the legislature intended to foster. We think this act is constitutional.

The act of 1892, with its amendment of 1895, seems not to be exposed to the objection just considered; for their provisions extend to any persons and any association or union of workmen adopting a label or trademark to distinguish any merchandise or product of labor made, packed, or put on sale by such persons, association, or union. But these acts are assailed on the ground that their titles do not comply with that provision of the Constitution (art. 4, § 7, ¶ 4) which declares that "to avoid improper influences which may result from intermingling in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title." The title of the act of 1892 is, "A Further Supplement to an Act Entitled 'An Act to Protect Trademarks and Labels.'" That of the act of 1895 is, "An Act to Amend an Act Entitled 'A Further Supplement,'" etc. (quoting

the title of the act of 1892). The objection urged is that there existed no act entitled "An Act to Protect Trademarks and Labels," and therefore entitling these acts as supplements or amendments of such an act was misleading. But, conceding this, the inquiry is not concluded. The question still remains, Was the title misleading as to the object of the act? Did not the title, in spite of its false assumption of the existence of a prior statute, fairly express the object of the proposed legislation? On reading the act it will be perceived that its object is to protect trademarks and labels, and that for this purpose it is a complete and independent enactment. To express that object in the title, no particular form of words is required, nor is it necessary that the object should be expressed with precision. It is enough if the title be so phrased as to inform the legislators and the public of the subject-matter of the act. As was said by Mr. Justice Depue in *Grover v. Ocean Grove Camp-Meeting Assn.* 45 N. J. L. 399, 404. "The standard uniformly adopted for determining whether the legislature has complied with the constitutional requirement is whether the title of the act is such that by it members of the legislature are informed of the subject to which the act relates, and the public notified of the kind of legislation that is being considered. *State, Bumsted, v. Govern*, 47 N. J. L. 368, on error, 48 N. J. L. 612. Tested by this standard, these titles seem to be sufficient. They clearly indicate that the subject of legislation is trademarks and labels, and that the purpose is to protect them. True, they state that this is to be done in the form of supplements, but that does not affect the object of the statutes. In our legislation a formal supplement to an act is not necessarily a statute which supplies defects in its predecessor. It may be one that abrogates the preceding enactments, and substitutes radically different provisions. Hence the mere calling of an act a supplement to another designated act expresses nothing of its object. Thus, if the title were, "A Supplement to Assembly Bill No. 10, Which Became a Law on July 4, 1876," the constitutional requirement would not be satisfied, because the title would not at all express the object, while the title, "An Act to Define More Accurately the Crime of Murder of the First Degree," would fully express the object, although the act, in form and substance, were only a supplement to § 68 of the crimes act. Entitling an act a supplement to a former act complies with the Constitution only when so much of the original title is recited as expresses the object of the proposed law; and, if that object be expressed, the Constitution does not defeat the statute merely because it is erroneously styled a supplement. We therefore conclude that these acts are valid, so far as they are necessary to sustain the complainant's bill.

We also think that upon general principles the substance of the bill is sufficient. It alleges: That a company of journeymen hatters, calling themselves "The Union Hat Makers' Association of Newark, New Jersey," have, in common with similar associa-

tions formed elsewhere, adopted a certain label or trademark, of which the following is a copy:



That for ten years last past they have used said label or mark to designate and distinguish the hats made by members of the association by affixing it upon each of those hats, and that for about three years last past the defendants have used a fraudulent imitation of that mark upon the hats made and sold by them, thereby deceiving the public, violating the rights of the members of the association, and depriving them of large profits which they would otherwise have gained. These allegations seem to present a case of inequitable infringement of the association's right of property in its trademark or label. In *McAndrew v. Bassett*, 4 De G. J. & S. 380, Lord Westbury said: "The essential ingredients for constituting an infringement of that right probably would be found to be no other than these: First, that the mark has been applied by the plaintiffs properly (that is to say, that they have not copied any other person's mark, and that the mark does not involve any false representations); secondly, that the article so marked is actually a vendible article in the market; and, thirdly, that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description." These views received the approval of Lord Cairns, sitting in the court of appeals, in *Maxwell v. Hogg*, L. R. 2 Ch. 307-314, and accord with the great weight of authority on this much-litigated subject. The present bill clearly sets out the adoption and proper application of the mark by the association, and its fraudulent imitation for the interdicted purpose by the defendants. It is not so explicit as to the second ingredient mentioned by the lord chancellor, but the court does not need to be told that hats made by a company of journeymen hatters during ten years were actually vendible articles in the market. So much will be inferred.

But the objection urged by the defendants against the bill is that it does not allege, and the court cannot infer, that the journeymen owned the hats made by them; and it is insisted that ownership of the article to which the trademark is affixed is necessary to the acquisition of a right in the mark. To support this claim, *Schneider v. Williams*, 44 N. J. Eq. 391, is cited. Some expressions in the opinion of the able jurist who decided that case certainly give countenance to the pres-

ent objection, but on consideration I think those expressions will appear to be unwarranted. Thus, in defining the means by which a person will acquire an exclusive right to a trademark, he says: "First, he must select or adopt some mark or sign not in use to distinguish goods of the same class or kind already on the market, belonging to another trader; second, he must apply his mark to some article of traffic; and, third, he must put his article, marked with his mark, on the market." Now, it is undisputed that this association has complied with the first two of these requirements. Only in respect to the third has it failed. It did not itself put upon the market its own articles marked with the label. But it is doubtful whether the learned judge intended this third requisite to be so strictly read, for he immediately added: "Mere adoption of a mark or sign, and a public declaration, by advertisement or otherwise, that a person will at a subsequent time put a particular thing on the market, marked or distinguished in a certain way, create no right. Until the thing is actually on the market, marked by the particular mark of the person intending to acquire a title, no property right in the mark arises." This seems to indicate that it was the actual marketing of the marked article, and not the person by whom it was marketed or owned, on which stress was laid. And why should this specific personal element be deemed important? The public object sought in the protection of trademarks is to bring upon the market a better class of commodities, and the means for attaining that object is by securing to those who are instrumental in supplying the market whatever reputation they gain by their efforts towards that end. The workman by whose handicraft the commodity is made is one of these instruments, just as is his employer who furnishes the raw material and owns and sells the finished product; and if the former is permitted by the owner to place upon the commodity a mark to indicate whose workmanship it is, and thereby commend his workmanship to other employers, this license from the owner should be deemed a right against everybody else. His aptitude in his trade is his property, and, if by a mark he can have it identified as his in the market, he may enhance its salable value, and thus secure the same sort of advantage as his employer, by similar means. No reason exists why this advantage should not be

protected by the courts in the same manner and to the same extent as is the like advantage of the employer. The mere fact that one rather than the other of these persons has placed the product upon the market has no rational bearing upon the matter; for both alike have had the market in view in the efforts they have made, and through those efforts the market is supplied. A different objection to a suit of this nature was sustained in *Weener v. Brayton*, 152 Mass. 101, 8 L. R. A. 640, namely, that the label did not indicate by what persons the articles labeled were made, but only indicated that they were made by one of many persons who were not connected with each other in any business. The first clause of this objection would unduly restrict the law of trademarks as everywhere recognized; for it is established that, whatever be the quality indicated by a trademark, the mark need not point out the particular person from whom that quality is derived. The law has placed no limit upon the number of persons who may unite for business purposes and jointly acquire property in a trademark; and yet it is evident that, if there be many, some of them may have no personal share in producing the article identified by the mark. The second clause in the objection assumes what does not appear to be true in the case before us. We understand from the bill that the members of the association represented by the complainant are connected together as journeymen hatters; that their skill in this trade, and their mutual assistance in profiting by its practice, form the motive and chief aim of their association. This connection is as clearly one for business purposes as is that of members in a partnership, or of stockholders in a corporation. Although it is a comparatively novel species of relationship, it has become an established one, and therefore calls for the application of those general principles of law and equity which are applied to other species of business associations. According to these principles, we think a workman, or a number of workmen engaged in the same branch of industry and banded together for their mutual profit, in the pursuit of their common vocation, may acquire a right of property in a trademark designed to distinguish their workmanship from that of other persons, and that a trademark so owned is entitled to the same protection as other trademarks.

The decrees below should be reversed, and the demurrer overruled.

OHIO SUPREME COURT.

STATE of Ohio, *ex rel.* Richard PLIMMER,
v.

James D. POSTON *et al.*

(.....Ohio.....)

*The requirement of section 7 of the

*Headnote by the COURT.

NOTE.—The decision in the above case seems to be the first that has been rendered respecting the validity of a provision that signers to a 43 L. R. A.

amendatory act of April 8, 1898 (93 Ohio Laws, p. 93), that papers to secure the nomination of candidates for public offices "shall contain a provision to the effect that each signer thereto pledges himself to support and vote for the candidate or candidates whose nominations are therein requested," operating uniformly and impartially upon all classes of electors, and interposing no unrea-

petition for the nomination of a candidate must pledge themselves to vote for him.

sonable impediment to the exercise of the elective franchise, is valid.

(*Spear, Ch. J., and Minshall, J., dissent.*)

(November 1, 1898.)

PETITION for a writ of mandamus to compel defendants to receive and file a nomination paper which was alleged to contain the requisite number of signatures to make it valid. *Refused.*

Statement by **Shauck, J.:**

The petition of the relator alleges that he is a qualified elector of Franklin county, Ohio; that defendants compose the board of election of the city of Columbus, and are charged with the duties of deputy state supervisors of election of Franklin county; that on the 19th day of September, 1898, the relator presented to the defendants a nomination paper, signed by more than 300 qualified electors of said county, containing a list of nominations for the several offices of said county to be filled at the general election in November, 1898, including the nomination of the relator for the office of county commissioner. The allegations of the petition show that the paper conforms in all respects to the acts of the general assembly to provide for the mode of conducting elections, etc., except that it does not comply with the requirement of § 7 of the amendatory act of April 8, 1898 (93 Ohio Laws, p. 93), that "such nomination papers shall contain a provision to the effect that each signer thereto thereby pledges himself to support and vote for the candidate or candidates whose nominations are therein requested." The petition shows that, because the paper did not comply with the requirement of the statute in the respect indicated, the defendants refused to receive and file it, and to have the names of said nominees printed on the ballots to be voted at said election. The defendants demurred to the petition, and, for the purpose of final judgment, admit that its allegations are true.

Mr. F. M. McCartney, for relator:

It is the right, and consequently the duty, of the judicial tribunals to determine whether a legislative act drawn in question in a suit pending before them is opposed to the Constitution of the United States, or of this state, and if so found, to treat it as a nullity.

Cincinnati, W. & Z. R. Co. v. Clinton County Comrs. 1 Ohio St. 81; *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60.

The constitutionality of a law is determined by its application.

State, Atty. Gen., v. First Judicial Dist. C. P. Court Judges, 21 Ohio St. 1; *State v. Hipp*, 38 Ohio St. 199.

The general assembly, like the other departments of government, exercises only delegated authority, and it cannot be doubted that any acts passed by it, not falling fairly within this scope of legislative power, are as clearly void as though expressly prohibited.

Parker v. Com. 6 Pa. 511, 47 Am. Dec. 480; *State, Evans, v. Dudley*, 1 Ohio St. 437; *Cass v. Dillon*, 2 Ohio St. 607; *Varick* 43 L. R. A.

v. Smith, 5 Paige, 137, 28 Am. Dec. 417; *Pouers v. Bergen*, 6 N. Y. 358; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Rogers v. Bradshaw*, 20 Johns. 735; *People v. Platt*, 17 Johns. 195, 8 Am. Dec. 382; *People, Fountain, v. Westchester County Supers.* 4 Barb. 64; *Benson v. New York*, 10 Barb. 223; *People, Morris, v. Edmonds*, 15 Barb. 520; *Hatch v. Vermont C. R. Co.* 25 Vt. 49; *Raleigh & G. R. Co. v. Davis*, 19 N. C. (2 Dev. & B. L.) 451.

The general assembly is precluded from enacting any law whose operation and effect shall be to take away the elective franchise from any male citizen of the United States having the prescribed age, and residence in the state, and having such residence in the county, township, or ward, as it may provide by law, and who has not been convicted of bribery, perjury, or other infamous crime, and not being an idiot or insane person, or not being in the military, naval, or marine service of the United States.

Opinion of the Judges, 30 Conn. 591; *Lehman v. McBride*, 15 Ohio St. 621; *People v. Barber*, 48 Hun, 198; *Paine, Elections*, 301; *Cooley, Const. Lim.* pp. 682, 752; *State, Evans, v. Dudley*, 1 Ohio St. 450; *Hendershot v. State*, 44 Ohio St. 209.

This statute is equivalent to requiring that no elector or electors, except those who may have certain theories of governmental policy, or belong to a political organization casting over 1 per cent of the total vote at the next preceding general election, shall be eligible to office or have the right to vote at all elections, unless they first secure 308,640 qualified electors to sign their county and state petitions, respectively, and to pledge themselves to support the candidates so nominated. In any case the fulfillment of the requirements of this act would be impracticable, and in most cases impossible.

That cannot be called an election or the expression of the popular sentiment where part only of the electors have been allowed to be heard, and the others, not being guilty of fraud or negligence, have been excluded.

Cooley, Const. Lim. p. 775; *Fort Dodge City School Dist. v. Wakkansa Dist. Twp.* 17 Iowa, 85; *Barry v. Lauck*, 5 Coldw. 588; *Monroe v. Collins*, 17 Ohio St. 665; *Daggett v. Hudson*, 43 Ohio St. 548, 54 Am. Rep. 832; *Capen v. Foster*, 12 Pick. 488, 23 Am. Dec. 632; *Page v. Allen*, 58 Pa. 345, 98 Am. Dec. 272.

Regulations are to be subordinate to the enjoyment of the right, the exercise of which is regulated. The right must not be impaired by the regulation.

Byler v. Asher, 47 Ill. 101; *State, Wood, v. Baker*, 38 Wis. 88; *State v. Butts*, 31 Kan. 554; *Dells v. Kennedy*, 49 Wis. 558, 35 Am. Rep. 786; *Atty. Gen., Conely, v. Detroit*, 78 Mich. 545, 7 L. R. A. 99; *Davis v. Haverhill School Dist.* 44 N. H. 398; *Cooley, Const. Lim.* p. 775.

The act requiring signers to pledge themselves to vote and support the candidates nominated in the petition is a flagrant violation of the secrecy of the ballot as guaranteed by § 2, art. 5, of the Constitution, and for which the very subject of the act pretends to provide.

Cooley, Const. Lim. p. 760.

Sections 6 and 7 of the act passed April 18, 1892 (89 Ohio Laws, 434), as amended April 8, 1898 (93 Ohio Laws, 94), grant to a citizen or class of citizens privileges which, upon the same terms, do not equally belong to all citizens.

Section 6 grants privileges to some citizens, viz., those belonging to the parties casting more than 1 per cent of the total vote at the preceding general election, which, upon the same terms, are not equally enjoyed by other citizens of like qualifications, as to voting.

Section 7 imposes burdens upon a class of citizens, viz., those belonging to parties which did not cast 1 per cent of the total vote at the next preceding general election, which burdens are not equally shared by all citizens of like qualifications.

It is not competent for the legislature to divide those polling 1 per cent of the total vote at the next preceding general election into one class, and those polling for their candidates on the head of their ticket for a state office less than 1 per cent of the total vote at the next preceding general election, into another class, and enact one law granting the privilege of nominating candidates by certificates of nomination to the former, and another act imposing the burden of nominating by petition on the latter.

Costello v. Wyoming, 49 Ohio St. 208; *Ex parte Falk*, 42 Ohio St. 638; *Ayar's Appeal*, 122 Pa. 266, 2 L. R. A. 577; *Nichols v. Walter*, 37 Minn. 264; *State, Richards, v. Hammer*, 42 N. J. L. 435; *Bronson v. Oberlin*, 41 Ohio St. 476, 52 Am. Rep. 90.

Mr. Mahlon Rouch, also for relator:

In all cases where the Constitution has conferred a political right or privilege, and where the Constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power to adopt any reasonable and uniform regulations in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right, in a prompt, orderly, and convenient manner. Such a construction would afford no warrant for such an exercise of legislative power, as, under the pretense and color of regulating, should subvert or injuriously restrain the right itself.

Capen v. Foster, 12 Pick. 489, 23 Am. Dec. 632.

The present state legislature amended the election law to provide for secrecy, etc., by inserting into § 7, which provides for nomination by petition, these words: Such nomination papers shall contain a provision to the effect that each signer thereto thereby pledges himself to support and vote for the candidate or candidates whose nominations are therein requested.

That is, the title of the statute, which should express its object clearly, is, to insure secrecy of the ballot, and yet in the 7th section of the same statute the person who asks for a candidate or ticket by nomination papers must state in that petition that he

pledges himself to vote for the candidate named therein.

If these provisions can stand together, then the title to the statute is a fraud, and the pretended claim for secrecy is also a base fraud and a delusion.

There cannot be one law governing the Republican and Democratic parties in primaries and elections, and another to control the minor parties, whatever they may be.

The safeguard of secrecy is thrown around all parties which at the next preceding election polled more than 1 per cent of the whole vote cast, but the same law forces publicity and pledges on any party which casts less than 1 per cent of the whole vote. This is certainly an unlawful discrimination.

Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272; *Monroe v. Collins*, 17 Ohio St. 665.

The number of tickets put into the field can, and must, be left to the discretion and judgment of those entitled to vote. And this discretion and judgment will not often be abused. If any party, no matter how small, represents a just and vital issue, it should be given the privilege, with other parties, to maintain it on equal footing with them. If it represents a false idea, or one of prejudice or hate, it will not stand long.

Where is the safeguard to our freedom of the ballot as guaranteed by both state and National Constitutions, if encroachments such as now stand on our statute books are upheld by the courts?

If parties are prohibited by these laws from getting a ticket on the official ballot they must either vote for the candidates of one of the old parties or refrain from voting entirely. This is disfranchisement of the citizen.

Daggett v. Hudson, 43 Ohio St. 548, 54 Am. Rep. 832.

Mr. G. T. Stewart also for relator.

Messrs. Charles W. Voorhees, Florizel Smith, and William J. Ford, for defendants:

A writ of mandamus will not be awarded in the absence of a clear legal right to the object sought.

State, Baen, v. Yeatman, 22 Ohio St. 546.

The petition fails to set forth the fact that the nomination paper that was rejected contains a provision to the effect that each signer thereto thereby pledges himself to support and vote for the candidate or candidates whose nominations are therein requested.

The Constitution does not inhibit this regulation.

De Walt v. Bartley, 146 Pa. 525; *State, Ransom, v. Black*, 54 N. J. L. 446, 16 L. R. A. 769.

Mr. F. S. Monnett, Attorney General, also for defendants.

Shauck, J., delivered the opinion of the court:

It is admitted that by the express provision of the act of April 8, 1898, a pledge in a nomination paper that those who sign it will vote for the candidates whose nomination is requested is a condition to their right to have the names of the nominees printed on the ballot. If the prescribed condition is

valid, the law does not enjoin upon the defendants the duty of performing the act which the relator asks us to command. It is said, however, that the provision of the act which prescribes this condition is void, because it restricts the right of suffrage as guaranteed by §§ 1 and 2 of article 5 of the Constitution, ordaining:

"Sec. 1. Every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward in which he resides such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections.

"Sec. 2. All elections shall be by ballot."

It is not doubted that the power of the legislature over the subject is restricted to laws regulating the exercise of the right, nor that such laws "must be reasonable, uniform, and impartial, and calculated to facilitate and secure, rather than to subvert or impede, the exercise of the right to vote." The implied limitation was so defined in *Monroe v. Collins*, 17 Ohio St. 685, and its enforcement is obviously a judicial duty, to the end that the right may not be defeated by indirect means. The application of the limitation to this enactment is the subject of contention. It does not seem to be doubted that the provision in question operates uniformly and impartially on all political parties and sections of voters. Whatever discrimination it makes is on account of numbers solely. It is said, however, that it unreasonably impedes the exercise of the right to vote of the sections of voters to whom it applies. In *State, Plimmer, v. Poston*, 58 Ohio St. 620, 42 L. R. A. 237, we decided that the requirement of § 0, that certified nominations must represent a party which at the next preceding election had polled at least 1 per cent of the entire vote cast in the state, is valid. This was in view of the alternatives providing for procuring nominations on the ballot by means of petitions or nomination papers, and of every voter to supply the names of all persons for whom he may desire to vote, whether nominees of any party or not. Obviously the same constitutional considerations apply to the requirement as to the number of electors who shall sign nomination papers. The pledge required by the amendment now under consideration is a provision by the legislature to secure good faith on the part of the electors who sign such nomination papers. It was required, in view of the facts that at the preceding election six tickets were printed upon the blanket ballot, which required, to secure their places on the ballot, an aggregate of more than 102,000 votes at the prior election, or signatures to nomination papers, and which six tickets received at the election an aggregate of but 16,321 votes. One nomination paper was signed as it was required to be, by more than 10,200 electors for the nomination of a state ticket, which at the election received but 477 votes in the entire state. It can hardly be necessary to say that it is not practicable for the state to provide a ballot large enough to afford places for tickets for

each of such small sections of its voters, who number more than a million. If the general assembly is without power to enact such provisions as will maintain the practicability of the Australian ballot, it must have been without power to pass the act of April 18, 1892, which provided for it; and the denial of the validity of the amendment now under consideration is a denial of the validity of the original act. This does not seem to conflict with the views of counsel for the relator, for one of them, after speaking of the election of 1897, says: "The next session of the general assembly witnessed the closing plot of a revolution in the voting system commenced in April, 1892, and concluded in April, 1898." In view of the uniformity of the decisions upon the subject of the validity of laws providing for the system, the general acquiescence in it, and the number of cases in which we have enforced it, it does not now seem necessary to enter upon a discussion of the general subject.

It is said that this provision of the act destroys the secrecy of the ballot. The secrecy of the ballot is not preserved or required by the section of the Constitution which ordains that all elections shall be by ballot. In some of the states similar constitutional provisions are carried into effect by statutes which require all ballots to be so marked as to identify the persons by whom they are cast. Nor does this provision require any elector to disclose his purpose with reference to the character of his vote, unless he voluntarily does so as a petitioner on a nomination paper. The act merely defines the conditions on which the state will cause tickets to be printed upon the ballot, leaving every elector entirely free to vote a ticket that has otherwise acquired a place on the ballot, or to supply in secrecy the names of the persons for whom he desires to vote, or become a petitioner by giving the required pledge.

Nor can this requirement be held void because it is not logically consistent with the provisions of the act which prohibit the marking or exposing of his ballot by an elector. The original act and its amendments seem to be the result of a very sincere desire of the legislature to prevent the repetition of frauds upon the elective franchise which were notorious, and the moral coercion of electors which some believed to have been practised. Can it be said to be inconsistent, in an act passed for such a purpose, that an elector is forbidden to exhibit or mark his ballot for the purpose of showing that he has complied with the condition upon which he is to receive a bribe, and a petitioner is required to give such pledge as to his intention as will show that he signs a nomination paper in good faith? Moreover, the logical inconsistency of the provisions of a statute has never been regarded as a reason for declaring any of them void. Much that is said in the briefs of counsel and most of the cases cited relate, as does *Monroe v. Collins*, to enactments which impede and restrict the exercise of the right to vote. The provisions now under consideration, defining the conditions under which the state will provide tickets and thus facilitate the exer-

cise of the right, and leaving to every elector an opportunity to vote according to his preference, are within the power of the legislature. In view of the evils to be remedied, and the ends to be attained, we cannot say that any of them is unreasonable.

Writ refused.

Spear, Ch. J., and Minshall, J., dissent.

STATE of Ohio

v.

Harry MARTIN, alias Jim Anderson.

(.....Ohio.....)

*If imprisonment for a felony is terminated by an unconditional pardon, it is not to be regarded as one of the two former imprisonments for felony required by § 7388-11, 2 Bates's Anno. Stat., to place the accused in the category of habitual criminals.

(November 20, 1898.)

EXCEPTIONS by the state to rulings of the Court of Common Pleas for Franklin County made during the trial of an indictment charging defendant with grand larceny in which it was sought to secure his imprisonment as an habitual criminal. *Overruled.*

Statement by the Court:

One Martin was indicted for grand larceny committed on the 22d day of December, 1896. The indictment also charged that at the December term, 1877, of the court of common pleas of Wayne county, the defendant, as Elbert J. Anderson, had been convicted of the crime of grand larceny, and sentenced to imprisonment in the penitentiary, and that he was actually imprisoned in the penitentiary under that sentence, and that at the April term, 1893, of the common pleas court of Franklin county, he was convicted and sentenced to the penitentiary for burglary and grand larceny, and underwent the imprisonment imposed by the sentence. The defendant specially pleaded in bar of the allegations of the indictment charging him as an habitual criminal that on the 25th day of June, 1879, the said Elbert J. Anderson "was given an unconditional pardon for said conviction, sentence, and imprisonment by the governor of Ohio." A demurrer to this plea was interposed by the prosecuting attorney, and overruled by the court, to which ruling the prosecuting attorney excepted.

Messrs. F. S. Monnett, Attorney General, and George C. Blankner, for the State:

The pardon relieved defendant of the entire penalty incurred by his offense, but nothing more.

Mount v. Com. 2 Duv. 93.

*Headnote by the Court.

NOTE.—For enhanced penalty for crimes committed by habitual offenders, see note to *Re Miller* (Mich.) 34 L. R. A. 398; also, with respect to the constitutional provision against cruel and unusual punishments, note to *State, Garvey, v. Whitaker* (La.) 35 L. R. A. 579. 43 L. R. A.

Mr. J. E. Sater, for defendant:

Where complete power to pardon is conferred upon the executive, it may be doubted if the legislature can impose restrictions under the name of rules or regulations.

Cooley, Const. Lim. 5th ed. p. 138, *116; *Knapp v. Thomas*, 39 Ohio St. 392, 48 Am. Rep. 462; *State, Whiteman, v. Chase*, 5 Ohio St. 528; *Diehl v. Rodgers*, 169 Pa. 316; *Singleton v. State*, 38 Fla. 297, 34 L. R. A. 251; *State v. Sloss*, 25 Mo. 291, 69 Am. Dec. 467; *State v. McIntire*, 59 Am. Dec. 572, note, 46 N. C. (1 Jones, L.) 1.

The pardoning power of the governor is subject to no limitations other than those found in the Constitution, and the consequences attaching to a pardon granted by the governor cannot be enlarged or curtailed by legislative enactment or judicial construction.

1 Bishop, *New Crim. L.* 1892, § 998, defines pardon as "a remission of guilt."

Hay v. Tower Division Justices, L. R. 24 Q. B. Div. 561; *Leyman v. Latimer*, L. R. 3 Exch. Div. 15, 352. 13 Cox, C. C. 632, 14 Cox, C. C. 51; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366; *Hildreth v. Heath*, 1 Ill. App. 82; *Edwards v. Com.* 78 Va. 39, 49 Am. Rep. 377.

Another class of authorities defines pardon as a "remission of the punishment of guilt."

Bishop sustains the reasoning and theory of the *Edwards Case* and disapproves of the doctrine announced in *Mount v. Com.* 2 Duv. 93.

The doctrine of the *Garland Case* was but a reiteration of that previously announced by the Supreme Court of the United States.

Armstrong's Foundry v. United States, 6 Wall. 766, 18 L. ed. 882; *Knote v. United States*, 95 U. S. 149, 24 L. ed. 442; *Lilly, Abridgment*, 270, quoted in *Ex parte Hunt*, 10 Ark. 288; 5 Bacon, Abr., title *Pardon*, sub. H.

The Ohio law relating to the effect of a pardon follows the *Garland* and *Knote Cases*.

Knapp v. Thomas, 39 Ohio St. 381, 48 Am. Rep. 462.

The pardon makes "the offender a new man." A new man is an innocent man.

17 Am. & Eng. Enc. Law, p. 325; *Singleton v. State*, 38 Fla. 297, 34 L. R. A. 251; *Diehl v. Rodgers*, 169 Pa. 316; *State v. Foley*, 15 Nev. 64, 37 Am. Rep. 458; *Carlisle v. United States*, 16 Wall. 147, 21 L. ed. 426; 4 Bl. Com. p. 402; *United States v. McKee*, 4 Dill. 128; *Cooley, Const. Lim.* 5th ed. p. 137.

Pardoned crimes should not be taken into consideration in applying the habitual criminal act.

Edwards v. Com. 78 Va. 39, 49 Am. Rep. 377; *Com. v. Morrow*, 9 Phila. 583.

Per Curiam:

It is provided in § 7388-11, 2 Bates's Anno. Stat., that "every person who, after having been twice convicted, sentenced, and imprisoned in some penal institution for felony, whether committed heretofore or hereafter, and whether committed in this state or elsewhere within the limits of the United States

of America, shall be convicted, sentenced, and imprisoned in the Ohio penitentiary for felony hereafter committed, shall be deemed and taken to be an habitual criminal, and on the expiration of the term for which he shall be so sentenced, he shall not be discharged from imprisonment in the penitentiary, but shall be detained therein for and during his natural life," etc. The question presented by the exception is whether a former conviction and imprisonment for a felony, on account of which the governor has granted an unconditional pardon, may be regarded as one of the former convictions necessary to place the accused in the category of habitual criminals, as defined by the act. It may be that the criminal habit is as certainly indicated by the commission of felonies for which unconditional pardons have been

granted as by those whose penalties have been suffered to the end. But we must presume that the legislature enacted this section intending that the language should be construed according to the commonly received view as to the effect of a pardon. That view with reference to legislation of this character is that: "If a second offense is made by statute more heavily punishable than the first, then, if the first is pardoned, it is obliterated. The consequence of which is that a like offense afterward committed is not a second, and is punishable only as a first." 1 Bishop, New Crim. L. § 919; *Edwards v. Com.* 78 Va. 39, 49 Am. Rep. 377. The case of *Mount v. Com.* 2 Duv. 93, has not been accepted as a correct statement of the law.

Exception overruled.

RHODE ISLAND SUPREME COURT.

Pardon ARMINGTON

v.

Julius PALMER *et al.*

Gardiner C. SIMS

v.

SAME.

(.....R. I.....)

1. An injunction against the wrongful assumption and use by a corporation of the name of an individual, or of another corporation, may be granted in a suit by the owner of the name without the intervention of the state, if there is no statute to the contrary.
2. A suit to restrain the use of its name by a corporation is not in effect a suit to annul the corporation, which must be brought by the state.
3. A corporation which still has assets consisting of accounts, bills, and notes receivable, which were excepted from a sale of the remainder of the corporate property, can, without showing actual damage, restrain the use of its name by another corporation which has purchased the plant and is continuing the business of the former.
4. The absence of fraudulent intent is no defense to a corporation in a suit for wrongfully assuming and using a name belonging to another.
5. A purchase of the plant, machinery, stock, and such visible property of a manufacturing corporation, although it carries the right to use the name of the articles manufactured, does not give the purchaser the right to take the name of the corporation.
6. A vote of a corporation which is purely voluntary and without consideration, to give the use of the corporate name to

a new corporation which has previously purchased the plant of the former, is ineffectual as against a minority who do not consent.

(December 27, 1898.)

SUITS to enjoin defendants from using a name which was alleged to be an unlawful interference with the rights of complainants. *Judgment for complainants.*

The facts are stated in the opinion.

Messrs. Archibald C. Matteson and Amasa M. Eaton, for complainants:

The illegal use of a corporate name will be restrained by a court of equity upon the principles applicable to trademark cases.

Putnam v. Sweet, 1 Chand. (Wis.) 286; *Newby v. Oregon C. R. Co.* Deady, 609; *Holmes, D. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324; *Merchant Bkg. Co. v. Merchants' Joint Stock Bank*, L. R. 9 Ch. Div. 560; *Massam v. Thorley's Cattle Food Co.* L. R. 14 Ch. Div. 748; *Guardian Fire & Life Assur. Co. v. Guardian & General Ins. Co.* 43 L. T. N. S. 791; *William Rogers Mfg. Co. v. Rogers & S. Mfg. Co.* 11 Fed. Rep. 495; *Goodyear Rubber Co. v. Goodyear's Rubber Mfg. Co.* 21 Fed. Rep. 276; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. Rep. 94; *Farmers' Loan & T. Co. v. Farmers' Loan & T. Co.* 21 Abb. N. C. 104; *LePage Co. v. Russia Cement Co.* 5 U. S. App. 112, 51 Fed. Rep. 941, 2 C. C. A. 555, 17 L. R. A. 354; *Saunders v. Sun Life Assur. Co.* [1894] 1 Ch. 537; *DeLong v. DeLong Hook & Eye Co.* 10 Misc. 577; *William Rogers Mfg. Co. v. R. W. Rogers Co.* 86 Fed. Rep. 56; *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42; *Investor Pub. Co. v. Dobinson*, 72 Fed. Rep. 603; *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.* 35 U. S. App. 843, 70 Fed. Rep. 1017, 17 C. C. A. 576; 1

NOTE.—The rights of corporations in respect to names, which are very elaborately considered in the briefs and opinion in the above case, are also considered in the following cases in this series. *American Order of S. C. v. Merrill* (Mass.) 8 L. R. A. 320; *International Trust Co.* 43 L. R. A.

v. International Loan & T. Co. (Mass.) 10 L. R. A. 738; *Chas. S. Higgins Co. v. Higgins Soap Co.* (N. Y.) 27 L. R. A. 42; *Grand Lodge, A. O. U. W. v. Graham* (Iowa) 31 L. R. A. 133; and *Supreme Lodge K. of P. v. Improved Order K. of P.* (Mich.) 38 L. R. A. 658.

Thomp. Corp. § 296; Boone, Corp. § 32; 2 High, Inj. 3d ed. § 907; 1 Morawetz, Priv. Corp. 2d ed. §§ 296, 357; Angell & A. Corp. 11th ed. 432, 433; *Plant Seed Co. v. Michel Plant & Seed Co.* 23 Mo. App. 579.

If the corporation refuses to bring suit, a stockholder may bring it, making such corporation a party defendant.

Newby v. Oregon C. R. Co. Deady, 609.

Under a statute forbidding the carrying on of the business of banking by a foreign corporation under a name previously in use by a domestic corporation, the proper party to petition for injunction is the party aggrieved, i. e. the domestic corporation.

International Trust Co. v. International Loan & T. Co. 153 Mass. 271, 10 L. R. A. 758.

The question whether the names are so nearly identical as to mislead must be settled by the application of the principles which apply to analogous cases respecting trademarks.

Ibid.; *Farmers' Loan & T. Co. v. Farmers' Loan & T. Co.* 21 Abb. N. C. 104; *Reeves v. Denicke*, 12 Abb. Pr. N. S. 92.

It is fraud on a person who has established a trade and carried it on under a given name that some other person should assume the same name.

Lee v. Haley, L. R. 5 Ch. 155; *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 896, 45 U. S. App. 62, 74 Fed. Rep. 936, 21 C. C. A. 178.

Demand upon the party committing the wrong to cease doing so, before proceeding against such a party by a bill for an injunction, is not necessary if it is plain that it would be of no avail.

Brewer v. Proprietors of Boston Theatre Co. 104 Mass. 378; *Mussina v. Goldthwaite*, 34 Tex. 125, 7 Am. Rep. 281; *Heath v. Erie R. Co.* 8 Blatchf. 347; *Rogers v. Lafayette Agri. Works*, 52 Ind. 296; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Currier v. New York, W. S. & B. R. Co.* 35 Hun, 355; *Eaton v. Robinson*, 18 R. I. 396; *Loftus v. Farmers' Shipping Asso.* 8 S. D. 201; *Ziegler v. Lake Street Elev. R. Co.* 46 U. S. App. 242, 76 Fed. Rep. 662, 22 C. C. A. 465.

Intending incorporators may be prevented by injunction from using a name similar to that of a corporation already in existence.

Hendriks v. Montagu, L. R. 17 Ch. Div. 638; *Tussaud v. Tussaud*, 62 L. T. N. S. 633.

A charter may be refused upon the ground that the name applied for is too much like the name of a corporation already in existence.

First Presby. Church, 2 Grant, Cas. 240; *Re Sons of Progress*, 14 W. N. C. 31; *Ex parte Walker*, 1 Tenn. Ch. 97.

Should the Armington & Sims Engine Company procure a dissolution of its charter, these complainants would have the right to resume the same business, in their own names, theretofore carried on by the Armington & Sims Engine Company, and to authorize others to use it.

McCardel v. Peck, 28 How. Pr. 120. See also *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324.

Where one trader has taken a substantial part of another's trademark or tradename, 43 L. R. A.

the onus of proving that purchasers would not be deceived rests upon the former.

Orr Ewing v. Johnston, L. R. 13 Ch. Div. 434, 40 L. T. N. S. 307; *Johnston v. Orr Ewing*, L. R. 7 App. Cas. 219; *Ford v. Foster*, L. R. 7 Ch. 611; *Singer Mfg. Co. v. Wilson*, L. R. 2 Ch. Div. 434, Reversed in L. R. 3 App. Cas. 376.

No one engaged in business, whether an individual, copartnership, association, or corporation, can use his own name with the intention or result of injuring another or imposing upon the public.

Sykes v. Sykes, 3 Barn. & C. 541; *Croft v. Day*, 7 Beav. 84; *Holloway v. Holloway*, 13 Beav. 209; *Clark v. Clark*, 25 Barb. 76; *Howe v. Howe Mach. Co.* 50 Barb. 236; *De Youngs v. Jung*, 7 Misc. 56.

No maker of Armington & Sims engines, except Armington & Sims themselves or their authorized successor, can hold himself out to the world as being Armington & Sims.

Wotherspoon v. Currie, L. R. 5 H. L. 508; *Singer Mfg. Co. v. Wilson*, L. R. 3 App. Cas. 376; *Massam v. Thorley's Cattle Food Co.* L. R. 14 Ch. Div. 748.

Everyone, irrespective of any question of damages has a right to the exclusive use of his own name in the honest pursuit of his own business.

Reeves v. Denicke, 12 Abb. Pr. N. S. 902; *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489; *McLean v. Fleming*, 36 U. S. 245, 24 L. ed. 828; *Johnston v. Orr Ewing*, L. R. 7 App. Cas. 219; *Browne, Trademarks*, 3d ed. § 508.

Neither injury to the complainant nor actual fraud is necessary to entitle him to relief.

Davis v. Kendall, 2 R. I. 566; *Glenny v. Smith*, 2 Drew. & S. 476; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324; *Meriden Britannia Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 401; *Hookham v. Pottage*, L. R. 8 Ch. 91; *LePage Co. v. Russia Cement Co.* 5 U. S. App. 112, 51 Fed. Rep. 941, 2 C. C. A. 555, 17 L. R. A. 354; *Saunders v. Sun Life Assur. Co.* [1894] 1 Ch. 537.

Ignorance of the complainant's rights, and absence of intention to defraud, on the part of the respondent, are immaterial.

Coffeen v. Brunton, 4 McLean, 516; *Davis v. Kendall*, 2 R. I. 566; *Peterson v. Humphrey*, 4 Abb. Pr. 394; *Dale v. Smithson*, 12 Abb. Pr. 237; *Carter v. Carlile*, 31 Beav. 292; *Edelsten v. Edelsten*, 1 DeG. J. & S. 185.

Equity will restrain the wrongdoer by injunction, upon the grounds of protection of the complainant in the exercise of a legal right, the suppression of fraud, the prevention of irreparable mischief, or the misleading of the public.

Croft v. Day, 7 Beav. 84; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Glenny v. Smith*, 2 Drew. & S. 476; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324.

The remedy against the illegal or fraudulent use of complainant's name is by injunction.

Croft v. Day, 7 Beav. 84; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Holloway v. Holloway*, 13 Beav. 209; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Thompson v. Montgomery*, L. R. 41 Ch. Div. 35; *Russia Cement Co. v. LePage*, 147 Mass. 206; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. ed. 247; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.* 24 U. S. App. 395, 64 Fed. Rep. 841, 12 C. C. A. 432; *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 896; *Klotz v. Hecht*, 73 Fed. Rep. 822; *Investor Pub. Co. v. Dobinson*, 72 Fed. Rep. 603.

No one by dressing in another man's garments, or by assuming another man's name, shall be allowed to deprive the other of the gain or fame to which he is fairly entitled.

Knott v. Morgan, 2 Keen, 213; *Croft v. Day*, 7 Beav. 84; *Howard v. Henriques*, 3 Sandf. 725; *Marsh v. Billings*, 7 Cush. 322, 54 Am. Dec. 723; *Christy v. Murphy*, 12 How. Pr. 77; *Colton v. Thomas*, 2 Brewst. (Pa.) 308; *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.* 18 U. S. App. 372, 58 Fed. Rep. 884, 7 C. C. A. 558; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. ed. 247; *Coats v. Merrick Thread Co.* 149 U. S. 562, 37 L. ed. 847.

Where one palms off his own manufactures as those of another, he may be enjoined.

Holloway v. Holloway, 13 Beav. 209; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Radde v. Norman*, L. R. 14 Eq. 348; *Hirat v. Denham*, L. R. 14 Eq. 542; *Hookham v. Pottage*, L. R. 8 Ch. 91; *Singer Mfg. Co. v. Wilson*, L. R. 2 Ch. Div. 434, L. R. 3 App. Cas. 376; *Siegert v. Findlater*, L. R. 7 Ch. Div. 801; *Braham v. Beachim*, L. R. 7 Ch. Div. 848; *Metzler v. Wood*, L. R. 8 Ch. Div. 606; *Orr Ewing v. Johnston*, L. R. 13 Ch. Div. 434; *Johnston v. Orr Ewing*, L. R. 7 App. Cas. 219; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Somerville v. Schembri*, L. R. 12 App. Cas. 453; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. Rep. 94; *Thompson v. Montgomery*, L. R. 41 Ch. Div. 2; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 537, 34 L. ed. 997; *Chadwick v. Covell*, 151 Mass. 190, 6 L. R. A. 839; *Genesee Salt Co. v. Burnap*, 67 Fed. Rep. 534, 43 U. S. App. 243, 73 Fed. Rep. 818; *Buck's Stove & Range Co. v. Kiechle*, 76 Fed. Rep. 758.

The goodwill of a copartnership or of a corporation is an asset or property, may be sold, etc., and will be protected in equity.

Williams v. Wilson, 4 Sandf. Ch. 379; *Wedderburn v. Wedderburn*, 22 Beav. 84; *Remick v. Emig*, 42 Ill. 342; *Peltz v. Eichle*, 62 Mo. 171; *Sheppard v. Boggs*, 9 Neb. 257; *Beebe v. Hatfield*, 67 Mo. App. 609; *Washburn v. National Wall Paper Co.* 51 U. S. App. 380, 81 Fed. Rep. 17.

An assignment by a member of a manufacturing firm of all his right, title, and interest in and to the business and its assets, profits, and emoluments, without making any mention of any trademark or tradename, is not enough to show a relinquishment by the assignor of his right to use his own name in connection with similar manufactures, afterwards made by him.

Hazelton Boiler Co. v. Hazelton Tripod Boiler Co. 137 Ill. 231, 142 Ill. 494.

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Goodwill is not included in such terms as partnership property, credits and effects, nor stock and effects.

Hall v. Hall, 20 Beav. 139; *Howe v. Searling*, 19 How. Pr. 14; *Reeves v. Denicke*, 12 Abb. Pr. N. S. 92.

In the absence of express power corporations cannot sell, transfer, nor assign their franchises.

Coe v. Columbus P. & I. R. Co. 10 Ohio St. 372, 75 Am. Dec. 518; *Atkinson v. Marietta & C. R. Co.* 15 Ohio St. 21; *Com. v. Smith*, 10 Allen, 448, 87 Am. Dec. 672; *Richardson v. Sibley*, 11 Allen, 65; *Pullan v. Cincinnati & C. Air-Line R. Co.* 4 Biss. 35; *Carpenter v. Black Hawk Gold Min. Co.* 65 N. Y. 43; *State v. Morgan*, 28 La. Ann. 492; *Fietsam v. Hay*, 122 Ill. 293.

The right to be a corporation by a particular name is a franchise.

Hazelton Boiler Co. v. Hazelton Tripod Boiler Co. 137 Ill. 231; *Paulino v. Portuguese Ben. Asso.* 18 R. I. 165, 20 L. R. A. 272.

The franchises of a corporation cannot be sold, leased, mortgaged, nor taken on execution.

2 Morawetz, Priv. Corp. § 929; *Hall v. Sullivan R. Co.* Brun. Coll. Cas. 613, 2 Redf. Am. Ry. Cas. 621; *Atkinson v. Marietta & C. R. Co.* 15 Ohio St. 21; *Wood v. Bedford & B. R. Co.* 8 Phila. 94; *Hays v. Ottawa, O. & F. R. Valley R. Co.* 61 Ill. 422; *Black v. Delaware & R. Canal Co.* 24 N. J. Eq. 455; *Middlesex R. Co. v. Boston & O. R. Co.* 115 Mass. 347; *Randolph v. Larned*, 27 N. J. Eq. 557; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950.

Messrs. Comstock & Gardner, for respondents:

A suit to enjoin the use of a certain name by a legally organized corporation can only be maintained when brought by or in behalf of the state.

Paulino v. Portuguese Ben. Asso. 18 R. I. 165, 20 L. R. A. 272.

A charter of incorporation obtained by fraud remains valid until the state has elected to set it aside, and the rescission must be declared judicially and a proceeding instituted for that purpose by a proper government officer.

2 Morawetz, Priv. Corp. §§ 769, 938, 1040; *Rice v. National Bank of the Commonwealth*, 126 Mass. 300.

The right to use a name of a corporation selected and conferred in accordance with the provision of the law cannot be taken away at the suit of private parties.

Boston Rubber Shoe Co. v. Boston Rubber Co. 149 Mass. 436; *American Order of S. C. v. Merrill*, 151 Mass. 558, 8 L. R. A. 320.

The same principles of law must be applied to this bill brought by a private party to prevent the use of a corporate name as would be applied to a bill brought to restrain the use of a firm or trade name, and these principles and these alone have been applied to every cause of this character brought by private parties.

Holmes, B. & H. v. Holmes, B. & A. Mfg. Co. 37 Conn. 278, 9 Am. Rep. 324; *Celluloid*

Mfg. Co. v. Cellonite Mfg. Co. 32 Fed. Rep. 84; *Newby v. Oregon C. R. Co.* Deady, 609; *Churton v. Douglas*, 28 L. J. Ch. N. S. 841; 1 *Thomp. Corp.* § 290.

All that the public demands is, that when it orders an engine of this *Armington & Sims* Company it shall get the machine which has for fifteen years been known as the *Armington & Sims* engine; and as the bill does not intimate a doubt of this it cannot be maintained on the ground that the public is misled or defrauded.

26 *Am. & Eng. Enc. Law*, p. 260; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 *Am. Rep.* 324; *Oarmichel v. Latimer*, 11 R. I. 395, 23 *Am. Rep.* 481; *Leather Cloth Co. v. American Leather Cloth Co.* 11 H. L. Cas. 523; *Hall v. Barrows*, 4 DeG. J. & S. 150; *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769; *Oakes v. Toussimierre*, 49 Fed. Rep. 447; *Condy v. Mitchell*, 37 L. T. N. S. 766.

That proprietary right which a man has in his name or in any name as the designation of a business carried on by him is assignable, and will pass with the sale of such business even under a general assignment for the benefit of creditors.

Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L. R. A. 42; *Snyder Mfg. Co. v. Snyder*, 54 Ohio St. 86, 31 L. R. A. 657; *Hegeman v. Hegeman*, 8 Daly, 1; *Hall v. Barrows*, 4 DeG. J. & S. 156; *Witthaus v. Braun*, 44 Md. 303; *Banks v. Gibson*, 34 Beav. 566; *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. (Pa.) 321; *Hozie v. Chaney*, 145 Mass. 592; *Pepper v. Labrot*, 8 Fed. Rep. 29; *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769; *Booth v. Jarrett*, 52 How. P. 169.

When an inventor or first maker of an article who gives his name to such article has caused the article to be so associated with the name given to it that it has ceased to indicate him as the manufacturer of the goods, and his peculiar skill and character, and come to mean the goods of a particular type made at a particular factory or by a particular process, such name may be used by the successor in business of the original inventor, or by any person who has the legal right to manufacture such article.

26 *Am. & Eng. Enc. Law*, p. 260; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Jennings v. Johnson*, 37 Fed. Rep. 364; *Croft v. Day*, 7 Beav. 84; *Singer Mfg. Co. v. Stanage*, 6 Fed. Rep. 279; *Singer Mfg. Co. v. Riley*, 11 Fed. Rep. 706; *Goodyear India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 123 U. S. 598, 32 L. ed. 535; *Leclanche Battery Co. v. Western Electric Co.* 23 Fed. Rep. 276; *Wheeler & Wilson Mfg. Co. v. Shakespear*, 39 L. J. Ch. N. S. 36; *Brill v. Singer Mfg. Co.* 41 Ohio St. 127, 52 *Am. Rep.* 74; *Frazier v. Frazier Lubricator Co.* 121 Ill. 147.

The right to the exclusive use of a trade-mark (if such exclusive right exists) is inseparable from the right to make and sell the article which it has been appropriated to designate. It may be abandoned if the business of the proprietor is abandoned. It may become identified with the place where the article is manufactured.

Atlantio Mill. Co. v. Robinson, 20 Fed. Rep. 217.

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Stinness, J., delivered the opinion of the court:

These bills set out that the complainants were formerly partners, under the name of *Armington & Sims*, in the manufacture of high-speed engines, which were protected by patents. In 1882 they procured an act of incorporation from the general assembly of this state, as the *Armington & Sims* Company, and upon organization they conveyed to the corporation all the assets of the partnership, including the patents and goodwill.

In 1883 another act of incorporation was procured for the *Armington & Sims Engine Company*, to which the former corporation made a similar conveyance. The latter corporation went on in business until August, 1890, when, becoming seriously involved, an agreement of six parts was entered into between the *Armington & Sims Engine Company*, a committee of the creditors of said corporation, creditors of said corporation who were not holders of its stock, creditors of the corporation who were holders of stock, holders of a majority of the stock of the corporation, and *Armington & Sims* as individuals. The indebtedness of the corporation was extended for the term of three years; the sum of \$35,000 was advanced by certain creditors for small bills and a working capital; the control of the business was given to the creditors' committee, to whom a majority of the stock was transferred, and they were to sell the property of the corporation to pay its indebtedness, upon request of a majority of the creditors other than the stockholders of the company.

It was found to be impossible to carry on the business in that way, and upon request, as aforesaid, the property was sold at auction to the respondent *Scott*, who, with the respondents *Palmer* and *Bushnell*, organized, under the general laws of this state, a new corporation, with the name *Armington & Sims Company*.

A meeting of the *Armington & Sims Engine Company* was called to ratify and confirm the use of the name *Armington & Sims* in the name of the new corporation, and at said meeting, by a *viva voce* vote, and against the written protest of the complainant *Sims*, a resolution granting to the respondents the right to use the name *Armington & Sims Company* as the name of their corporation was declared to be passed, said *Armington* not being present.

The respondents, under this name, are engaged in business to sell "*Armington & Sims engines*" as "*Armington & Sims Company*, successors to *Armington & Sims Engine Company*."

The complainants, individually and as stockholders in the last-named company, claim that this a wrongful and injurious use of their names, against which they pray for an injunction restraining the use of such corporate name, and for other relief. The respondents demur to the bills upon the ground that a suit for such an injunction cannot be maintained by private parties against a corporation organized under the laws of this state, but that suit must be brought by or in behalf of the state; and also that no

facts are set out which entitle the complainants to relief.

Upon the first ground of demurrer the question is whether a private party can maintain a bill against a corporation for the wrongful assumption of its name. The respondents rely upon *Rice v. National Bank of the Commonwealth*, 126 Mass. 300; *Boston Rubber Shoe Co. v. Boston Rubber Co.* 149 Mass. 436; *American Order of S. C. v. Merrill*, 151 Mass. 558, 8 L. R. A. 320; and *Paulino v. Portuguese Ben. Asso.* 18 R. I. 165, 20 L. R. A. 272.

The first of these cases was an information quo warranto, to exclude the respondents from exercising the franchise of being a corporation. The court held that such a bill must be filed by the state, and not by private parties. With this doctrine we need not disagree. The second case was a petition for leave to file an information quo warranto, and to restrain the respondent from doing business under the name of the Boston Rubber Company, claiming that this was distinct from the franchise to be a corporation. The statutes of Massachusetts, of 1870, provided that the name assumed in the agreement of association should not be changed but by act of the legislature, and also that the agreement was to be submitted to a commissioner of corporations for his approval. The court held that, as it was within his discretion to refuse to approve it, the court could not exercise that discretion, and the certificate was conclusive. The court said that the statute was not intended to prevent the fraudulent use of tradenames, but to prevent the identity of corporate names. The statute, like our own, required that the name should not be one in use by any existing corporation of the state. The statutes of Massachusetts (Pub. Stat. chap. 186, § 17) provide for an application to the court in cases of private injury; but as the petitioner had acquiesced in the use of the name for ten years, without injury, the court held that it did not make out a case for injunction under the statute. The third case is to the same effect, that the approval by the insurance commissioner of the name adopted by a beneficial association is conclusive, in a private suit, of the right of the association to such corporate name. Both of these latter cases so clearly rest upon the conclusiveness of the judgment of the commissioner that they are hardly in point in respect to our statute, which has no such provision. Judge Holmes, in *American Order of S. C. v. Merrill*, foresaw a case like this one, in saying: "When there are no statute provisions as to the choice of names, and parties organize a corporation under general laws, it may be that they choose the name at their peril, and that, if they take one so like that of an existing corporation as to be misleading, and thereby to injure its business, they may be enjoined, if there is no language in the statute to the contrary."

The possibility here suggested is fully sustained by many cases, among which are the following, some of which were cited by Judge Holmes: *Putnam v. Sweet*, 1 Chand. (Wis.) 286; *Newby v. Oregon C. R. Co.* 43 L. R. A.

Deady, 609; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Ann. Rep. 324; *Farmers' Loan & T. Co. v. Farmers' Loan & T. Co.* 21 Abb. N. C. 104; *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. Rep. 94; *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.* 17 C. C. A. 576, and note, 35 U. S. App. 843, 70 Fed. Rep. 1017; *Plant Seed Co. v. Michel Plant & Seed Co.* 23 Mo. App. 579, Affirmed 37 Mo. App. 313.

The principles upon which these cases rest are that, although a corporation may be legally created, it can no more use its corporate name in violation of the rights of others than an individual can use his name, legally acquired, so as to mislead the public and to injure another. The principle adopted is similar to that of a tradename or trademark, and is applied accordingly. Consequently a court of equity has jurisdiction in such a case, without the intervention of the state.

The case of *Paulino v. Portuguese Ben. Asso.* is quite different from the case now before us. In that case the complainants, a voluntary association, had appointed a committee to procure a charter, which was procured and under which the corporators had organized. The bill sought to annul the charter, because of alleged misconduct on the part of the corporators. The court held that this could not be done. Clearly the remedy of the complainants was of a different sort. After referring to some of the cases cited above, the court used the same language, herein quoted from the opinion of Judge Holmes, in *American Order of S. C. v. Merrill*, thus intimating the very right which is claimed in this case.

But the respondents argue, as was argued in the Massachusetts cases, that to restrain the use of the name is practically to annul the corporation, because it cannot act without a name. We do not think that this result follows. According to the allegations of the bill, the name assumed by the respondents is so like that of the older corporation as to be misleading and injurious. We see no reason why the corporation, if it is restrained from using its present name, may not, under R. I. Gen. Laws, chap. 176, § 7, choose another name. That section, relating to an increase of the capital stock, says: "Such agreement may be amended in any other particular, excepting as provided in the following section," which relates to a decrease of the capital stock. The corporation, therefore, may still exist and enjoy the franchise, except in the wrongful use of its present name. This fact distinguishes the case from those in Massachusetts. Our opinion is that the bill states a case, and that the demurrer must be overruled.

Upon the merits, subject to the demurrer, the case is submitted on bill and answer. There is no dispute that the respondents have the right to make and sell the Armington & Sims engine, the only contention being that of the right to use the name of the former maker, The Armington & Sims Engine Company, which had become known and established, and to which the stock of the original Armington & Sims Company had

been surrendered and canceled, and thus the original corporation had ceased to exist. Stated generally, the defense is that having the right to make the engine the respondents have the right to use the name, which, for this reason, cannot injure the complainants; that no fraud was intended in the choice of the name; and the authority given by the vote above referred to for the use of the name by the respondents.

The use of a tradename is in some respects different from that of a trademark. The latter usually relates chiefly to the thing sold; while, in addition to this, the former involves the source from which it comes, the individuality of the maker, both for protection in trade and for avoiding confusion in business affairs, as well as for securing to him the advantage of any good reputation which he may have gained. The law of trademark is designed chiefly for the protection of the public from imposition; that of tradename for the protection of the party entitled to it. A case, therefore, in regard to tradename is of somewhat broader scope than one relating to a trademark. It would be of little use to go over the numerous cases upon these subjects, as they all agree in principle, however variant may have been its application. For this case it is enough to say that, although one may make and sell an unprotected article, he cannot simulate the name or product of another so as to trench upon the latter's rights or to mislead the public. Lord Langdale stated the rule plainly in *Perry v. Truefitt*, 6 Beav. 66, cited in 2 Story, Eq. Jur. § 951, note, as follows: "The principle on which both the courts of law and of equity proceed, in granting relief and protection in cases of this sort, is very well understood. A man is not to sell his own goods under the pretense that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or *indicia* by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. . . . The case of *Millington v. Fox*, 3 Myl. & C. 338, seems to have gone this length, that the deception need not be intentional." Applying this principle to this case it is demonstrative. The name adopted by the respondent is so close a resemblance to that of the *Armington & Sims Engine Company* that there can be little doubt that it would be misleading and confusing in business matters, and the respondent advertises itself as the successor of said company. That company is still in existence. So far as appears it still has assets, because its accounts, bills, and notes receivable were excepted from the sale of its property. As such corporation it has the right to its name, free from simulative interference. Some of the cases cited by the respondents are of a different character. They relate to the right to use the name which has become descriptive of an article, e. g. "*Singer*," as applied to a sewing machine, *Singer Mfg. Co. v. Stanage*, 6 Fed. Rep. 279; *Singer Mfg. Co. v. Riley*, 11 Fed. 43 L. R. A.

Rep. 706; *Brill v. Singer Mfg. Co.* 41 Ohio St. 127, 52 Am. Rep. 74; "*Goodyear Rubber*," *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 32 L. ed. 535. In this case the decision is based on the descriptive character of the name, but the court suggests that, as the respondent was the elder company, if there was any exclusive right it would be with that company rather than with the complainant.

Several of the cases cited support the complainants. *Croft v. Day*, 7 Beav. 84, enjoined the respondents from using their own names against the right of a prior firm of *Day & Martin*. *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828, held that the appellant infringed a trademark in using the name "*Dr. McLane's Liver Pills*" and that proof of fraudulent intent is not required where the infringement clearly appears. *Frazer v. Frazer Lubricator Co.* 121 Ill. 147, where the appellant had sold his right to his preparation known as "*Frazer's Axle Grease*" with the right to use his name. He afterwards undertook to carry on the business as *S. Frazer & Co.*, but was enjoined.

But the respondents claim that the *Armington & Sims Engine Company* is not in business, and so no injury can follow. As we have said, the company is still in existence, and may be put on a footing for active business by a further contribution of capital, a thing which is often done. It has the right to its name, and if its right be violated it is not necessary to show actual damage, nor will the absence of fraudulent intent be a defense. *Davis v. Kendall*, 2 R. I. 566. This disposes of the defense on the ground of innocent intent.

The third branch of the defense, the claim of authority, cannot prevail. The respondent did not acquire the right to use the name by purchase. They bought only the plant, machinery, stock, and such visible property. The purchase of these does not carry the franchise or name of the corporation. Undoubtedly, as the respondents claim, the right to use the name goes with the right to manufacture, but this applies only to the use of the name in connection with the article, while the question here involved is the right to use the name of a maker, which stands upon a different ground.

The vote of the corporation is of no effect. In the first place, the majority of the stock was held by the creditor's committee, who do not appear to have held that amount of interest in the corporation. But if they had, or if the creditors whom they represented desired them so to vote, aside from the defect of record by which it is claimed that the vote of a majority appears, it was done after the sale of the property and the organization of a new company, and without consideration. It was therefore a purely voluntary act. It was not referred to in the sexpartite agreement, which was the foundation of the whole matter. A majority cannot give away the rights of a minority.

We are therefore of opinion that the demurrer to the bill must be overruled, and that upon the showing of the bill and answer the complainants are entitled to relief.

SOUTH CAROLINA SUPREME COURT.

W. L. MAULDIN *et al.*, *Respts.*,
v.
City Council of GREENVILLE, *Appt.*

(.....S. C.....)

Assessments upon owners of abutting lots for new sidewalks and drains, which were necessary only because of a change of the grade of the street, are in violation of the South Carolina Constitution, which requires the whole property of the municipality to be taxed for any public or corporate purpose.

(September 29, 1898.)

APPPEAL by defendant from a judgment of the Common Pleas Circuit Court for Greenville County in favor of plaintiffs in an action brought to enjoin defendant from enforcing an assessment for local improvements upon plaintiff's property. *Affirmed.*

The facts are stated in the opinion.

Messrs. Joseph A. McCullough and J. P. Carey, for appellant:

In *Mauldin v. Greenville*, 42 S. C. 293, 27 L. R. A. 284, this identical act and identical ordinance were before the court, and they were upheld so far as they relate to sidewalks.

Where the expense is to be assessed in proportion to the frontage the proper course is to ascertain the entire expense, both as to sidewalks and roadways, and charge it upon each lot in the proportion that its frontage bears to all the lots fronting on the street improved.

Elliott, Roads & Streets, p. 390.

It depends on the provisions of the special charter, or legislative act, whether or not notice to the abutter or proprietor is required in order to make him liable to pay the expense or cost of the local improvement, and in what manner it shall be given.

2 Dill. Mun. Corp. § 803; *Davis v. Lynchburg*, 84 Va. 861; *Gillette v. Denver*, 21 Fed. Rep. 824; *Cooley*, Taxn. p. 623; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763.

Parties seeking relief in equity from assessments alleged to be excessive or erroneous must show that they have exercised strict diligence in availing themselves of every opportunity elsewhere afforded for the correction of alleged errors.

2 Desty, Taxn. pp. 625, 662; 2 Dill. Mun. Corp. § 804; *Fanning v. Leviston*, 93 Cal. 186; *Wright v. Tacoma*, 3 Wash. Terr. 410; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772; *Nevin v. Roach*, 86 Ky. 492; *McKusick v. Stillwater*, 44 Minn. 372.

Under power to improve any street the city council is not required to improve the entire length of the street or none; it may improve part and confine the assessment to the lots adjoining the part improved.

2 Dill. Mun. Corp. § 799, note 1; *Scovill*

NOTE.—For former decision in this case, which is here overruled on one point, see *Mauldin v. Greenville* (S. C.) 27 L. R. A. 284. 43 L. R. A.

v. Cleveland, 1 Ohio St. 133; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159; *Craycraft v. Selvaige*, 10 Bush, 696; *St. Louis, Creamer, v. Clemens*, 36 Mo. 467; *Lafayette v. Fowler*, 34 Ind. 140; *Bacon v. Savannah*, 86 Ga. 301.

On reargument.

The legislature had the power to pass this act unless restrained by constitutional provisions.

Rose v. Charleston, 3 S. C. N. S. 369; *State v. Hayne*, 4 S. C. N. S. 420; *Mobile County v. Kimball*, 102 U. S. 703, 26 L. ed. 241.

The provisions in our Constitution with reference to taxation are not a limitation upon the power of the legislature in this respect. They are not exhaustive.

Polzer v. Campbell, 15 S. C. 593, 40 Am. Rep. 705; *State v. Hayne*, 4 S. C. N. S. 420; *Charlotte, C. & A. R. Co. v. Gibbs*, 27 S. C. 306; *State v. Columbia*, 6 S. C. N. S. 1; *Information v. Oliver*, 21 S. C. 318; *Information v. Jager*, 29 S. C. 438.

The word "tax" as used in these sections of the Constitution, has no reference or application to "special assessments."

Cooley, Taxn. pp. 626, 627, note 4, 628, 632, 636, 638; *Illinois C. R. Co. v. Decatur*, 147 U. S. 198, 37 L. ed. 134; *Elliott, Roads & Streets*, p. 369; *Birmingham v. Klein*, 89 Ala. 461, 3 L. R. A. 369; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677; 2 Dill. Mun. Corp. §§ 737, 755, and note, 757, notes 1, 2; 2 Desty, Taxn. p. 1252, note 3; *Edgerton v. Green Cove Springs*, 19 Fla. 140; *Hayden v. Atlanta*, 70 Ga. 817; *Speer v. Athens*, 85 Ga. 40, 9 L. R. A. 402; *Goodrich v. Winchester & D. Turnp. Co.* 26 Ind. 119; *Warren v. Henry*, 31 Iowa, 31; *Morrison v. Hershire*, 32 Iowa, 271; *Holtzhauser v. Newport*, 94 Ky. 396; *Maddux v. Newport*, 12 Ky. L. Rep. 657; *Barber Asphalt Paving Co. v. Gogreve*, 41 La. Ann. 251; *Dorgan v. Boston*, 12 Allen, 223; *Brooks v. Baltimore*, 48 Md. 265; *Williams v. Detroit*, 2 Mich. 560; *Hoyt v. East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76; *Daily v. Scope*, 47 Miss. 367; *Garrett v. St. Louis*, 25 Mo. 505, 69 Am. Dec. 475; *People, Griffin, v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330; *Winona & St. P. R. Co. v. Watertown*, 1 S. D. 461; *Cooley*, Const. Lim. pp. 617, 618; *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569; *Willard v. Presbury*, 14 Wall. 676, 20 L. ed. 721; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Lightner v. Peoria*, 150 Ill. 80; *Wilson v. Philippi*, 39 W. Va. 75; *Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 135; *Auburn v. Paul*, 84 Me. 212; *Chrisman v. Brookhaven*, 70 Miss. 477; *English v. Wilmington* (Del.) 37 Atl. 158; *Kelly v. Minneapolis*, 57 Minn. 294, 26 L. R. A. 92; *Hilliard v. Asheville*, 118 N. C. 845; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270.

A statute which authorized a city to open and improve streets, and to assess the cost thereof on owners of adjoining lots, does not deprive such owners of their property without due process of law, nor deny to them the equal protection of the law.

Walton v. Nevin, 128 U. S. 578, 32 L. ed. 544; *Cooley*, Const. Lim. pp. 617, 618; 2 Dill. Mnn. Corp. § 754; *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330; *Speer v. Athens*, 85 Ga. 49, 9 L. R. A. 402; *People, Griffin, v. Brooklyn*, 4 N. Y. 418, 55 Am. Dec. 266; *Cooley*, Taxn. p. 624.

Assessments for sidewalks have been uniformly sustained by the courts, although held otherwise by some of them in regard to the other street improvements.

Davis v. Litchfield, 145 Ill. 313, 21 L. R. A. 565, note; *Stato v. Portage*, 12 Wis. 563, 14 Wis. 551; *Paxson v. Sweet*, 13 N. J. L. 196; *State, Agens, v. Newark*, 37 N. J. L. 416, 18 Am. Rep. 729; *Sands v. Richmond*, 31 Gratt. 571, 31 Am. Rep. 742; *Palmer v. Way*, 6 Colo. 106; *Bordages v. Higgins*, 1 Tex. Civ. App. 56; *Deblois v. Baker*, 4 R. I. 445; *Greenburg v. Young*, 53 Pa. 280; *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 503; *Bonnall v. Lebanon*, 19 Ohio, 418; *Hudler v. Golden*, 36 N. Y. 446; *Scott County v. Hinds*, 50 Minn. 204; *Lowell v. Hadley*, 8 Met. 180; *White v. People, Bloomington*, 94 Ill. 604; *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Reinken v. Fuchring*, 130 Ind. 382, 15 L. R. A. 624; *Washington v. Nashville*, 1 Swan, 177; *Franklin v. Maberry*, 6 Humph. 368; *Wilson v. Philippi*, 39 W. Va. 75.

Every lotowner may be required to build the public improvements in front of his lot without regard to the inequalities in the value of the lots, in the expense of constructing the improvements, or to the question whether the lot is injured or benefited by their construction.

Weeks v. Milwaukee, 10 Wis. 258; *Black, Const. Law*, p. 68; *Ex parte Roundtree*, 51 Ala. 42; *Jenkins v. Ewin*, 8 Heisk. 456.

Messrs. Mooney & Patterson and Haynsworth & Parker for respondents.

Pope, J., delivered the opinion of the court:

This action was begun in the court of common pleas for Greenville county on the 1st day of September, 1896, to obtain a perpetual injunction restraining the defendant, the city council of Greenville, from levying and collecting an assessment of two thirds of the cost for laying a sidewalk on each side of Main street from Reedy river to North street from those owners of real estate which abutted on said Main street within the limits above stated, on the ground that the act of the legislature of this state approved in the year 1891 (see 20 Stat. at L. p. 1372) was unconstitutional, on the several grounds set up in the complaint. The answer denied that the act in question was unconstitutional or that there was any failure on the part of the city council that rendered the assessment null and void, or that the plaintiff could controvert the constitutionality of the 43 L. R. A.

act in question by reason of the fact that as to him the judgment of this court, as found in the case of *Mauldin v. Greenville*, 42 S. C. 293, 27 L. R. A. 284, affirming its constitutionality, was *res judicata*. The cause came on to be heard before his honor, Judge Watts, through exceptions to the report of Master Verner; and by Judge Watts's decree it was held that the defendant should be enjoined and restrained from levying the assessments against the plaintiff and other property owners on Main street for two thirds of the cost of improvements to the sidewalks and drains. From this decree the defendant now appeals, on eighteen exceptions.

There have been two hearings had before this court. On the first, when the argument was finished in this court an order was passed directing a reargument, with leave to counsel to question "the correctness of the former decision in this case, as reported in 42 S. C. 293, 27 L. R. A. 284, in so far as it holds that the city council has power to assess the property of any taxpayer to pay the 'cost of the improvements to the sidewalks and drains fronting their respective lands.'" 29 S. E. 812. The appellant relies upon the police power to sustain the constitutionality of the assessments made by the city council of Greenville against the plaintiffs for the cost of the sidewalks and drains recently improved by the city council of Greenville, and paid for by said city council out of the general funds of the municipality. Quite recently, in the two cases of *Cornelia Real-Estate Co. v. Charleston*, and *Stehmeyer v. Charleston* (S. C.) 31 S. E. 322, this court has, with great patience, endeavored to show that the police power, where the public health, the public morals, and the public safety are concerned, operates directly upon the persons and property of the citizen, so as to require that such person or property shall not prove injurious to other citizens; and then, also, such police power is made to operate upon persons and property where the citizen is not at fault, but to further a public purpose; and when, to accomplish the furtherance of a public purpose, the property is taken from the citizen or citizens by taxation or the right of eminent domain, that in such cases the right to tax or the right of eminent domain must be exerted in accordance with the provisions of the Constitution adopted in the year 1895, which are therein ordained to regulate taxation or the right of eminent domain. The grounds for these conclusions of this court on the police power need not be reproduced here, inasmuch, as before remarked, as this court has so recently embodied its conclusions on this subject in the two cases just quoted.

But, independently of the exercise of the police power, the appellant, the city council of Greenville, seeks on two other grounds to sustain the assessment of these lotowners for the cost of improvement of the sidewalks and drains in front of their property, respectively: First, it is insisted that this question is *res judicata* as to *W. L. Mauldin*; and, second, that such an assessment is perfectly consistent with the provisions of our

present Constitution. Let us examine these positions in their order.

Is the decision of the case of *Mauldin v. Greenville*, 42 S. C. 293, 27 L. R. A. 284, controlling, as *res judicata* of the question now presented by the case at bar? We uphold the doctrine of *res judicata* as it is presented in *Hart v. Bates*, 17 S. C. 35, namely: "The doctrine of '*res judicata*' is very far-reaching and effective. It is founded on principles of the wisest policy, because the peace and order of society require that a matter once litigated should not again be drawn in question between the same parties, or those claiming through them. But, whilst it is important to maintain the principle in all its integrity, it is not less important that it should be clearly defined, and kept within its proper limits. All agree as to its utility and necessity, but there has been a difference of opinion as to its precise limits, and its application in particular cases. As we understand it, the rule established in the *Duchess of Kingston's Case*, is: 'First, that the judgment of a court of competent jurisdiction, directly on the point is, as a plea in bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.' 2 Smith, Lead. Cas. 424, and notes. It seems, therefore, to make out the defense at least three things are necessary: The parties must be the same, or their privies; the subject-matter must be the same; and the precise point must have been ruled." We may remark at the beginning that the present action was commenced by W. L. Mauldin for himself and such others in like plight with himself who would elect to come into this suit, and that, by a consent order passed in the case at bar, Theron Earle, James McPherson, W. C. Gobson, and others did come in under such invitation. Each of these parties hold their property separately from each other, and are not privies of W. L. Mauldin. So, therefore, it would seem that even if W. L. Mauldin was bound by the former judgment, under the doctrine of *res judicata*, his coplaintiffs are not so bound. But is W. L. Mauldin precluded from this suit by the former adjudication? In the former suit W. L. Mauldin sought to enjoin the city council of Greenville from levying an assessment upon his property on Main street to pay for the cost of an improvement to the street (Main) running in front of his property; but, in praying for an injunction against the assessment upon his property because of the improvement to the street, he also prayed that the city council of Greenville should be restrained from levying an assessment on his

property to improve the sidewalks and the drain in front of his property. So, therefore, the judgment of this court, composed as it was then of the present Chief Justice and Mr. Justice Pope (for Mr. Justice Gary did not sit in that case), was in these words: "It is therefore the judgment of this court that so much of the judgment of the circuit court as grants a perpetual injunction against the defendant, preventing any assessment upon the property of the plaintiff, and other citizens of the city of Greenville in like plight as the plaintiff, to pay for the cost of improving the roadway of Main street, in said city, be affirmed, but when the said judgment enjoins the defendants from levying and assessing upon the plaintiff, and others in like plight with him, the cost of the improvements to the sidewalks and drains fronting their respective lands, it be reversed." The plaintiffs seek to show that, although such was the judgment of this court in the previous case, yet that judgment referred to the status of the parties in the year 1893, and that since that time, to wit, in the year 1896, the city council of Greenville has caused its engineer to relocate both the sidewalks and drains, claiming to act under the act of the legislature passed in the year 1891, and also by virtue of sundry resolutions passed by the said city council of Greenville, whereby they required the taxpayers in question to pay off the cost of such improvements and drains, so that each of such taxpayers would pay one third of the cost of sidewalks and drains in front of his property, and also one third of the cost of such improvements of the sidewalks and drains on the opposite side of the street, thus making each taxpayer who owns land on Main street pay two thirds of one half of the aggregate cost of such sidewalks and drains on both sides of such street so improved. It is thus hoped by the taxpayers in question that the doctrine of *res judicata* may be avoided. This matter thus presented is not free from difficulty, but we much prefer not to be misled by any apparent avoidance of the former decision, so far as sidewalks and drains are concerned. The two justices who rendered the former decision confessed with candor that so much of their judgment as related to sidewalks and drains was reluctantly made, because of some previous decisions rendered while the Constitution of 1790 was of force, and not because, in their opinion, such previous decisions were bottomed upon correct principles of law. The two justices in question felt a reluctance to overrule such decisions; but now, when the court is full, we propose to go to the root of the matter, and, if it becomes necessary to destroy the former decision, as found in 42 S. C. 293, 27 L. R. A. 284, so far as sidewalks and drains are concerned, to do so.

It must be borne in mind that the Constitutions of 1787 and 1790 contained no restriction upon the power of the general assembly in the matter of taxation other than that which ordained: "No freeman of this state shall be taken or imprisoned, or exiled or disseized of his freehold, liberties, or priv-

illeges, or outlawed, or exiled, or in any manner destroyed or deprived of life, liberty, or property but by the judgment of his peers or by the law of the land. . . . "So that whenever the general assembly itself, or any municipal corporation created by it and clothed by it with power, should desire and ordain the payment of a tax by the citizens, it was only necessary that the provisions of § 2 of article 9 of the Constitution of 1790 (which we have just quoted) should not be violated. Under previous legislation, which had been continued of force, the citizens of the city of Charleston were required to pay for sidewalks and drains fronting their premises. Therefore, under the wholesome provision, "by the law of the land," these improvements in the city of Charleston as to sidewalks and drains were held by the courts to be constitutional. But by the Constitutions of the years 1868 and 1895 very radical changes were made on the subject of taxation. It was no longer left to the general assembly or its municipalities to tax as they pleased. All taxes were required to be levied according to the value of the property, real and personal. All persons and property were required to be taxed uniformly. Whenever any property was exempted from taxation, it was specifically named in the Constitution itself. The assessments of the value of property for taxation were required to be made in anticipation of the laying of taxes. Great care was taken in providing that taxes as laid by the state should be for public purposes, and by municipal corporations that taxation should be for corporate purposes. Taxes for municipalities were required not to exceed 8 per cent of taxable property. It is true, municipalities were allowed to tax, by a graduation tax, incomes, and to impose a graduated tax on occupations and business. By § 5 of article 10 in the Constitution of 1895, the general assembly was required to compel municipal corporations to exact a tax on all the property, except that specially exempted under the Constitution, for corporate purposes, and for the payment of debts contracted under authority of law. We thus see what strides the organic law of the state has made in regulating this power of taxation by the state and her municipalities. What a public purpose is to the state, a corporate purpose is to the municipality. It is the same thing in each, being differently named, so as to emphasize the difference in territorial limits. In *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455, Mr. Justice Miller very ably discussed the necessity, in a tax, that it could only be legally laid when for a public purpose. It is admitted that an effort is made by persons to justify the imposition of "special assessments," as they are called, by claiming that such assessments are made for specific divisions of corporate territory, so that certain streets are called "tax districts;" but it is enough for our purpose to say that in our Constitution no power is given to the general assembly to carve the territory of the state into special tax districts for state taxation, except into counties, townships, school districts, cities, towns, and villages, and what 43 L. R. A.

is denied under the Constitution to the general assembly for state purposes is equally denied to chartered cities, towns, or villages, in dividing up such cities, towns, or villages, as the case may be, into separate tax districts to answer corporate purposes. Whenever there is a public or corporate purpose, the whole property of the city, town, or village must be taxed to subserve such public or corporate purpose. It is admitted everywhere that a public highway belongs to no one citizen or set of citizens to the exclusion of other citizens. It belongs to the public, and the public should keep it in repair. Navigable streams are always open to the public as highways. Sidewalks are, after all, nothing but a part of the highway or roadway. The highway is for vehicles and for men and animals to use whenever they see proper. So with sidewalks. All pedestrians may use them, without let or hindrance. They belong to the public. The same argument that would convert a highway into a taxing district would convert a sidewalk into one, and *vice versa*. As well might it be demanded that, inasmuch as a state house or a county courthouse or a state college happens to be located nearer the property of some citizens than others (as must be the case), therefore such persons living nearest each of these must be responsible for a larger proportion of the expense of their construction than all other citizens. Such is not the law, and has never been the law, because opposed to common sense.

W. L. Mauldin, James McPherson, and Theron Earle had good, hard sidewalks in front of their respective lots on Main street, in the city of Greenville. Both Mauldin and McPherson had taken the pains, before laying their sidewalks, to confer with the city authorities, and locate the same on the grade required by said city authorities; but, when the latter saw proper to regrade the roadway of Main street, the result was that these sidewalks in front of the lots owned by Mauldin, McPherson, and Earle were either too high or too low, with reference to the new roadway. Hence the city council saw proper to regrade the sidewalks, and lay afresh an improved pavement on the sidewalk. For this, for the distance of 105 feet, Mauldin was required to pay \$174.59 therefor. Now, look at this proposition. Mauldin had, prior to the year 1896, under the direction of the city authorities, constructed a sidewalk and drain in front of his property, which sidewalk and drain comported with the grade of said Main street up to the year 1893. But the city authorities determined to improve Main street as a roadway by changing the grade, because thereby it facilitated public travel over said street, and such improvement was completed. Then the city council concluded to improve the sidewalks so that the grade of the same, when paved, should be in keeping with the newly-graded roadway on Main street, and to do this they assessed two thirds of the cost of the same upon the said W. L. Mauldin for his 105-foot frontage on Main street. Was this not all required for the benefit of the public? Who would be responsible for

any damages to the pedestrians which might occur by reason of the defective sidewalk? Certainly not W. L. Mauldin or McPherson or Theron Earle, if such damages occurred on the pavement in front of their respective lots.

In *Mauldin v. Greenville*, 42 S. C. 293, 27 L. R. A. 284, this court announced that this state has repudiated, and still continues to repudiate, the doctrine of supposed benefit to owners of lots of land abutting on public streets, in levying taxes; and we are now

satisfied that such former decision, where it upheld assessments made upon owners of lots abutting on streets where improved sidewalks and drains are constructed, was wrong, and should be reversed, as opposed to our present Constitution. Such conclusion on our part renders it unnecessary that we should pass upon any other question raised by this appeal.

It is therefore the judgment of this court that the judgment of the Circuit Court be affirmed.

VERMONT SUPREME COURT.

Oliver WHEELOCK, Appt.,

v.

Elmer E. JACOBS.

(70 Vt. 162.)

1. A stream of water large enough to fill a $\frac{3}{4}$ pipe, running through a fissure or hole in the bed rock several feet below the surface of the ground, but not flowing in a well-defined channel underground, is to be deemed percolating water which can be appropriated by the owner of the land without liability to the owner of a spring a short distance therefrom, into which some of the water has been accustomed to find its way.
2. Percolating water is regarded as a part of the earth itself as much as the soil and the stones, with the same absolute right of use and appropriation by the owner of the land in which it is.
3. The doctrine of prescription is not applicable to percolating water.
4. A grant of a spring does not by implication convey percolating water before it reaches the spring.

(Taft, J., dissents.)

(December 2, 1897.)

A PPEAL by complainant from a decree of the Washington County Court in favor of defendant in an action brought to enjoin the interference with water percolating to complainant's spring. *Affirmed*.

The facts are stated in the opinion.

Messrs. T. J. Deavitt and J. P. Lamson, for appellant:

The orator, by his deed of the house and spring, had the right to all the benefits as they then existed. The defendant by obtaining a subsequent deed, with or without consideration from the same grantor who reserved all he had before that time deeded, large enough to dig and blast on, where it was obvious to him the water supply of the spring might be reached, cannot deprive the orator of his rights.

NOTE.—As to rights in subterranean waters, see note to *Southern P. R. Co. v. Dufour* (Cal.) 19 L. R. A. 92; also *Willis v. Perry* (Iowa) 26 L. R. A. 124; and *Tampa Waterworks Co. v. Cline* (Fla.) 33 L. R. A. 376.
43 L. R. A.

Coolidge v. Hager, 43 Vt. 9, 5 Am. Rep. 256; *Vermont C. R. Co. v. Hills*, 23 Vt. 681; *Minard v. Currier*, 67 Vt. 489; *Broom, Legal Maxims*, p. 362; *Nicholas v. Chamberlain*, Cro. Jac. 121; *Goodrich v. Burbank*, 12 Allen, 459, 90 Am. Dec. 161; *Nitzell v. Paschall*, 3 Rawle, 76.

Mr. John H. Senter, for appellee:

Whose is the land, his is also that which is above or below it.

Wharton, Legal Maxims, p. 24; *Broom, Legal Maxims*, p. 395; *Domat, Civil Law*, § 1581; *Pardessus, Traité des Servitudes*, § 76.

The maxim, *Sic utere tuo ut alienum non ledas*, is mere verbiage.

Bonomi v. Backhouse, El. Bl. & El. 643; *Hague v. Wheeler*, 157 Pa. 324, 22 L. R. A. 141.

If a man digs a well in his own field, and thereby drains his neighbor's, he may do so unless he does it maliciously.

Acton v. Blundell, 12 Mees. & W. 324; 2 Bl. Com. p. 18; 2 *Bouvier, Inst.* § 160.

The rule in relation to diverting a natural watercourse, to the injury of other riparian proprietors, does not apply to underground springs of water.

2 Washb. Real Prop. 44; *Pingrey, Real Prop.* § 224.

Percolating water is part of the soil, or cannot be distinguished from it. Hidden or unknown veins of water belong to the soil, and constitute a part of it, and may be used, controlled, and removed by the owner in the same manner that he can the soil through which the water percolates.

1 *Pingrey, Real Prop.* § 225; 3 *Kent, Com.* 14th ed. 44, note b; *Kerr, Real Prop.* § 2224; *Eggleston, Damages*, § 347; *Gould, Waters*, § 280; *Black's Pomeroy, Water Rights*, § 68.

The owner of land may construct a well thereon, although by so doing he cuts off the supply of water to the springs and wells in the vicinity.

2 *Waterman, Trespass*, p. 272; *Goddard, Easem. Bennett's ed.* p. 64; *Bishop, Non-constr. L.* § 877; *Weeks, Damnum Absque Injuria*, § § 100, 103; *Chatfield v. Wilson*, 28 Vt. 49; *Ray, Negligence of Imposed Duties, Personal*, p. 282.

If a person without any intention to in-

jure an adjacent owner, and while making use of his own land for any suitable and lawful purpose, cuts off, diverts, or destroys the use of an underground spring or current of water which has no known or defined course, but has been accustomed to penetrate and flow into the land of his neighbor, he is not thereby liable to any action for the diversion or stoppage of such water.

Washb. Easem. 2d ed. § 411; Beach, Inj. § 1114; 6 Lawson, Rights, Rem. & Pr. § 2945; 1 Wait, Act. & Def. p. 144; Angell, Watercourses, § 109.

Acton v. Blundell, 12 Mees. & W. 324, established the doctrine in England of the absolute right of the owner of land, through whose land water percolates, to use that water.

In *Chasemore v. Richards*, 7 H. L. Cas. 349, 1 English Ruling Cases, 729, this rule is laid down: "Where a proprietor digs a well on his own land, and pumps up water to an extent exceeding what is required for his private use, with the result of absorbing water from the substrata and diminishing the supply enjoyed by neighboring proprietors, but without diverting water already collected in any definite channel, the loss suffered by these proprietors is *damnum abeque injuria*, and affords no ground of action against the first proprietor."

Bury v. Pope, Cro. Eliz. pt. 1, p. 118; *Ballard v. Tomlinson*, L. R. 26 Ch. Div. 194; *Broadbent v. Ramsbotham*, 11 Exch. 602, 34 Eng. L. & Eq. 553; *Smith v. Kenrick*, 7 C. B. 566; *Ballacorkish Min. Co. v. Dumbell*, 43 L. J. P. C. N. S. 19, L. R. 5 P. C. 49; *Brain v. Marfell*, 41 L. T. N. S. 455, 20 Am. L. Reg. N. S. 93; *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 662, 46 L. J. Ch. N. S. 68; *North Shore R. Co. v. Pion*, L. R. 14 App. Cas. 612, 59 L. J. P. C. N. S. 25; *Wyatt v. Harrison*, 3 Barn. & Ad. 871; *New River Co. v. Johnson*, 2 El. & El. 435; *Queen v. Metropolitan Bd. of Works*, 3 Best & S. 708; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721.

Percolating water belongs absolutely to the owner of the soil, and his title thereto is not affected by the fact that an impervious stratum beneath and on which the porous stratum containing the water rested in close contact directs the course of percolating water over adjoining land.

Gould v. Eaton, 111 Cal. 639; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *South-ern P. R. Co. v. Dufour*, 95 Cal. 615, 19 L. R. A. 92; *Ingraham v. Hutchinson*, 2 Conn. 584; *Roath v. Driscoll*, 20 Conn. 532, 52 Am. Dec. 352; *Brown v. Illius*, 25 Conn. 583, 27 Conn. 84, 71 Am. Dec. 49; *Tampa Water-works Co. v. Oline*, 37 Fla. 586, 33 L. R. A. 376; *New Albany & S. R. Co. v. Peterson*, 14 Ind. 112, 77 Am. Dec. 60; *Greencastle v. Hazelett*, 23 Ind. 189; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Benthall v. Seifert*, 77 Ind. 302; *Cairo & V. R. Co. v. Houry*, 71 Ind. 364; *People's Gas Co. v. Tyner*, 131 Ind. 277, 16 L. R. A. 443; *Hougan v. Milwaukee & St. P. R. Co.* 35 Iowa, 558, 14 Am. Rep. 502; *Quinn v. Chicago, B. & Q. R. Co.* 63 Iowa, 510; *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265; *Hail v. Reed*, 15 B. Mon. 479; *Redman v. Forman*, 83 Ky. 214; 43 L. R. A.

Thurston v. Hancock, 12 Mass. 220, 7 Am. Dec. 57; *Callender v. Marsh*, 1 Pick. 434; *Greenleaf v. Francis*, 18 Pick. 117; *Wilson v. New Bedford*, 108 Mass. 265, 11 Am. Rep. 352; *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569; *Upjohn v. Rickland Twp. Bd. of Health*, 46 Mich. 542; *Shane v. Kansas City, St. J. & C. B. R. Co.* 71 Mo. 238, 36 Am. Rep. 489; *Beatrice Gas Co. v. Thomas*, 41 Neb. 662; *Mosier v. Caldwell*, 7 Nev. 363; *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 407; *Ocean Grove Camp Meeting Assn. v. Asbury Park Comrs.* 40 N. J. Eq. 447; *Lord v. Carbon Iron Mfg. Co.* 42 N. J. Eq. 157; *Panton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369; *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Wagner v. Long Island R. Co.* 2 Hun. 635; *Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co.* 3 Hun. 528; *Bellows v. Sackett*, 15 Barb. 96; *Ellis v. Duncan*, 21 Barb. 230; *Delhi v. Youmans*, 50 Barb. 316, 45 N. Y. 362, 6 Am. Rep. 100; *Waffle v. New York C. R. Co.* 58 Barb. 423; *Goodale v. Tuttle*, 29 N. Y. 459; *Pizley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Bliss v. Greeley*, 45 N. Y. 671, 6 Am. Rep. 157; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Bloodgood v. Ayers*, 108 N. Y. 400; *Frazier v. Brown*, 12 Ohio St. 204; *Elster v. Springfield*, 49 Ohio St. 82; *Taylor v. Welch*, 6 Or. 198; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Stoughton's Appeal*, 88 Pa. 198; *Kier v. Peterson*, 41 Pa. 357; *Halde-man v. Bruckhart*, 45 Pa. 517, 54 Am. Dec. 511, and notes; *Chicago & A. Oil & Min. Co. v. United States Petroleum Co.* 57 Pa. 83; *Coleman v. Chadwick*, 80 Pa. 81, 21 Am. Rep. 93; *Trout v. McDonald*, 83 Pa. 146; *Lybe's Appeal*, 106 Pa. 626, 51 Am. Rep. 542; *Hague v. Wheeler*, 157 Pa. 324, 22 L. R. A. 141; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 143, 57 Am. Rep. 445; *Collins v. Chartier's Valley Gas Co.* 131 Pa. 143, 6 L. R. A. 280; *Williams v. Ladew*, 161 Pa. 283; *Buffum v. Harris*, 5 R. I. 243; *Metcalf v. Nelson*, 8 S. D. 87; *Sullivan v. Northern Spy Min. Co.* 11 Utah, 438, 30 L. R. A. 186; *Meyer v. Tacoma Light & W. Co.* 8 Wash. 144.

There are no correlative rights between adjoining proprietors as to waters percolating under the surface.

Chatfield v. Wilson, 28 Vt. 49, 31 Vt. 358; *Delhi v. Youmans*, 50 Barb. 316; *Harwood v. Benton*, 32 Vt. 724; *Clark v. Conroe*, 38 Vt. 469; *Boynton v. Gilman*, 53 Vt. 17; *Minard v. Carrier*, 67 Vt. 489.

An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.

14 Alb. L. J. 61; *Jenkins v. Fowler*, 24 Pa. 308; 21 Alb. L. J. 284.

But no man by mere prior enjoyment of the advantages of his own land can obtain a servitude in the land of another.

If I see a well on my neighbor's land, I have no power to interfere, and no occasion to announce any purpose as to my own land. Then, should this state of things continue during the prescription period, there can be no presumption that we bargained for it,

since there was nothing to call out a controversy or a compromise.

Bishop, Noncontr. L. § 885; Gould, Waters, § 281; Kerr, Real Prop. § 2221; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; Angell, Watercourses, § 114; Goddard, Easem. p. 63; Washb. Real Prop. pp. 327, 328; Pingrey, Real Prop. § 227; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 725; *Halde-man v. Bruckhart*, 45 Pa. 514, 54 Am. Dec. 515; *Greenleaf v. Francis*, 18 Pick. 117; *Lybe's Appeal*, 106 Pa. 626, 51 Am. Rep. 542; *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419; *Delhi v. Youmans*, 50 Barb. 316, 45 N. Y. 362, 6 Am. Rep. 100; *Frazier v. Brown*, 12 Ohio St. 294; *Tinicum Fishing Co. v. Carter*, 61 Pa. 42, 100 Am. Dec. 597; *Whetstone v. Bowser*, 29 Pa. 59; *Bealey v. Show*, 6 East, 208; *Raustron v. Taylor*, 33 Eng. L. & Eq. 435, 11 Exch. 369; *Greatrew v. Hayward*, 8 Exch. 291; *Wood v. Waud*, 3 Exch. 748; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Weld v. Hornby*, 7 East, 195; *Webb v. Bird*, 10 C. B. N. S. 260; *Rights in Subterranean Waters*, 2 Am. L. Reg. N. S. 65; 1 Am. L. Reg. N. S. 637.

The orator's deed simply conveys to him a spring of water.

Conveyance of a well carries, not only the right to use the water, but conveys, not only the orifice reaching down to the water, but the whole opening in the earth before it was stoned, and the stone wall and the water.

Browne, Judicial Interpretation, 524; *Mixer v. Reed*, 25 Vt. 254; *Magoon v. Harris*, 46 Vt. 264.

The grants and the covenants of the grant-or are the precise measures of the orator's right.

Goddard, Easem. p. 185; *Lybe's Appeal*, 106 Pa. 626, 51 Am. Rep. 542; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569; *Bliss v. Greeley*, 45 N. Y. 672, 6 Am. Rep. 157; *Brain v. Marfell*, 41 L. T. N. S. 455, 20 Am. L. Reg. N. S. 93.

Rowell, J., delivered the opinion of the court:

On January 1, 1872, Eben Scribner, by his warranty deed of that date, conveyed to the orator a dwelling house, outbuildings, and a spring then supplying said buildings with water. The spring was on other land of the grantor's and the words conveying it are: "Also a spring of water, and the pipe that conveys the water from said spring to said buildings." This is not a spring where water issues from the ground by natural forces, but was formed by excavating 3 or 4 feet through the soil to the bedrock, which dips towards the Winoski at quite a sharp angle. At the bottom of this excavation there is a fissure in the rock through which the water comes into the excavation from the upper side. This fissure was closed on the lower side, and the excavation bricked up, to make a receptacle for the water. In wet times there is usually plenty of water, but in dry times it is scant. The snow and rain that fall on the land above supply the spring with water, which percolates the soil to the bedrock, then follows the rock to the river, "passing

over the rock in its lowest places, or through some fissure or hole therein," as the master finds. The orator's grantor consequently conveyed to J. G. Scribner the land around the spring, except what he had theretofore conveyed by deed, and J. G. Scribner conveyed to the defendant a small piece of it just below the spring, on which the latter, without malice, but for the purpose of obtaining needed water for his own house, dug down to the bedrock, the top of which was "rotten, and full of joints," which, on being removed with pick and shovel to the depth of 3½ or 4 feet below the surface, revealed a fissure or hole in the rock 6 or 8 inches in diameter, through which a stream of water was running large enough to fill a five-eighths pipe, the direction of which, if continued in the same course, would carry it some feet south of the orator's spring. The defendant stopped this hole at the lower end, except putting in a ½ inch pipe near the bottom to let the water through, and this formed a small hollow in the rock, which filled with water, and from which the defendant took water to his house. Some portion of the water thus taken by the defendant theretofore usually found its way into the orator's spring through some subterranean passage or passages, and was one source of its supply; and it is to restrain this diversion of water that the bill was brought.

This is not a case of water flowing in a well-defined channel under ground, but of water coming from rain and melting snows, percolating in varying quantities the soil of an extensive hill-side to the bedrock, down which it wanders in divers depressions and passages of unknown location, size, and direction, until it finally reaches the river. Now, there are no correlative rights between owners of adjoining land in respect of percolating water, which is regarded as a part of the earth itself, as much as the soil and the stones, with the same absolute right of use and appropriation by the owner of the land in which it is. *Chatfield v. Wilson*, 28 Vt. 49; *Chasemore v. Richards*, 7 H. L. Cas. 349, 1 English Ruling Cases, 729. Hence, on this score, the orator's loss is without legal injury, and affords no ground for sustaining the bill. Nor has the orator acquired a prescriptive right to this water, for the doctrine of prescription is not applicable to percolating water. Angell, Watercourses, 6th ed. § 114 p; *Lybe's Appeal*, 106 Pa. 626, 51 Am. Rep. 542; *Chasemore v. Richards*, above cited; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352. But the orator says that his deed conveys the water to him by implication before it reaches the spring, because the maxim is that when you grant a thing you are presumed also to grant to the extent of your power that without which the thing granted cannot be enjoyed, and that, therefore, the acts complained of are in derogation of the grant; and he relies on *Ooolidge v. Hager*, 43 Vt. 9, 5 Am. Rep. 256, as fully sustaining his claim. That was a conveyance of a house and lot without mention of a spring owned by the grantor on the land of another, from which water was then running to said house

through an aqueduct that was partly in the land conveyed, partly in other adjoining land of the grantor's and partly in the land of the third person. No question was made, nor could be, but that the grant carried all of the aqueduct that was in the land conveyed, and the court held, on the principle of the maxim invoked, that the grant of the house and the land and of that part of the aqueduct in the land, carried with them the water as it was then running, with the right to the spring and the aqueduct sufficient for its continuance, as an appurtenance of the house and the land. But that case is not like this. There the question was whether the spring was conveyed at all or not, while here it is, not whether the spring was conveyed, but whether the grant of it conveys, by implication, percolating water before it reaches the spring; and so the question is as to the extent of the grant, as it was in *Minard v. Currier*, 67 Vt. 480, which is much in point. That was a conveyance in fee of certain springs or wells fed by percolating water, with a further conveyance of all the grantor's right to the water that would naturally flow into them. It was said that a grant of the land containing the wells would not have deprived the grantor nor his grantees of the right to dig upon the remaining land to the injury of the wells, but that a right to percolating water greater than could be acquired by a deed of the land could be created by apt and sufficient words, and, if the language of the deed clearly imports such right, the law will recognize it; and it was held that the further conveyance did import such right in that case, and conveyed the water that the wells would receive when nothing was done to intercept its passage. *Whitehead v. Parks*, 2 Hurlst. & N. 870, is to the same effect. Now, there is no difference between granting land containing a spring, and granting a spring without more; and in each case, although the grantee takes the fee, he must stand on his common-law right as to percolating water. The orator's deed gives him the spring and the water therein and flowing therefrom, but it gives him no right to water before it reaches the spring, and consequently no right to prevent his grantor, nor those claiming under him, from diverting it from the spring. *Brain v. Marfell* (English Court of Appeals) 41 L. T. N. S. 455, 20 Am. L. Reg. N. S. 93, is a leading case on this subject, and a stronger one for the plaintiff than this is for the orator. There the defendant sold a spring to the plaintiff and the sole right to the water therein and obtainable therefrom, with the right of conveying the same through a pipe in the defendant's land to the plaintiff's dwelling house, with the right of entry for repairs and other proper purposes, with a declaration that the plaintiff, his heirs and assigns, should be the absolute owner of the spring, and a covenant of quiet enjoyment. The defendant subsequently sold some of his land near the spring to a railroad company, which made a tunnel through it that destroyed the spring, whereupon the plaintiff sued the defendant for a breach of his con-

tract; and it was held that the defendant had conveyed the water only after it reached the spring, and that draining the water before it reached the spring was no breach. Lord Coleridge said, in the course of his opinion, that in a case on the western circuit, the name of which he did not remember, it was held that in the conveyance of a spring with the water flowing from it, the spring head, with the definite stream of water flowing from it, was meant, and that interference with the water before it reached the head, or before it began to run in a definite channel, was not actionable. In *Bliss v. Greeley*, 45 N. Y. 671, 6 Am. Rep. 157, the owner of a farm granted to the plaintiff, with a covenant of warranty, the right to dig and stone up a spring thereon, and to lay a pipe therefrom to plaintiff's house. Held, that the entire farm was not thereby made servient to the grant, and that the grantor's assignee might lawfully dig a spring near plaintiff's spring though it was thereby rendered useless. *Lybe's Appeal* above cited, was like this, a bill for an injunction. There the grantor of land reserved the right to conduct water from a spring thereon to his adjoining land, on which a well was subsequently dug, whereby the subterranean supply of the spring was cut off; and an injunction was denied. In *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569, the grantor of land reserved the privilege of taking water from a spring thereon to his house and barn and pasture. The court said that, while the grantor's rights in the spring were completely subject to the grantee's right to consult his own convenience and advantage in the digging of a well in the land conveyed for better supplying it with water, yet, if he dug the well for the sole and malicious purpose of cutting off the sources of the spring and injuring the plaintiff, he would be liable. By our law it is immaterial with what motive a man does an act lawful in itself.

Decree affirmed, and cause remanded.

Taft, J., dissents.

Louis PLOOF, Admr., etc., of Frank Ploof,
v.

BURLINGTON TRACTION COMPANY.

(.....Vt.....)

1. The negligence of parents, contributing to an accident which injures a minor child, cannot be imputed to the child in an action by the child against a third person for personal injuries sustained through negligence.

2. The contributory negligence of

NOTE.—As to the doctrine of imputing negligence to children because of their parents' negligence, see note to *Chicago City R. Co. v. Wilcox* (Ill.) 21 L. R. A. 76; also *Bottoms v. Seaboard & R. R. Co.* (N. C.) 25 L. R. A. 784; *Atlanta & C. Air Line R. Co. v. Gravitt* (Ga.) 26 L. R. A. 553; and *Roth v. Union Depot Co.* (Wash.) 31 L. R. A. 855.

parents is a defense to an action for the death of their minor child, under Stat. §§ 2451, 2452, which give the right of action to the personal representative of the child for the benefit of the next of kin.

3. Negligence of parents in permitting a boy ten years old to go upon the street does not proximately contribute to an accident resulting from his attempt to cross the street in front of a moving car.

(July 21, 1898.)

EXCEPTIONS by plaintiff to rulings of the Chittenden County Court made during the trial of an action brought to recover damages for the alleged negligent killing of plaintiff's minor son which resulted in a verdict in defendant's favor. *Reversed.*

The facts are stated in the opinion.

Messrs. Seneca Haselton, E. R. Hard, and George W. Deberville, for plaintiff:

The doctrine that negligence of a parent or of one standing in the place of a parent is imputable to a child of tender years so as to defeat its recovering in an action against another for injuries negligently inflicted was first announced in *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273.

The next case involving this question was *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67, which denied the doctrine of the imputed negligence of a parent.

The supreme court of Massachusetts in 1857 held as that of New York had done.

Holly v. Boston Gaslight Co. 8 Gray, 123, 69 Am. Dec. 233.

In the following year, 1858, the question came before the courts of Connecticut and Tennessee. Both repudiated the doctrine of *Hartfield v. Roper*.

Daley v. Norwich & W. R. Co. 26 Conn. 591, 68 Am. Dec. 413; *Whirley v. Whiteman*, 1 Head, 613.

The doctrine of *Robinson v. Cone* is now the prevailing doctrine in this country.

The reason underlying *Hartfield v. Roper* is fallacious.

Shearm. & Redf. Neg. §§ 77, 78; 2 *Thomp. Trials*, § 1687; 2 *Thomp. Neg. ed.* 1886, p. 1186, note; *Wood, Railway Law*, § 322; *Bishop, Noncontr. Law*, § 582; *Beach, Contrib. Neg.* 2d ed. § 127; *Harris, Damages by Corp.* § 463; *Wharton, Neg. ed.* 1874, § 313; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 400, 98 Am. Dec. 175; 4 *Am. Law Rev.* 405; 3 *Elliot, Railroads*, p. 1881; *Cleveland, C. C. & I. R. Co. v. Manson*, 30 Ohio St. 451; *Erie City Pass. R. Co. v. Schuster*, 113 Pa. 412, 57 Am. Rep. 471; *Huff v. Ames*, 16 Neb. 139, 49 Am. Rep. 716; *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 369, 26 L. R. A. 553; *Bottoms v. Seaboard & R. R. Co.* 114 N. C. 699, 25 L. R. A. 784; *Government Street R. Co. v. Hanlon*, 53 Ala. 70; *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64, 46 Am. Rep. 265; *Westbrook v. Mobile & O. R. Co.* 68 Miss. 560; *Winters v. Kansas City Cable R. Co.* 99 Mo. 509, 6 L. R. A. 536; *Chicago City R. Co. v. Wilcox*, 138 Ill. 370, 21 L. R. A. 76; *Battishill v. Humphreys*, 64 Mich. 494; *Shippey v. Au Sable*, 55 Mich. 280; *Missouri, K. & T. R. Co. v. Shockman* (Kan.) 52 Pac. 43 L. R. A.

446; *Newman v. Phillipsburg Horse Car R. Co.* 52 N. J. L. 446, 8 L. R. A. 842; *Consolidated Traction Co. v. Hone*, 59 N. J. L. 275; *Wymore v. Mahaska County*, 78 Iowa, 396, 6 L. R. A. 545; *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. 455; *Norfolk & W. R. Co. v. Groseclose*, 88 Va. 267; *Westerfield v. Levis Bros.* 43 La. Ann. 63; *Roth v. Union Depot Co.* 13 Wash. 525, 31 L. R. A. 353; *Moore v. Metropolitan R. Co.* 2 Mackey, 437; *Berry v. Lake Erie & W. R. Co.* 70 Fed. Rep. 679.

In those states in which the rule of *Hartfield v. Roper* has been recognized and not repudiated it has been in various ways modified and restricted under the growing sense of its harshness and unreasonableness.

Louisville, N. A. & O. R. Co. v. Sears, 11 Ind. App. 654; *Baltimore City Pass. R. Co. v. McDonnell*, 43 Md. 534; *Meeks v. Southern P. R. Co.* 56 Cal. 513, 38 Am. Rep. 67.

In New York, Massachusetts, and Maine, it is now uniformly held that if the child in fact did nothing at the time of injury which would be deemed negligence in an adult, the contributory negligence of its parents or guardian must not be imputed to it in an action in its behalf.

Ihl v. Forty-Second Street & U. Street Ferry R. Co. 47 N. Y. 317, 7 Am. Rep. 450; *McGarry v. Loomis*, 63 N. Y. 104; *Collins v. South Boston R. Co.* 142 Mass. 301, 56 Am. Rep. 675; *Munn v. Reed*, 4 Allen, 431; *Lynch v. Smith*, 104 Mass. 52, 6 Am. Rep. 188; *O'Brien v. McGlinchy*, 68 Me. 552.

When the death of a person is caused by the wrongful act, neglect, or default of another, our statute gives a right of action in the name of the personal representative of such deceased person for the benefit of the next of kin, whenever, if death had not ensued, the party injured would have been entitled to maintain an action, and it therefore necessarily follows that no element of contributory negligence can enter into the consideration of a case brought by an administrator which would not have entered into the consideration of the case if death had not ensued and the action had been brought by the party injured.

Vt. Stat. §§ 2451, 2452; *Wymore v. Mahaska County*, 78 Iowa, 396, 6 L. R. A. 545; *Consolidated Traction Co. v. Hone*, 59 N. J. L. 275; *Norfolk & W. R. Co. v. Groseclose*, 88 Va. 267; *Westerfield v. Levis*, 43 La. Ann. 63; *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633; *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 369, 26 L. R. A. 553.

The negligence of the parents, if there was any, consisted in letting their boy of ten years go to the fair on the morning of the day on which he was injured at four o'clock in the afternoon while returning therefrom. If the parents were negligent, their negligence was remote and not proximate, and, whether imputable or not, cannot affect the right of recovery in this case.

Trow v. Vermont C. R. Co. 24 Vt. 487, 58 Am. Dec. 191; *Davies v. Mann*, 10 Mees. & W. 546; *Colchester v. Brooks*, 7 Q. B. 377; *Hyde v. Jamaica*, 27 Vt. 458; *Templeton v. Montpelier*, 56 Vt. 328; *Davis v. Central Vermont*

R. Co. 66 Vt. 290; *Bisaillon v. Blood*, 84 N. H. 565; *Berry v. Lake Erie & W. R. Co.* 70 Fed. Rep. 679; *Kyne v. Wilmington & N. R. Co.* 8 Houst. (Del.) 185; *Waite v. North Eastern R. Co.* El. Bl. & El. 719; *Meeks v. Southern P. R. Co.* 56 Cal. 513, 38 Am. Rep. 67.

Messrs. A. G. Whittemore and R. E. Brown, for defendant:

No greater degree of care as to pedestrians or private vehicles in the street is demanded of a street-railway company than is exacted of the owner of any other vehicle.

Booth, Street Railways, § 309; *Unger v. Forty-Second Street & G. Street Ferry R. Co.* 51 N. Y. 497.

As to members of the general public between whom and the company no relation arising out of contract, express or implied, exists, the employees are bound to exercise only what amounts, under all the circumstances of the case, to ordinary care and prudence.

Booth, Street Railways, § 309; *Pendleton Street R. Co. v. Shires*, 18 Ohio St. 255; *Pendleton Street R. Co. v. Stallman*, 22 Ohio St. 1; *Etherington v. Prospect Park & O. I. R. Co.* 88 N. Y. 641; *Roller v. Sutter Street R. Co.* 66 Cal. 230.

The motorman has the right to assume that the traveler in front has heard the warning given, and will turn aside in time to avoid injury.

Ereetti v. Los Angeles Consol. Electric R. Co. (Cal.) 6 Am. Elec. Cas. 460; *McLaughlin v. New Orleans & O. R. Co.* 48 La. Ann. 23; *Fleishman v. Neversink Mountain R. Co.* 174 Pa. 510.

This suit was brought for the sole benefit of the parents of the deceased. The question of their negligence was for the jury.

Lindsay v. Canadian P. R. Co. 68 Vt. 556; *Roller v. Sutter Street R. Co.* 66 Cal. 230; *Booth, Street Railways*, §§ 390, 391; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399, 98 Am. Dec. 175; 2 Thomp. Neg. p. 1101; *Glassey v. Hestonville, M. & F. Pass. R. Co.* 57 Pa. 172; *Philadelphia & R. R. Co. v. Long*, 75 Pa. 265; *Chicago v. Starr*, 42 Ill. 174, 89 Am. Dec. 422; *Ewen v. Chicago & N. W. R. Co.* 38 Wis. 613; 1 Shearm. & Redf. Neg. § 71; *Beach, Contrib. Neg.* § 44; *Grant v. Fitchburg*, 160 Mass. 16; *Casey v. Smith*, 152 Mass. 294, 9 L. R. A. 259; *Pittsburgh, A. & M. R. Co. v. Pearson*, 72 Pa. 169; *Smith v. Hestonville, M. & F. Pass. R. Co.* 92 Pa. 450, 37 Am. Rep. 705; *Albertson v. Keokuk & D. M. R. Co.* 48 Iowa, 292; *Wymore v. Mahaska County*, 78 Iowa, 396, 6 L. R. A. 545; *Bellefontaine & I. R. Co. v. Snyder*, 24 Ohio St. 670; *Reed v. Minneapolis Street R. Co.* 34 Minn. 557; *O'Flaherty v. Union R. Co.* 45 Mo. 70, 100 Am. Dec. 343; *Schiehold v. North Beach & M. R. Co.* 40 Cal. 447; *Westbrook v. Mobile & O. R. Co.* 66 Miss. 560; *Hoppe v. Chicago, M. & St. P. R. Co.* 61 Wis. 357; *Dahl v. Milwaukee City h. Co.* 62 Wis. 652; *Ewen v. Chicago & N. W. R. Co.* 38 Wis. 613; *Chicago v. Starr*, 42 Ill. 174, 89 Am. Dec. 422; *Western U. Teleg. Co. v. Hoffman*, 80 Tex. 420; *Norfolk & W. R. Co. v. Groseclose*, 88 Va. 267; *Birkett v. Knickerbocker Ice Co.* 110 N. Y. 504; *Ihl v. Forty-* 43 L. R. A.

Second Street & G. Street Ferry R. Co. 47 N. Y. 317, 7 Am. Rep. 450.

The degree of care and caution required of a child must be measured by his age and capacity.

Robinson v. Cone, 22 Vt. 213, 54 Am. Dec. 67; *Maher v. Central Park, N. & E. R. Co.* 67 N. Y. 52; *McCarthy v. Cass Avenue & F. G. R. Co.* 92 Mo. 536; *Crissey v. Hestonville, M. & F. Pass. R. Co.* 75 Pa. 83; *Philadelphia City Pass. R. Co. v. Hassard*, 75 Pa. 367; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 657, 21 L. ed. 745; *Cleveland Rolling Mill Co. v. Corrigan*, 46 Ohio St. 283, 3 L. R. A. 385; *Crowell, Electricity*, § 760.

The question of negligence is generally for the jury.

Crowell, Electricity, § 764; *Booth, Street Railways*, § 385; *Baltimore City Pass. R. Co. v. McDonnell*, 43 Md. 534; *Stone v. Dry Dock, E. B. & B. R. Co.* 115 N. Y. 104; *Connolly v. Knickerbocker Ice Co.* 114 N. Y. 104; *McCarthy v. Cass Avenue & F. G. R. Co.* 92 Mo. 536; *Maher v. Central Park, N. & E. R. Co.* 67 N. Y. 52; *Philadelphia City Pass. R. Co. v. Hassard*, 75 Pa. 367; *McLaughlin v. New Orleans & C. R. Co.* 48 La. Ann. 23; *Beach, Contrib. Neg.* 2d ed. §§ 117, 118.

To the extent that a child has knowledge and understanding of the danger to which he is exposed, or where it is of such a nature as to be necessarily obvious to one of his years, he is under a legal duty to avoid it.

Booth, Street Railways, § 385; *Ridenhour v. Kansas City Cable R. Co.* 102 Mo. 270; *Chicago City R. Co. v. Wilcox* (111.) 8 L. R. A. 494; *Sicft v. Staten Island Rapid Transit R. Co.* 123 N. Y. 645; *Nagle v. Allegheny Valley R. Co.* 88 Pa. 35, 32 Am. Rep. 413; *Munahan v. Steinway & H. P. R. Co.* 125 N. Y. 760; *Tucker v. New York C. & H. R. R. Co.* 124 N. Y. 308; *McMahon v. New York*, 33 N. Y. 642; *Sheets v. Conolly Street R. Co.* 54 N. J. L. 518.

Ross, Ch. J., delivered the opinion of the court:

This is an action to recover such damages as are just with reference to the pecuniary injuries resulting from the death of Frank Ploof, a boy ten years of age, to Louis Ploof, his father, the plaintiff administrator, and to his wife, the mother of Frank Ploof; the father and mother being the next of kin of Frank Ploof. The trial resulted in a verdict and judgment for the defendant. The defendant, on September 4, 1896, owned and operated an electric railway in the city of Burlington. On that day one of its cars ran over the intestate, Frank Ploof, and inflicted upon him such injuries that he died in a few hours. At that time the intestate was a boy ten years of age, healthy, and of ordinary ability. He attended the public schools, could read and write, and for about a year had sold evening papers on the street. He had gone about the city and on the streets on which the electric cars ran for the purpose of attending school and for the purpose of selling papers. On the day he was injured he had, with the consent of his parents, at-

tended the annual fair at Howard Park, about $\frac{1}{2}$ mile distant from the place of the accident, and was returning for the purpose of procuring and selling the evening papers. His parents were not present at the place of the accident when it occurred, and resided some distance from it. The defendant claimed that the parents of the deceased were negligent in permitting him to go into the streets where the cars were, and at the defendant's request, against the exception of the plaintiff, the court charged: "The defendant claims that the negligence of the parents contributed to the accident; that they did not exercise ordinary care—the care of prudent persons in permitting the boy to go into the streets where the car ran. The parents were bound in this respect to exercise ordinary care,—the care of prudent persons,—and if they were negligent in permitting the boy to go to the fair and return home over Pine street, where the accident took place, the plaintiff cannot recover." The plaintiff took several other exceptions to the charge, but now insists upon this one alone. He insists that this exception should be sustained:

1. Because he contends that the recovery is in the right of the intestate, and that under the decisions of this court, the negligence of the parents contributing to the accident which injures their minor child cannot be imputed to the minor child in an action brought by the child against a third person to recover personal damages sustained through the concurring negligence of such third person. Assuming, but not conceding, that this is such an action, or one in which the administrator is seeking to recover damages sustained by the intestate, and for the benefit of the estate of intestate, his contention is supported by *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67, and note. That case has become a leading case against the doctrine of imputed negligence, and its doctrine is quite generally followed by courts of last resort, and indorsed by eminent legal writers. The doctrine of imputed negligence was announced in the earlier decision of *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, which has been followed to some extent by courts of last resort. Some such courts which early adopted the doctrine on the strength of *Hartfield v. Roper* have receded and now hold the doctrine of *Robinson v. Cone*. Much has been written for and against the doctrine of imputed negligence. It is very fully and carefully collated and clearly set forth in the brief for the defendant. We shall take no time in reviewing the decisions on the subject. In a suit in which a minor or his administrator seeks to recover damages in the right of the minor, or in the right of his estate, for injuries inflicted upon such minor by the negligence of a party, it is difficult to find any satisfactory legal ground upon which such party can, in a court of justice, be heard to say: "True, I negligently inflicted a serious injury upon the child, but no legal obligation rests upon me to compensate the child for injuries inflicted by my negligence, because the parents of the child were negligent in the same transaction, 43 L. R. A.

and their negligence contributed to the happening of the accident occasioning such damages." Parents are the natural protectors and guardians of their minor children, but not their agents to waive torts committed upon them. The usual doctrine is that every joint tortfeasor is liable for all the damages committed, and there is no contribution between joint tortfeasors. Such excuse overturns this wholesome and just doctrine when the negligence of the parent is involved in the wrongdoing. It would be much easier to find good reasons for holding that such an injured child might recover jointly against his parent and the third person. This court is content to abide by the decision of *Robinson v. Cone* on the doctrine of imputed negligence.

2. The plaintiff contends that when the recovery, as in this case, is for the benefit of the parents, the contributory negligence of such parents is no defense. Put briefly, this contention is that a parent may recover damages sustained in part by his own wrong, or damages produced by an accident to which his own negligence contributed. This contention is against the recent decision of this court in *Lindsay v. Canadian P. R. Co.* 68 Vt. 556, and against the general doctrine that a party whose negligence has contributed to the happening of the accident causing him damages cannot recover, because he cannot recover for so much of such damages as he himself caused, and because the law will not, if it were possible fairly and justly so to do, trouble itself to inquire into and divide such damages between the wrongdoers contributing thereto. Again, it is practically impossible to ascertain and divide such damages justly between the parties whose negligence has contributed to the accident causing them. In *Lindsay v. Canadian P. R. Co.* there is no discussion of this doctrine. But the case in facts and in principle is like the present case, and the point was taken and fully discussed, supported by a large citation of authorities, at the hearing, and fully considered by the court. The plaintiff does not contend against the soundness of the general doctrine that a plaintiff whose negligence contributes to the happening of an accident causing him damages cannot recover, but contends that this case does not fall within that class of cases; that it is governed and controlled by the statute conferring it. Nor does he contend that the recovery, if had, would not be wholly for the benefit of the parents of the intestate. He insists that the statute either gives the damages in right of the intestate, or, if in the right of the parents, it gives an absolute right of recovery, regardless of the contributory negligence of such parents or next of kin. The statutes relied upon are Vt. Stat. §§ 2451, 2452. They read: When the death of a person is caused by the wrongful act, neglect, or default of a person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person or corporation liable to such action, if death had not ensued, shall be lia-

ble to an action for damages, notwithstanding the death of the person injured, and although the death is caused under such circumstances as amount in law to a felony." "Such action shall be brought in the name of the personal representative of such deceased person, and commenced within two years from his decease, and the court or jury before whom the issue is tried may give such damages as are just, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin, and the amount recovered shall be for the benefit of such wife and next of kin, who shall receive the same proportions as in the distribution of the personal estate of persons dying intestate." It is manifest that the recovery under these statutes, though in the name of the personal representative of the deceased, is not, in general acceptance, for the benefit of the estate of the deceased, but is for the benefit of those who may take by the terms of the statute, and the damages are measured "with reference to the pecuniary injuries resulting from such death to the wife and next of kin." Hence such personal representative is not the agent of the estate of the deceased, and does not recover in the right of the deceased, but is the agent of the wife and next of kin, and recovers, although the recovery grows out of an injury to the deceased, not for the injury to the deceased, nor to his estate, but for a pecuniary injury to the wife and next of kin involved in and flowing from the injury to the deceased. This court had these statutes under consideration in *Legg v. Britton*, 64 Vt. 652. It is there said: "The recovery is for the benefit of his widow and next of kin. The damages are to be assessed, not with reference to the loss sustained by the intestate, but with reference to the pecuniary injury resulting to them from his death. It is contended that the statute gives a new right of action. Strictly, it is a new right of recovery arising from an injury to the intestate which gave or would have given him a right of action and of recovery, if death had not ensued. The amount to be recovered is determined by the injury sustained by the widow and next of kin. . . . The right of recovery and measure of damages are different from what existed in the intestate. This right of recovery did not exist at common law. It is wholly given by the act. It is not an act to cause to survive a right of recovery which otherwise would be taken away by the death of the injured. The damages are based mostly upon the wrongful destruction of the earning capacity of the intestate." Hence the contention that the recovery is in the right of the intestate, and can be defeated only by his contributory negligence, cannot be sustained. Nor does the statute give the representative of the wife and next of kin an absolute right of recovery. Their right to damages determines their right to recover. The language of the statute is, "the court and jury may give such damages as are just with reference," etc. 43 L. R. A.

From a very early day the common law has denied a recovery, as unjust, to a party whose negligence has contributed to the accident causing the injury for which he demands damages. All statutes conferring a right of recovery of damages, especially when in terms they give such damages only as are just, must be read and considered with reference to this universal principle of the common law. So read, this statute does not give an absolute right to recover in case a right of action would have survived to the intestate if death had not ensued. The plaintiff has brought to our attention some cases where the courts have apparently supported his contention. *Wymore v. Mahaska County*, 78 Iowa, 396, 6 L. R. A. 545, cited by the plaintiff, is against his contention. The statute of Iowa gave a right of recovery to the estate of the minor intestate and one to the next of kin. The action was to recover for the estate. The court held that the contributory negligence of the parents could not be imputed to their minor child to defeat a recovery for his estate, but say, "Such negligence would prevent a recovery by the parents in their own right." *Consolidated Traction Co. v. Hone*, 59 N. J. L. 275, seems to support the contention of plaintiff. The statute of New Jersey is worded somewhat differently from our statute. The opinion cites—evidently without careful consideration—the Iowa case as supporting the decision. Whether the other cases cited by the plaintiff support his contention we have not been able to determine. The statutes in some of the states from which cases are cited are very different from the one under consideration, and may properly receive different consideration. Some give a definite sum in damages, without reference to the pecuniary injury to the party for whose benefit recovery is had. On further consideration we hold to the conclusion reached in *Lindsay v. Canadian P. R. Co.* 68 Vt. 556, that when the recovery is for "such damages as are just with reference to the pecuniary injuries resulting from such death to the wife and next of kin," the negligence of such wife and next of kin, entering into and contributing to the accident causing such death, will defeat their right to recover. *Atlanta & C. Air-Line R. Co. v. Gravitt*, 44 Am. St. Rep. 145, and note, 93 Ga. 369, 26 L. R. A. 553.

3. The plaintiff contends that there was error in the charge wherein, in substance, the court told the jury that, if the parents were negligent in permitting the boy to go into the street where the car ran, the plaintiff could not recover. He contends with much force, and, so far as disclosed by the exceptions, we think with reason, that there was no evidence of negligence on the part of these parents to be submitted to the jury; that the boy was of such an age, and of such physical and mental characteristics, that it was not negligence to permit him to go upon the streets where the cars ran; that the law required them to send him to school over

such streets; that they had the right to send him on errands, or for pleasure and amusement, unattended, upon such streets where the law compelled them to send him to attend school. The plaintiff did not raise this question by a proper motion or request; hence we do not consider whether there was any evidence to go to the jury on the question of contributory negligence. By his exception to the charge he has raised the question whether evidence that the parents permitted the intestate to go upon the street had a tendency to show such proximate negligence contributing to the accident which caused his death as will defeat a recovery. The most this evidence tended to show was that the parents negligently permitted him to go unattended upon the street where the car ran, or that their negligence was a factor in bringing him to the place of the accident, but not a factor in the boy's attempting to cross the street in front of the moving car, and therefore not a factor entering into and contributing to the happening of the accident which caused his death. At most, their negligence was a remote, and not a proximate, factor of the accident. Such remote negligence will not defeat a right of recovery otherwise proved. In *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67, and note, the boy injured was only four years old, and was coasting on a sled on a street over which he was accustomed to pass in attending school. The trial court charged the jury, in reference to the negligence of the parents in allowing him to go unattended upon the street, as follows: "That if the boy were of so tender years as to be absolutely incapable of observing and avoiding travelers, it might be gross negligence in parents to permit him to be on the street, and in such case the defendant would not be liable unless he were also guilty of gross negligence; but that, if the plaintiff were an active boy of sufficient age to attend school, and was attending school, and if children of his age and capacity would ordinarily be allowed and expected to attend school, and be in the street, as he was, then there would be no gross negligence on the part of the parents, though the boy might not have the prudence and capacity of a man to avoid danger, and the defendant could derive no advantage from the principle of law before stated." The word "gross" is used somewhat indefinitely, probably in the sense of "proximate." This instruction was not found erroneous in this court. The court had under consideration the question of remote and proximate negligence as affecting a plaintiff's right to maintain an action in *Trow v. Vermont C. R. Co.* 24 Vt. 487, 58 Am. Dec. 191, and note. The plaintiff had negligently permitted his horse to be upon the highway, from which it went upon the defendant's railroad, where it was injured. The defendant had negligently failed to fence its railroad. After discussing the question and decided cases, the court says: "When there has been mutual negligence, and the negligence of each party

was the proximate cause of the injury, no action whatever can be sustained. In the use of the words 'proximate cause' is meant negligence occurring at the time the injury happened. In such case no action can be sustained by either for the reason 'that, as there can be no apportionment of damages, there can be no recovery.' So, where the negligence of the plaintiff is proximate, and that of the defendant remote, or consisting in some other matter than what occurred at the time of the injury, in such case no action can be sustained, for the reason the immediate cause was the act of the plaintiff himself. Under this rule falls that class of cases where the injury arose from the want of ordinary or proper care on the part of the plaintiff at the time of its commission. These principles are sustained by *Hill v. Warren*, 2 Starkie, 377; *Munroe v. Leach*, 7 Met. 274; *Parker v. Adams*, 12 Met. 415, 46 Am. Dec. 694; *Brownell v. Flagler*, 5 Hill, 282; *Brown v. Maxwell*, 6 Hill, 592, 41 Am. Dec. 771; *Williams v. Holland*, 6 Car. & P. 23. On the other hand, when the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault." The doctrine of this case was followed in *Hyde v. Jamaica*, 27 Vt. 458; *Templeton v. Montpelier*, 56 Vt. 328, and in *Davis v. Central Vermont R. Co.* 66 Vt. 290. In *Templeton v. Montpelier* there were two highways leading from Montpelier to the place where the plaintiff desired to go. The referee found that the plaintiff was negligent in taking the highway where the accident occurred, but was guilty of no other contributory negligence. This court held that his negligence was remote, and permitted him to recover. In *Davis v. Central Vermont R. Co.*, the defendant, it was found, owed a duty to the plaintiff to have moved the grain from the elevator before it was destroyed by fire, without their negligence being involved in the fire. It was held that defendant's negligence was the remote cause of the loss of the plaintiff's grain, and did not entitle them to recover. The negligence in the *Caso of Trow* and in the two cases last named consisted in bringing the party or property destroyed to the place of the accident, as the parents' negligence in the case under consideration brought the intestate into the street where the cars ran, and it was held the negligence was remote, and, when that of the plaintiff, did not defeat his right of recovery, and, when that of the defendant, did not authorize a recovery. *Hyde v. Jamaica* falls within same class as *Davis v. Central Vermont R. Co.* These decisions sustain this exception taken by the plaintiff. It is observable that in each of the cases the failure to discharge a duty denominated "remote negligence" was not an active factor of the accident causing damages, but a factor in producing a condition upon which the proximate or causal negligence of the other party operated.

Judgment reversed, and cause remanded.

WASHINGTON SUPREME COURT.

Annie E. BEACH, *Resp't.*,

v.

Abbie D. BROWN, *Appt.*

(.....Wash.....)

1. A married woman may maintain an action in her own name to recover damages for the alienation of her husband's affections where the statutes abolish all disabilities of the wife and give her the same right to sue as if she were single.
2. Procuring a divorce from her husband will not prevent a woman from maintaining an action against a third person for prior alienation of his affections.
3. Letters written by a husband to his wife during coverture are admissible to prove his affection for her in an action by her against a third person for alienation of his affections from her.
4. Evidence of declarations of a husband as to his purpose in writing letters to his wife during coverture is not admissible to contradict expressions of affection contained in them.
5. A husband who lives and cohabits with his wife, having children by her, is presumed to have an affection for her, which presumption will continue until overthrown by a fair preponderance of evidence to the contrary.

(November 29, 1898.)

APPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover damages for alienation of the affections of plaintiff's husband. *Affirmed.*

The facts are stated in the opinion.

Messrs. John E. Humphries, W. E. Humphrey, and E. P. Edsen, for appellant:

A married woman in the state of Washington cannot maintain a suit in her own name for tort unless her husband joins with her, where the damages secured would be community property.

The statutes of this state must be construed as one entire system of laws.

Humphries v. Davis, 100 Ind. 274, 50 Am. Rep. 788.

All of the sections have been construed together, and the rights of married women defined.

Seattle Bd. of Trade v. Hayden, 4 Wash. 263, 16 L. R. A. 530; *Hawkins v. Front Street Cable R. Co.* 3 Wash. 592, 16 L. R. A. 808.

All property accumulated by either husband or wife, or both, after marriage, is community property.

The husband and wife cannot by contract change community to partnership property. In fact they cannot form a partnership; and while they may be in partnership the property is community property instead of co-

partnership property, if accumulated by them after marriage.

Gallagher v. Bowie, 66 Tex. 265; *Loper v. Western U. Telg. Co.* 70 Tex. 689; *State, Baumann, v. Langridge*, 44 La. Ann. 1014; *Barton v. Kavanaugh*, 12 La. Ann. 333; *Cooper v. Cappel*, 29 La. Ann. 213; *Holzab v. New Orleans & C. R. Co.* 38 La. Ann. 185, 58 Am. Rep. 177; *McFadden v. Santa Ana, O. & T. Street R. Co.* 87 Cal. 468, 11 L. R. A. 252; *Neale v. Depot R. Co.* 94 Cal. 425; *Rice v. Mexican Nat. R. Co.* 8 Tex. Civ. App. 130; *Ezell v. Dodson*, 60 Tex. 331; *Texas C. R. Co. v. Burnett*, 61 Tex. 638; *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363.

The right to recover for personal injury, as well as the money recovered as damages, is property, and may be regarded as choses in action.

Chicago, B. & Q. R. Co. v. Dunn, 52 Ill. 260; *Neale v. Depot R. Co.* 94 Cal. 425; *Black, Law Dict.* p. 202; *Abbott, Law Dict.* p. 219; *Anderson, Law Dict.* p. 179.

The chose in action becomes personal property, and the husband has the right to manage and control a chose in action, and for the recovery of the chose in action the suit must be brought in the name of the husband, and not in the name of the wife.

At common law the wife could not maintain an action for the loss of the society and support of her husband.

Duffies v. Duffies, 76 Wis. 374, 8 L. R. A. 420; *Main v. Main*, 46 Ill. App. 106; *Doe v. Roe*, 82 Me. 503, 8 L. R. A. 833; *Libby v. Berry*, 74 Me. 286, 43 Am. Rep. 589.

The interest of a wife in community personal property is a mere expectancy, like the interest that an heir may possess in the property of his ancestor.

Greiner v. Greiner, 58 Cal. 115.

After divorce and voluntary separation a woman cannot maintain an action for enticing away her husband.

Buckel v. Suss, 28 Abb. N. C. 21.

One who entices away a husband is not liable in damages to the wife for the loss of his society and support.

Duffies v. Duffies, 76 Wis. 374, 8 L. R. A. 420, 31 Cent. L. J. 32, note.

All of the cases upon which respondent relies are based upon a statute giving married women the right to sue for damages; but we have no such statute in this state.

Doe v. Roe, 82 Me. 503, 8 L. R. A. 833; *Libby v. Berry*, 74 Me. 286, 43 Am. Rep. 589; *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; *Cooley, Torts*, pp. 223-227; *Main v. Main*, 46 Ill. App. 106; *Dillon v. Linder*, 36 Wis. 344; *Freese v. Tripp*, 70 Ill. 503; *Jaynes v. Jaynes*, 39 Hun, 40; *Calloway v. Laydon*, 47 Iowa, 456, 29 Am. Rep. 489.

The court of appeals of New York made a mistake in the case of *Bennett v. Bennett*, 116 N. Y. 584, 6 L. R. A. 553, as to the rule at common law.

NOTE.—As to a wife's right of action for alienation of her husband's affections, see *Tucker v. Tucker* (Miss.) 32 L. R. A. 623, and 43 L. R. A.

authorities cited in the footnotes thereto; also *Brown v. Brown* (N. C.) 38 L. R. A. 242, and *Gerner v. Gerner* (Pa.) 40 L. R. A. 549.

Even if the case of *Bennett v. Bennett* is the law in New York, it cannot apply in Washington because the damages are community property, and under the Washington statute the wife cannot recover for personal injuries, without joining her husband.

Hawkins v. Front Street Cable R. Co. 3 Wash. 592, 16 L. R. A. 808; *German Ins. Co. v. Hunter* (Tex. Civ. App.) 32 S. W. 344; *Neule v. Depot R. Co.* 94 Cal. 425; *Ezell v. Dodson*, 60 Tex. 331.

The divorce settles all property rights for damages.

Buckel v. Suss, 28 Abb. N. C. 21; *Main v. Main*, 46 Ill. App. 106; *Doe v. Roe*, 82 Me. 503, 8 L. R. A. 833; *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; *Brown v. Smith*, 19 R. I. 319, 30 L. R. A. 680.

How is it possible that a woman who has no cause of action while married can make a cause of action by getting a divorce, unless the choses in action are given her by the decree?

Weedon v. Timbrell, 5 T. R. 357; *Buckel v. Suss*, 28 Abb. N. C. 21.

If respondent had cause of action then her husband was a necessary party, and in fact the only necessary and proper party.

Hawkins v. Front Street Cable R. Co. 3 Wash. 592, 16 L. R. A. 808; *Rice v. Mexican Nat. R. Co.* 8 Tex. Civ. App. 130.

The judgment for alimony settles all of her rights to community property. The property rights are all settled by the decree of divorce.

Webster v. Webster, 2 Wash. 417; *Fields v. Fields*, 2 Wash. 441; *Prouty v. Prouty*, 4 Wash. 174; *Ferry v. Ferry*, 9 Wash. 239; *Main v. Main*, 46 Ill. App. 106; *Buckel v. Suss*, 28 Abb. N. C. 21; *German Ins. Co. v. Hunter* (Tex. Civ. App.) 32 S. W. 344; *Musselman v. Musselman*, 44 Ind. 106; *Muckenburger v. Holler*, 29 Ind. 139, 92 Am. Dec. 345; *Behrley v. Behrley*, 93 Ind. 255; *Nicholson v. Nicholson*, 113 Ind. 131.

A woman divorced has no interest in her husband's property.

Brown v. Smith, 19 R. I. 319, 30 L. R. A. 680; *Fletcher v. Monroe*, 145 Ind. 56; *McKean v. Ferguson*, 51 Ohio St. 207; *Weindel v. Weindel*, 126 Mo. 640; *Winch v. Bolton*, 94 Iowa, 573.

The title to community property remains in the husband.

Rosholt v. Mehus, 3 N. D. 513, 23 L. R. A. 239; *Burns v. Lewis*, 86 Ga. 591; *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; *Piper v. May*, 51 Ind. 283; *Libby v. Berry*, 74 Me. 286, 43 Am. Rep. 589.

The court erred in admitting in evidence letters written by W. H. Beach to the respondent. The letters are confidential communications from husband to wife written in the absence of appellant, and are not competent testimony for any purpose.

2 Ballinger's Codes & Statutes, § 5994; *Scott v. Com.* 94 Ky. 511; *State v. Ulrich*, 110 Mo. 350; *Underwood v. Linton*, 54 Ind. 468; *Higham v. Vanosdol*, 101 Ind. 160; *Dye v. Davis*, 65 Ind. 474; *White v. Ross*, 47 Mich. 172; *Perry v. Randall*, 83 Ind. 143; *Buchanan v. Foster*, 23 App. Div. 542; *Lanotot v. State*, 98 Wis. 136; *Henderson v. 43 L. R. A.*

Chaires, 25 Fla. 26; 1 Greenl. Ev. §§ 334, 337; *Selden v. State*, 74 Wis. 271; *Smith v. Merrill*, 75 Wis. 461; *Lafferty v. Lafferty*, 42 W. Va. 783; *White v. Perry*, 14 W. Va. 66; *Fratini v. Caslini*, 66 Vt. 273.

No letter or communication made by husband or wife after suspicion of guilt can be admitted.

1 Phillipps, Ev. § 181; 1 Greenl. Ev. § 102; 1 Wharton, Ev. § 225.

There is no presumption of law that a husband loves his wife.

The burden of proof was upon respondent under the issues.

Buchanan v. Foster, 23 App. Div. 542; *Mask v. Allen* (Miss.) 17 So. 82; *Com. v. Louisville & N. R. Co.* 17 Ky. L. Rep. 417; *J. D. Marshall Livery Co. v. McKelvy*, 55 Mo. App. 240; *Long v. Long*, 44 Mo. App. 141.

The admission of the letters and the exclusion of the declarations cannot both be right.

Witman v. Egbert, 27 App. Div. 374; *Manwarren v. Mason*, 79 Hun, 592; *Bowes v. Steffen*, 43 N. Y. S. R. 29; *Erben v. Lorillard*, 19 N. Y. 299; *Hobby v. Hobby*, 64 Barb. 277.

Messrs. Lindsay, King, & Turner, for respondent:

It is the refinement of absurdity to say that the husband can join a third person in committing a wrong on the wife, and that the damages recovered by the wife would be "community property."

At common law an action for damages could be maintained for the alienation and loss of the affections and the society of the husband from the wife.

Lynch v. Knight, 9 H. L. Cas. 577; *Bassett v. Bassett*, 20 Ill. App. 543; *Foot v. Card*, 58 Conn. 1, 6 L. R. A. 829; *Bennett v. Bennett*, 116 N. Y. 584, 6 L. R. A. 553; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13.

Dunbar, J., delivered the opinion of the court:

This is an action by the respondent against the appellant for damages for alienating the affections of respondent's husband. A demurrer was interposed to the complaint, to the effect that it did not state facts sufficient to constitute a cause of action, which was overruled. A motion for a nonsuit was also made and overruled. Upon the trial of the cause a verdict was rendered in favor of the respondent, judgment was entered in accordance therewith, and an appeal was taken to this court.

It is the contention of the appellant, in the first instance, that this action cannot be maintained, for the reason that a married woman in the state of Washington cannot maintain a suit in her own name for tort without her husband joining her, where the damages secured would be community property. This statement assumes somewhat the legal questions at issue. But on the main proposition, as to whether a married woman can maintain this action for the loss of the consortium of her husband, the authorities are somewhat conflicting. In *Duffies v. Duffies*, 76 Wis. 374, 8 L. R. A. 420, a case which was strongly relied upon by the appellant,

it was decided by a divided court that she could not, but we are not impressed with the reasoning upon which that decision is based. It is conceded that at the common law the husband might maintain an action for the alienation of the affections of a wife, but it is said that the wife's right to the society of the husband is different in degree and value, and, in a long opinion, the court undertakes to substantiate this proposition. The reasons given are too numerous to set forth in this opinion, but we think they are unsatisfactory and illogical. The decision is also based upon the fact that at the common law the wife had no property in the consortium of her husband, and that her position as a wife precluded her from bringing the action. An attempt is made in this case to distinguish the cases that hold that the wife at common law had a right to bring this action, but we think the attempt was unsuccessful, and there are other cases maintaining the same view. However, the case of *Williams v. Williams*, 20 Colo. 51, squarely decides the proposition the other way, and shows that the doctrine is really based upon the ancient idea of the comparative inferiority of the wife. The court in that case said: "Mr. Justice Blackstone, who wrote 150 years ago, gave as a reason for denying the wife's right of action in cases of this kind the following: 'The inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury.' 3 Bl. Com. p. 142. This language seems strange in the present age, however familiar it may have been during the last century." And the court then quotes *Warren v. Warren*, 89 Mich. 127, 14 L. R. A. 545, where it is said: "The wife is entitled to the society, protection, and support of her husband as certainly, under the law and by moral right, as he is to her society and services in his household." *Foot v. Card*, 58 Conn. 1, 6 L. R. A. 829, is also quoted, where the court said: "So far forth as the husband is concerned, from time immemorial the law has regarded his right to the conjugal affection and society of his wife as a valuable property, and has compelled the man who has injured it to make compensation. Whatever inequalities of right as to property may result from the marriage contract, husband and wife are equal in rights in one respect, namely, each owes to the other the fullest possible measure of conjugal affection and society. The husband owes to the wife all that the wife owes to him. Upon principle, this right in the wife is equally valuable to her, as property, as is that of the husband to him. Her right being the same as his in kind, degree, and value, there would seem to be no valid reason why the law should deny to her the redress which it affords to him." This reasoning, it seems to us, is more in conformity with modern thought on the subject of the marital relations existing between husband and wife. See also *Bennett v. Bennett*, 116 N. Y. 584, 6 L. R. A. 553; *Van Arnam v. Ayres*, 67 Barb. 544; *Haynes v. Nowlin*, 129 Ind. 581, 14 L. R. A. 787; *Lynch v. Knight*, 9 H. L. 43 L. R. A.

Cas. 577; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397.

But, however it may have been at the common law, the trend of judicial opinion in this country has been in favor of extending rights of this kind to the wife, and it seems to us that the right is placed beyond a peradventure by our own statutes. We do not think that the cases decided by this court which are cited by the appellant bear upon this question. The legislature of this state has, from time to time, plainly sought to remove disabilities of this character from married women, and § 1408, 1 Hill's Code, provides that "every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued as if he or she were unmarried." It would seem as if this statute was very nearly conclusive of this question, but, if not, § 1409 makes it absolutely so. That section provides that "all laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights she shall have the same right to appeal in her own individual name to the courts of law or equity for redress and protection that the husband has;" and it will be observed that all the exception that there is to this sweeping law is made in a proviso to § 1409, to this effect: "Provided, always, that nothing in this chapter shall be construed to confer upon the wife any right to vote or hold office, except as otherwise provided by law."

And an investigation of the statutes in relation to the rights of married women shows that in all cases where exceptions are intended they are provided in the statutes. These statutes also do away with the necessity which existed under the common law, as held by some of the courts where the right was sustained, that the action could only be maintained when the husband joined in it. But the action in this case was brought by the respondent after she had obtained a divorce from her husband, and it is therefore urged by the appellant that, if she ever had the right to bring this action, it was lost when she sought and obtained a divorce; that all rights were settled by the decree of divorce; and cases from this court are cited to sustain that contention. But we do not think that the cases cited or the law bear upon this character of rights. It could not, in the very nature of things, have been contemplated in the divorce decree. It is a damage which is peculiar to the wife, which the husband, under no rule of right, could have any interest in; and it would be a harsh rule of law that, conceding that the wife had this right during coverture, would deprive her of the right when the wrongful acts of which she complains created the necessity for and caused the action for divorce. Of course, the damages could not be calculated after the time when the decree of divorce was obtained. Having, then, the right to maintain this action, and there being no community,—the community having been destroyed by the decree of divorce,—we need

not concern ourselves about the proposition that the damages when secured will be community property. The judgment settles the question as to the ownership of the amount secured for damages. This answers the demurrer upon both grounds, viz., that the complaint did not state facts sufficient to constitute a cause of action, and that the husband was a necessary party plaintiff; and also the error alleged in overruling the motion for a nonsuit.

It is alleged that the court erred in admitting in evidence letters written by the husband, Beach, to the respondent during coverture, for the purpose of showing the affection of the husband towards the wife. We think, under the circumstances of this case, that the letters were admissible, and the testimony was as competent as any other testimony showing the relations between the husband and wife, and they certainly do not fall under the ban of the statute cited by the appellant.

It is also claimed that the court erred in excluding testimony of the witness Stull in

relation to the object which the husband avowed that he had in writing the letters. We think this testimony was properly excluded, and that it falls under the head of self-serving testimony.

The appellant also objects to the following instruction given by the court: "The law presumes that a husband who lives with and cohabits with his wife, she bearing children, the issue of such cohabitation, has an affection for her, and this presumption continues until it is overthrown by a fair preponderance of the testimony to the contrary." We are not prepared to indorse the pessimistic view of the marriage relation contended for by the appellant, and we think the instruction was correct, and that there was no error in the modification by the court of the instructions requested by the appellant. There being no prejudicial errors committed by the court, *the judgment will be affirmed.*

Anders and Gordon, JJ., concur.

WISCONSIN SUPREME COURT.

Julia L. GREEN, Admx., etc., of Lars G. Green, Deceased, *Respt.*,
v.

ASHLAND WATER COMPANY, *Appt.*

(.....Wis.....)

1. A mere distributor of water for compensation is not liable as a guarantor of its quality.
2. A distributor of water under a public franchise will be liable for injury to consumers without fault on their part from using the water furnished if it knows or from the situation ought to know that the water it is distributing is dangerous for domestic use from some cause not discoverable ordinarily by the use of reasonable care, and it fails to disclose such danger to them.
3. Inability of a water company, through fault of the municipality, to procure pure water from a source designated in its contract, will not relieve the company from liability to consumers for injuries caused by its knowingly furnishing them with contaminated water and deceiving them into the belief that it is wholesome.
4. A consumer cannot hold a water company liable for injuries caused by unwholesome water furnished by it if he knew or ought to have known its dangerous condition when he used it.
5. Evidence of greater precautions by a water company to procure pure water after

NOTE.—The above case is wellnigh a pioneer on the question of the liability for disease caused by the impurity of a water supply.

As to the liability of a city for the impurity of water from a free public well, see *Danaher v. Brooklyn* (N. Y.) 7 L. R. A. 592.

As to the liability of a vendor in cases of tort for the sale of unwholesome food, see *note to Craft v. Parker, W. & Co.* (Mich.) 21 L. R. A. 139.

43 L. R. A.

the death of a customer from fever is not admissible in an action to hold it responsible for the death.

6. Upon the question of the liability of a water company for the death of a customer from fever evidence is not admissible of tests of the water supply long after the occurrence, when the conditions might have changed.
7. An expert cannot be permitted to give his opinion that a person died from drinking polluted water furnished by a water company when the evidence does not exclude the possibility of other sources of contagion.
8. The rule permitting a physician to testify as to the cause of a person's death does not include his opinion as to the cause of the fever which resulted in death.
9. Opinion evidence as to the duty of a water company to make tests of the water furnished by it is not admissible in an action against it for the death of a customer from fever alleged to have been caused by polluted water furnished by it.
10. A newspaper article charging a water company with distributing poisonous water and charging excessive rates, published months prior to the death of a customer of the water company from fever, is not admissible in an action seeking to hold the company liable for such death.
11. Evidence of proceedings of the municipal authorities for the annulment of the franchise of a water company is not admissible in an action to hold the company liable for the death of a customer which is alleged to have been caused by impure water.
12. A water company cannot be held liable for injuries caused to consumers from failure to exercise ordinary care to procure a pure water supply from the source designated by its contract, if the evidence does not show that pure water could be procured there.
13. A consumer of water furnished by

a water company who is possessed of average intelligence will be held to have notice that the water is impure if that condition has existed for a long time and the fact is widely and commonly known.

(November 22, 1898.)

APPEAL by defendant from a judgment of the Circuit Court for Portage County in favor of plaintiff in an action brought to recover damages for the death of plaintiff's intestate which was alleged to have been caused by impure water furnished by the defendant. *Reversed.*

Statement by **Marshall, J.:**

Action to recover damages for the death of plaintiff's intestate alleged to have been caused by negligence on defendant's part, in that it failed and neglected to extend its intake pipe into Chequamegon bay from time to time as needed to secure water free from sewage contamination, and suitable for domestic use as required by its contract with the municipality of Ashland. It was claimed that, owing to the breach of duty mentioned, in March, 1894, defendant took from Chequamegon bay water contaminated with typhoid fever germs and distributed the same to its customers in the city of Ashland, of whom the deceased was one; that without fault on his part, he used such polluted water taken from the service faucet at his residence, for drinking purposes, and was thereby stricken with typhoid fever from which he died. The facts mentioned were properly alleged in the complaint and put in issue by the answer. The facts established conclusively by the admissions in the pleadings or evidence given on the trial were, that the contract under which defendant's waterworks system was constructed and operated was made in 1884; that there was then no sewerage system in Ashland; that the contract required defendant to take its water supply from Chequamegon bay and to extend the intake pipe in the bay from time to time, as the growth of the city of Ashland might require, to keep the water free from contamination by the sewage from such city; that three years after the waterworks system was installed, there was constructed a sewerage system in Ashland by which the sewage of the city was deposited in the bay, and such system was extended from time to time, and the amount of the sewage thereby, and by the growth of the city, deposited in the bay from year to year down to the time of the occurrence complained of, was so increased that, with pollutions of like character which were drained into the bay from other sources, it was rendered practically impossible to secure therein with certainty, at all seasons of the year, a water supply suitable for domestic use; that as a result of the situation, for several years prior to the spring of 1894, at about the time of the break-up in the spring, there was an epidemic of typhoid fever in Ashland from using the bay water; that as early as 1891, it was generally accepted as true by the people of the city, that the water of the bay was contaminated with typhoid fever germs, and was the

cause of the prevalence of typhoid fever, especially in the spring; that the danger of taking the fever from using such water in the spring was notorious in 1894, and for some time prior thereto; that the subject was one generally talked about among the people and was discussed in the city press which was patronized by the intestate; that he had been a resident of the city for several years, was an intelligent working man, and his attention had been specially drawn to the subject of typhoid fever by reason of his wife having been afflicted with it about six months prior to his sickness; that he knew the source of defendant's water supply, and used the water freely without any effort to free it from dangers of sewage contamination. The evidence further shows that deceased was away from home all of the time for about four days prior to his sickness becoming so pronounced as to require him to desist from working, and that prior to such four days he was absent from home during the working time of each day. There was considerable evidence given by experts for the purpose of showing the condition of the bay water, and the probability that the death of the intestate was caused by using it. Numerous exceptions were taken to the rulings on questions propounded to the experts and to other rulings on the admission and rejection of evidence. At the close of plaintiff's case there was a motion for a nonsuit made and denied, and the question raised by such motion was again raised by a motion to direct a verdict in defendant's favor at the close of the evidence on both sides. The jury rendered a special verdict finding, among other things, that the deceased died from typhoid fever, caused by drinking water drawn from the faucet in his house; that typhoid fever was epidemic in the city in 1892 and 1893, and that defendant knew, or ought to have known, that the water it furnished was dangerously contaminated with typhoid germs; that it could have procured wholesome water from Chequamegon bay prior to the sickness of the deceased; that the deceased was without fault in using the water, and that it was publicly and widely stated and believed among the citizens of Ashland, prior to the occurrence complained of, that the typhoid fever epidemics in the city of Ashland were attributable to the water furnished by the defendant. All other issues requisite to plaintiff's recovery were found in her favor, and damages assessed at \$5,000. There was a motion for a new trial made after verdict, sufficiently broad to present all questions necessary to be preserved thereby. Proper exceptions were taken to all rulings of the court, adverse to the defendant. Defendant appealed.

Messrs. Tomkins & Merrill, for appellant:

The court allowed the plaintiff to introduce evidence that the defendant used greater precautions and built a filter after the death of Green. This was error.

Castello v. Landwehr, 28 Wis. 530; *Lang v. Sanger*, 76 Wis. 71; *Anderson v. Chicago, St. P. & O.R.Co.* 37 Wis. 195, 23 L. R. A. 203.

It was error to allow the physicians to testify that intestate's death, in their opinion, was caused by drinking the bay water furnished by the defendant.

Luning v. State, 2 Pinney, 215, 52 Am. Dec. 153; *Wright v. Hardy*, 22 Wis. 348; *Kreuziger v. Chicago & N. W. R. Co.* 73 Wis. 158; *Maitland v. Gilbert Paper Co.* 97 Wis. 476.

The city and water company both undoubtedly believed, when the contract was entered into, that wholesome water could be procured from the bay. The city fixed and furnished the site for the pumping station with the right to purchase the plant. Both parties were mistaken as to the quality of the bay water. The one is as culpable as the other.

Du Bois v. Du Bois City Waterworks Co. 176 Pa. 430, 34 L. R. A. 92; *United States Waterworks Co. v. Du Bois*, 176 Pa. 439.

When the fact is that the damages claimed in an action were occasioned by one of two or more causes, for one of which the defendant is responsible, and for the other of which it is not responsible, the plaintiff must fall if his evidence does not show that the damages were produced by the former cause.

Searles v. Manhattan R. Co. 101 N. Y. 661; *Hanrahan v. Brooklyn Elev. R. Co.* 17 App. Div. 588.

Green knew, or ought to have known, that the bay water was contaminated with sewage and liable to cause typhoid fever.

Where the water is taken from a natural body of water like a river, bay or lake, it is as much the duty of the consumer as the water company to ascertain the character of the water, and take measures to protect himself against the dangerous impurities of the water.

Messrs. Lamoreux & Shea, also for appellant:

There is no proof that the water was unwholesome until the analysis in May after typhoid epidemic in the spring.

Danaher v. Brooklyn, 119 N. Y. 241, 7 L. R. A. 592.

It cannot be said that any citizen of intelligence of the city of Ashland who had resided in the city as long as Green had, to wit, since April, 1887, could be ignorant of the source or place from which this water was received.

Green knew as well as this company that the water being used in his house was being pumped from Chequamegon bay.

Mr. Green, when he began using this water, must have known that the water company were simply pumping bay water up to that house. He was bound to know its source and bound to know its condition in the bay.

If the water company did nothing to contaminate it or injure it in moving it from the bay to his house they cannot be held to be guilty of any wrong.

Messrs. Cate, Sanborn, Lamoreux, & Park, for respondent:

The questions objected to do not cover a single mooted "evidentiary" question of fact in the case, not purely in the domain of scientific inquiry. There is absolutely no evidence in the case that up to the time he was

taker sick, Green drank or was where he had an opportunity to drink any other than the water furnished by the defendant.

Whether the bay water was poisoned by typhoid bacilli, whether by drinking this he contracted typhoid fever, were purely scientific questions, depending upon the opinion of experts.

1 Rice, Ev. p. 330; *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578; *Com. v. Piper*, 120 Mass. 185; *Lindsay v. People*, 63 N. Y. 143; *Smalley v. Appleton*, 75 Wis. 18; *Heald v. Thing*, 45 Me. 392; *McCallan v. Buckstaff*, 96 Wis. 316; *Gates v. Fleischer*, 67 Wis. 504.

It is demanding too much of a man in Green's walk in life to hold that he, as a matter of law, should have been on his guard against the water the entire community were drinking, and say to his widow, Mr. Green should have dug a well, driven a pump, or bought spring water, because, although he did not know of it, there was a contention in the locality where he lived that the bay water was causing typhoid fever.

In the following cases some material fact like notice of the danger brought home to the defendant, or the entire absence of any duty to the person injured, resulted in a judgment for the defendant, but in each case the liability of the defendant on a proper showing is freely and fully admitted:

Buckingham v. Plymouth Water Co. 142 Pa. 221; *Danaher v. Brooklyn*, 119 N. Y. 241, 7 L. R. A. 592; *Milnes v. Huddersfield*, L. R. 10 Q. B. Div. 124, L. R. 12 Q. B. Div. 443.

The action is one purely and simply for the tort of the defendant, and the duty to the deceased which the defendant negligently failed to perform is based upon contract.

Coy v. Indianapolis Gas Co. 146 Ind. 655, 36 L. R. A. 535; 2 Dill. Mun. Corp. § 985a; *Thomas*, Neg. pp. 998, 1027.

A company undertaking to supply the inhabitants of a municipality with water for domestic purposes for a valuable consideration should be held to impliedly warrant the water it so furnishes as pure, wholesome, and fit for that purpose.

10 Am. & Eng. Enc. Law, p. 157; *Lukens v. Freund*, 27 Kan. 604, 51 Am. Rep. 429; *Hunter v. State*, 1 Head, 160, 73 Am. Dec. 165; *Benjamin, Sales*, § 673a, p. 772; *Craft v. Parker, W. & Co.* 969 Mich. 245, 21 L. R. A. 139.

Marshall, J., delivered the opinion of the court:

This action was brought, tried, submitted to the jury, and went to judgment, upon the theory, apparently, that a recovery was claimed for the death of plaintiff's intestate on the ground of actionable negligence of defendant. Something is said in the briefs of counsel about the rule, so called, of implied warranty in the sale of provisions for immediate domestic use, as if that rule might apply to the facts. It is not necessary to consider that theory because of the manner in which the case was tried and submitted, as indicated, though it is proper, and deemed advisable as a guide in future proceedings to discuss it. The doctrine of Sir William

Blackstone that there is a warranty of the wholesomeness of provisions sold for domestic use to the buyer, and the vendor is bound to know their quality in that regard at his peril is controverted by the weight of authority in this country and England. Liability for damages in the circumstance mentioned is supported, but on the ground of deceit, not contract. It would be interesting, and probably constitute a valuable addition to our jurisprudence, to have the true nature of that liability definitely decided here. The writer is not familiar with any case where the point has been so presented and decided that the result stands as a binding adjudication on the subject, though there are *dicta* here and there recognizing the rule as stated by Blackstone as one prevailing in this country generally. *Gettely v. Rountree*, 2 Pinney, 379, 54 Am. Dec. 138; *Williams v. Slaughter*, 3 Wis. 347. There is a strong reason for holding that *caveat emptor* applies to the purchase of provisions for domestic use the same as to the purchase of other articles, in the absence of the express contract or of fraud; that the only difference is that the situation and relation of the parties in the one case raises an inference of artifice, while in the other it does not. In *Emerson v. Brigham*, 10 Mass. 197, 6 Am. Dec. 109, it is said in substance, that the mistake of Blackstone was in treating deceit and fraud as breach of implied contract; that artifice must be established as the foundation of liability, and without it no liability in the nature of that on an implied warranty exists in case of the sale of provisions any more than in the sale of any other article; that the sale of provisions for a sound price for immediate consumption involves a representation of wholesomeness, and knowledge of the falsehood, if falsehood there be, is presumed from the nature of the transaction and duties growing out of the trade; that the inference of fraud arises from the necessities of the situation, and to the deceit attaches the liability. That was affirmed in *Winsor v. Lombard*, 18 Pick. 57, where Chief Justice Shaw stated, in effect, that the supposition as to the rule of implied warranty existing in the sale of provisions any more than in the sale of other articles, is founded in failure to distinguish between a rule of evidence and a rule of law, as explained in Mr. Justice Sewall's opinion in *Emerson v. Brigham*. In *Moses v. Mead*, 1 Denio, 378, 43 Am. Dec. 676, Bronson, Ch. J., speaking on the same subject, said that the *dictum* of Blackstone cannot be supported in its full extent; that the liability can be supported, but on the ground of deceit, citing *Emerson v. Brigham* with approval, and distinguishing *Van Bracklin v. Fonda*, 12 Johns. 467, 7 Am. Dec. 339, a leading case often cited to the implied warranty theory and as sustaining the *dictum* of Blackstone. A careful reading of it shows that the sale considered was with actual knowledge of the vendor of the unwholesomeness of the article. He was guilty of a fraud and liable on that ground, and that was the real foundation of the recovery. See further, to the same effect, *Giroux v. Steadman*, 145 Mass. 439, and 43 L. R. A.

Burnby v. Bollett, 16 Mees. & W. 644. A careful examination of the textbooks on this subject shows that the writers reason along the line of *Emerson v. Brigham* and the other cases cited. Benjamin, Sales, ed. 1892, § 646; Biddle, Warranties, §§ 193-204; Schouler, Pers. Prop. § 348; 10 Am. & Eng. Enc. Law, p. 157. Courts in recent years have not been inclined to add new exceptions to the rule of *caveat emptor*, or to extend those already established. It once applied to all sales of personal property with the one exception of warranty of title. Many exceptions have since been added, presumably under the influence of the civil law, where the rule was *caveat venditor*, a rule as harsh to the seller as that of the common law to the buyer. Each exception in the development of our system paved the way for another, and that for still another, as the exigencies of particular situations seemed to require, in order to harmonize moral with legal obligations, till the rule itself ceased to be the safe and simple guide it was when Justice Popham, in pronouncing the law in his time, said, "If I have commodities which are damaged, whether victuals or otherwise, and I, knowing them to be so, sell them for good and affirm them to be so, an action upon the case lies for deceit; and although they be damaged, if I, knowing not that, affirm them to be good, still no action lies without I warrant them to be good." That a more enlightened sense of justice has softened and limited that rigorous rule, is by no means to be regretted; but if a written system of laws is to be preserved at all, and the science of the law is to be found therein, so many exceptions and limitations of a principle should not be recognized as to practically obscure it. To the one implied warranty of title, with which the rule of the common law, as indicated, commenced, has been added that in case of a sale by sample, warranty of general character where the chattel is not present and subject to inspection, warranty of manufactured goods as to merchantable quality, warranty that manufactured goods sold for a particular purpose are reasonably suitable therefor, and perhaps some others. None of the changes, however, have taken place in recent times, and as the remedy is ample to protect against frauds on the part of vendors where the vendees use reasonable care in looking after their own interests, our system, without further changes, is probably as perfect to the end that even-handed justice between individuals may be guaranteed as it can reasonably be.

In the light of the foregoing, no reason is perceived for saying that a mere distributor of water for a compensation should be held liable as a guarantor of its quality. It is not a commodity kept for sale in the strict sense of the term, but is free to everyone, in nature's reservoir, like light and air. It is taken directly or indirectly from a common source of supply. The immediate source, as in this case, is usually selected in advance and fixed by contract, leaving the mere service of a carrier to be performed, of taking the water from such source and distributing it to the consumer. To say that the person

or corporation performing that service shall be burdened with an implied warranty of the quality of the thing carried and distributed, would be treating the transaction as a sale, strictly so called, and then applying an exception to the doctrine of *caveat emptor* not supported by good reason or any authority we are able to find, or any to which our attention has been called. It would burden such public service in a way that would be destructive of private enterprise in that line, and render public enterprise in the same direction so attended with dangers as to discourage a service that has become a necessity in all communities of any considerable size, and which promotes to a high degree the welfare and happiness of individuals in communities great or small. If distributors of water under public franchises be held strictly accountable for the exercise of ordinary care not to place before their customers an unwholesome article under circumstances liable to induce persons, in the exercise of ordinary care, to use it for drinking or other domestic purposes in ignorance of the dangers attending the use, and held liable for deceit in such transactions, and the law be firmly administered along those lines, the safety of individuals, as affected by public water service, will be as well promoted as is consistent with the continuance of such service whether performed by strictly public or by quasi public agencies.

From the foregoing, it will be seen that if a recovery can be sustained on the facts of this case at all, it must be on the ground of actionable fraud or negligence without contributory fault on the part of the deceased. If defendant knew, or from the situation ought to have known, the water it was distributing in the city of Ashland was dangerous for domestic use, from other cause not discoverable ordinarily by the exercise of reasonable care, it owed the duty to its customers of disclosing that danger, and a failure so to do, knowing that such customers were liable to use the water through ignorance of its character, was a fraud in law, rendering the defendant liable to legal damages to any person injured by such fraud without fault on his part, and it was also a failure of duty amounting to actionable negligence as well, to which the same liability is incident. The mere fact, if it be a fact, that it had been rendered impracticable for defendant to procure a supply of wholesome water in Chequamegon bay, as required by the contract with the city, from causes attributable to the municipality, though constituting a defense against any action on its contract with the city or to forfeit its franchise, does not excuse knowingly pumping contaminated water from the bay and distributing the same to customers and deceiving them into the belief that it was wholesome. But, as indicated, though the conduct of the defendant be held wrongful on the ground of either fraud or negligence, if the deceased knew, or under the circumstances ought to have known, the dangerous condition of the water, yet used it with the consequence complained of, no legal liability thereby attaches to the defendant. If the deceased knew, and he is charged with

knowledge of what a man of ordinary intelligence under the circumstances ought to have known, then he was not deceived, whatever may have been the conduct of the defendant, and for the same reason he is chargeable with contributing to the result complained of, by his own want of care. So, plaintiff's cause of action, if any there be, sounds in tort however we may look at it, and knowledge, or its equivalent, on the part of the defendant, and want of such knowledge or equivalent on the part of the deceased, is essential to legal liability in the one case as well as the other, the only difference being in the manner of establishing the fault of the deceased, the affirmative of that being on the complainant, if a recovery be sought on the ground of fraud, and on the defendant if on the ground of actionable negligence. The distinction between the two is exceedingly shadowy, and really not important in the practical application of principles.

The foregoing discussion and statement is deemed justified, if not called for, by the positions taken by counsel. If some of the principles contended for were applied on a new trial of the case, and it resulted favorably to the plaintiff, the misfortune of a reverse might probably follow. The danger in that regard may be avoided, guided by what has been said.

In considering the specific errors assigned, it appears most logical to first take up the rulings complained of on the admission of evidence. First in order is that admitting proof that greater precautions to obtain pure water were taken by the defendant after the occurrence complained of than before. If defendant in fact knew the water supply was dangerously contaminated, the fact that it subsequently took means to correct the evil, as we have seen, is immaterial on that question, but the question of whether the water was impure, and whether defendant negligently failed to remedy the difficulty, were material, and determinable solely by the situation prior to the occurrence complained of. What was done afterwards had no legitimate bearing on that question, and the jury had no right to draw any inference therefrom. Such evidence has been repeatedly condemned by this and other courts. *Castello v. Landwehr*, 28 Wis. 522; *Anderson v. Chicago, St. P. M. & O. R. Co.* 87 Wis. 195, 23 L. R. A. 203; *Downey v. Sawyer*, 157 Mass. 418; *Columbia & P. R. Co. v. Hawthorne*, 144 U. S. 202, 36 L. ed. 405; *Blair v. Daly*, 68 N. Y. 547; *Nalley v. Hartford Carpet Co.* 61 Conn. 524, 50 Am. Rep. 47; *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15, 7 L. R. A. 338; *Hodges v. Percival*, 132 Ill. 53; *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692; *Motey v. Pickle Marble & G. Co.* 36 U. S. App. 682, 74 Fed. Rep. 155, 20 C. C. A. 366.

What has been said on the subject of evidence of precautions against sewage contamination after the occurrence complained of, applies to evidence of experts, received against defendant's objection, as to tests made of water taken from the bay some time after the occurrence. For aught that appears, the water may have been wholesome in

the early part of March, 1894, and very unwholesome when the subsequent tests were made. The evidence shows that the deceased took the fever about the 1st of March, and that the height of the typhoid fever epidemic was not reached till the last of that month, there being several hundred persons afflicted in all. Under the circumstances, sufficient time had elapsed for a material change in the bay water to have taken place. The admission of the evidence was plainly prejudicial error. True, evidence of a situation existing after an injury, though a considerable time may have elapsed, is admissible to show the situation existing at the time of the injury, if preceded by prima facie proof that no change has taken place in the meantime. *Tremblay v. Harnden*, 162 Mass. 383. Here that preliminary proof not only was wanting, but there was a strong case to the contrary made by the evidence.

It is further assigned for error that the court allowed opinion evidence as to facts in issue,—the evidentiary facts (not for scientific controversy) relating thereto being in dispute,—contrary to the settled law on the subject, and as declared in numerous decisions in this court, and recently stated in *Maitland v. Gilbert Paper Co.* 97 Wis. 476. The following are some of the questions complained of: "You may state whether or not, in your opinion, the water furnished by the Ashland Water Company during the winter and spring of 1894 had anything to do with the typhoid fever epidemic which prevailed in the city of Ashland during that time?" "What, in your judgment, was the cause of the typhoid fever of which he [Green] died?" "You say the typhoid fever in this case, in your opinion, was caused by drinking bay water: Do you say that from the investigations you made?" All the questions were answered in the affirmative. The learned counsel for respondent say in support of the questions, that they were proper because the effect of evidence in establishing controverted facts, on which opinions were given, was not involved,—that such facts were not in dispute. We are unable to see the case that way. How can it be said the question was established beyond a controversy that the deceased did not drink other than bay water? Let it be admitted that up to within four days from the time he was stricken with the disease, bay water was used at his working place as well as at his home. How can it be assumed from that alone that he did not drink water elsewhere or come in contact with some other medium whereby the seeds of the disease were taken into his system? As to each of these points, if the evidence was such as to remove it from the realms of mere conjecture, certainly it was not established in plaintiff's favor so as to warrant taking it from the jury, and if not, certainly the expert could not properly pass upon the evidence in giving his opinion. All the facts on which the opinions were given, except that Green died of typhoid fever, and that prior to his taking the disease he habitually used bay water for drinking purposes, were in controversy. It seems clear that opinions going to the question of how the disease was

contracted could have been properly elicited only on hypothetical questions, leaving the jury free to consider such opinions after finding from other evidence the existence of the foundation facts upon which they were based.

As a second proposition respondent suggests, with apparent confidence, that the questions were proper under the rule that a physician may testify, as to the cause of death, from personal examination or knowledge. That rule is familiar, but extends no further than the immediate cause of death, because, manifestly, that is the limit of scientific investigation. Failure to observe that test often leads to prejudicial error. A competent witness may testify as to whether a person came to his death by a wound found upon the body, but not as to who inflicted it, because, as said, he cannot go beyond the range of scientific investigation. This court said an expert may testify that certain injuries to a female, found on personal examination, may have been caused by a ravishment, but not that they were so caused, and, we may add, certainly not who was the guilty party. *Noonan v. State*, 55 Wis. 258. These illustrations show clearly that respondent's counsel erred in relying on the rule mentioned to sustain the method of examination of the expert resorted to. That such was their reliance is evident from the fact that they rounded out their examination by interrogating the witness as to whether he gave his opinions from personal examination. Wherever expressions are used in the books to the effect that opinion evidence of the cause of death, based on personal examination, is admissible, they will readily be seen, by a little attention to the matter, to relate solely to the immediate cause, not what set the action in motion.

Opinion evidence was permitted against objection, as to the duty of the defendant with reference to testing the water supply. As to this, respondent's counsel answer. The objectionable parts of the evidence, if there be such, were not responsive to the questions. An examination of the record fails to bear out that view. The questions were: "What, in your judgment, should the water company do with reference to ascertaining the purity or impurity of the water?" "How frequently, in your judgment, should these analyses be made?" They seem to call very clearly for opinion evidence as to the duty of defendant as regards testing the water supply. That certainly, if material at all, was a question to be determined by the jury. No ground is perceived upon which the questions can be sustained. It was competent to show by opinion evidence that the quality of the water was only determinable by certain tests, but whether legal duty required defendant to make the tests was certainly not a matter for such evidence.

The appellant further complains of a ruling, admitting in evidence an article published in an Ashland newspaper about seven months prior to Green's death, wherein the defendant was charged with distributing poisonous water to its customers and requiring the city to pay for water service twice as much as was proper, and it was suggested

that the most expeditious method of dealing with defendant, in order to remedy the evils complained of, was to annul its franchise and seize its property; and it was further suggested that the officers of the company should be prosecuted without leniency, civilly and criminally, if they did not voluntarily and immediately remedy such evils. There can be no justification suggested for the admission of that evidence. We have a right to assume that the learned counsel for respondent were unable to suggest any, as they did not attempt to do so. If overcharges were made by the water company, that had nothing to do with causing the death of Green by typhoid fever, and if the death was so caused, the declarations made in a newspaper in regard to the condition of the water certainly had no possible bearing on that question. They were no more competent as evidence because made editorially in a newspaper than if made by any individual. They had no legitimate place in the trial. They were well calculated to prejudice the jury against the defendant and prevent a fair and impartial trial of the important issues between the parties on the legitimate evidence produced. An examination of the record shows that considerable other evidence, admitted over the objections of appellant's counsel, to which no particular reference is made in their brief, was irrelevant and prejudicial. This observation refers to proceedings of the common council covering a period of about one year before Green's death and a month or two afterwards. That placed before the jury the history of a bitter contest that existed between defendant and the city of Ashland, covering the period mentioned. It closed with a resolution passed some time after the death of Green, canceling the defendant's franchise and directing the city attorney to commence proceedings to annul the same by judicial decree and to condemn the water supply. It is not claimed that any of this evidence was admissible for any purpose except to show notice to the defendant that it was claimed by the city that the bay water was unwholesome for domestic use. So little of it was relevant for that purpose, and that little so involved with matter having no bearing even on the question of notice, and so tending to prejudice the minds of the jury unfavorably to the defendant and to prevent a fair trial, that the whole should have been rejected on defendant's objection.

The remaining question for consideration was raised by the motion for a nonsuit, the motion to direct a verdict, and the motion for a new trial. All the rulings may properly be considered together. The learned trial court correctly held that the franchise under which the defendant operated its works did not require it to go outside of Chequamegon bay for a water supply. Following that and the negligence alleged in the complaint,—failure to extend the intake pipe to a point beyond the reach of sewage contamination,—the court submitted to the jury these questions: "Could the defendant company have procured wholesome water from Chequamegon bay at and prior to the sickness of Green?" "Was the defendant company guilty

of negligence which was the proximate cause of the death of Green?" "Did the defendant know, or ought it reasonably to have known, prior to the time when the deceased contracted the disease from which he died, that the water it furnished deceased was contaminated by typhoid germs?" To each of these questions the jury answered in the affirmative. Thus, it will be seen, the right of plaintiff to recover was made to turn on whether defendant negligently failed to extend its intake pipe into pure water in Chequamegon bay. As heretofore indicated, the mere fact of impracticability or impossibility of obtaining a pure water supply in the bay, if such were the facts, did not legally excuse defendant for knowingly distributing dangerously impure water for domestic consumption under such circumstances that persons of ordinary intelligence might probably use the same with dangerous consequences. But as that was not the theory of the plunders in making up the issues for trial, or in the submission of their case to the jury, the case will be considered as the parties and the trial court considered it. Whether a judgment could be sustained under the complaint and findings of fact against the defendant on the other theory, is immaterial on account of the branch touching defendant's fault, which is to be considered hereafter.

Does the evidence warrant the finding that defendant failed to exercise ordinary care to procure a pure water supply from the bay? That, as indicated, is the key to plaintiff's case. We have searched the record from beginning to end, and read and reread it with the greatest care, to find such evidence, and have failed. The point was raised in appellant's brief that no such evidence exists, and no reply thereto appears in the brief of respondent. No evidence is pointed out by them upon which the findings can rest. They evidently turned, if based on evidence at all, on an unsworn report of a chemist, based in part on an unverified report of an examination made by Vaughn, of the Michigan University, of several samples of water, one of which was taken from a point about 1,300 feet east of the breakwater, which point was about 2 miles from the pumping station. The samples were selected some time after the occurrence complained of. The one east of the breakwater was the only one found free from sewage contamination. The chemist who made the report did not place sufficient reliance thereon to recommend resorting for a supply to the place where, on the single occasion, pure water was found. He thought a supply might be found there with reasonable certainty, but expressed a preference for going outside the bay entirely. All the sworn evidence in the case shows that if pure water was found on one occasion at a particular place, that situation might or might not continue; that the bay water was so generally contaminated with sewage, especially in the spring, that a safe supply could not be found there with any reasonable certainty. Dr. Hosmer said, if there was no current, there would be more protection; that towards Washburn, just before reaching the

sewage on that side of the bay, was the safest place, but on account of the swinging currents one could not tell anything about it; that emptying so much sewage into the bay was sufficient to condemn it as a source of water supply without any test. Some tests were made of samples taken from different parts of the bay, one being near Houghton Point, several miles from the pumping station, that being the only one free from sewage contamination. One of the experts said that it was improper to take water for dietetic use from a body of water having no current, into which the sewage of a city was drained, unless the sewage delivery and the end of the intake pipe were many miles apart. There is a large amount of evidence of that character in the record, and nothing to controvert it. Further, it is shown that nearly a year prior to the death of Green, the officers of the city and the officers of the water company were of one mind as to the necessity of going outside the bay to get water suitable for domestic use. As early as February, 1893, an official report was made to the common council and adopted, to the effect that the intake pipe should be extended so as to take the water supply from the lake instead of the bay, and the city attorney was requested to draw a resolution formally directing the defendant to make such extension. In April thereafter, such a resolution was drafted by the board of health and adopted by the council, and thereafter an attempt was made to condemn the water supply and annul the defendant's franchise because it did not go to the lake with its intake pipe. It clearly appears all through the proceedings of the common council, for nearly a year prior to the death of Green, that all parties understood that the bay water was unsuitable for dietetic use. During all that time a contest existed between the municipality and the defendant as to whether the latter was obliged to extend the intake pipe into the lake, it being agreed that water free from dangerous pollution could not be obtained from the bay. That being the situation as to the primary parties to the contract, the situation could not be different as to private persons who became parties thereto by claiming the benefit of the contract. The verdict of the jury on the point here considered appears to be contrary to the evidence, and if a recovery on the record depends on that question, the verdict should have been directed for the defendant, and the judgment appealed from cannot stand. There is no explanation, it would seem, of the finding of the jury, consistent with the theory that it was based on evidence, except that they considered that regarding the filtration system, and did not mean to say that the water of the bay, without treatment by filtration, could at any point be depended upon as a safe source of supply.

It is further contended by appellant's counsel that the evidence conclusively shows contributory fault of deceased, precluding a recovery. As before indicated, if deceased drank the bay water with knowledge, or rea-

sonable means of knowledge, that it was dangerously polluted with sewage, he took upon himself the risk and the plaintiff cannot recover, whether recovery be sought on the ground of deceit or negligence. The jury found specifically for plaintiff on that point, yet said by another finding that prior to the death of Green it was publicly and widely stated, and believed, among the citizens of Ashland, that the cause of typhoid fever epidemics in the city was the impure drinking water furnished by defendant. In view of the fact, which we deem uncontroverted by the evidence, that the water was impure, and that such condition had existed for a long time and was widely and commonly known, the findings referred to are inconsistent, there being no evidence explaining why the deceased did not know of that which was a matter of common knowledge in the community where he lived. Common knowledge of a fact raises a presumption that all persons of average intelligence have notice of it. That is elementary. Not only was there no proof to justify the jury in saying the deceased did not have reasonable ground to believe what they said was commonly known and believed, but there is such affirmative evidence to the contrary. He knew that the sewage of the city was drained into the bay, and that the defendant's water supply was taken therefrom. He was an intelligent, reading, working man. He took one of the city papers wherein the dangers of taking water from the bay were discussed. He had typhoid fever in his family six months before he was stricken, his wife being the afflicted party. She was attended by Dr. Hosmer,—one of plaintiff's witnesses, who was thoroughly conversant with the condition of defendant's water supply, and who probably talked with the deceased on the subject, as he did with intelligent men generally, it being a matter of common talk. All these facts are in evidence. It is not deemed advisable to quote the evidence at length. Suffice it to say that the proof is overwhelming to the point that the bay water was dangerously polluted at the time Green was stricken with the fever, and that it had been in that condition, especially in the spring, for several years; that the facts in that regard were understood in the city generally, and had been the subject of discussion at public meetings and in the city council, and in the newspapers, and among the people for a long time. There is no evidence in the record to rebut the presumption that the deceased had notice of what was so commonly known. So we cannot escape the conclusion that the verdict of the jury on the subject of Green's contributory fault is without evidence to support it, and that the contrary is established by the evidence. For this and the other reasons mentioned, the judgment appealed from must be reversed.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

MONTANA SUPREME COURT.

J. J. YORK, *Respt.*,
v.

John M. STEWARD *et al.*, *Appts.*

(.....Mont.....)

1. Oral warranties are not admissible to vary the terms of a written lease subsequently or contemporaneously made.
2. There is no implied warranty that a leased house is fit for the use for which it is let, or that it is suitable for any purpose, or that it shall remain in a tenable condition.
3. An averment in answer to an action for rent that the lessor made false representations as to the fitness and condition of the building is not such an allegation of fraud as will entitle defendant to show the condition of the building.
4. The flowing of water into leased apartments from an upper tenement owned and occupied by the lessor, because of defective plumbing, causing injury to the lessee's goods, which the lessor refused to remedy within a reasonable time after notice, constitutes a breach of the implied covenant for quiet enjoyment, in the absence of excusing facts.
5. Refusal to allow a pleading to be amended during trial will not be ground for reversal, where no abuse of discretion or necessity to amend is shown.

(November 7, 1898.)

APPEAL by defendants from a judgment of the District Court for Silver Bow County in favor of plaintiff in an action brought to recover rent alleged to be due and unpaid. *Reversed.*

The facts are stated in the opinion.

Mr. John W. Cotter, for appellants:

The lease sued upon in this action contains an implied covenant for quiet enjoyment as against the lessor and those claiming under him.

Gear, Land. & T. § 91, note; 12 Am. & Eng. Enc. Law, p. 1011; Foster v. Peyser, 9 Cush. 242, 57 Am. Dec. 43; Boreel v. Lawton, 90 N. Y. 293, 43 Am. Rep. 170; DeWitt v. Pierson, 112 Mass. 8, 17 Am. Rep. 58; Whitbeck v. Cook, 15 Johns. 483, 8 Am. Dec. 272; 3 Parsons, Contr. p. 501.

It was competent to show the actual condition of the building and its unfitness for the purpose intended.

Blake v. Dick, 15 Mont. 236; Milliken v. Thorndike, 103 Mass. 385.

Any act on the part of the landlord which so disturbs the tenant's possession of the demised premises as to compel an abandonment of the same, or which deprives him of their

NOTE.—As to the effect of a partial eviction upon liability for rent, see *note* to *Edmison v. Lowry* (S. C.) 17 L. R. A. 275; also *Collins v. Lewis* (Minn.) 19 L. R. A. 822.

As to constructive eviction, see also *Lelferman v. Osten* (Ill.) 89 L. R. A. 156.

For implied covenants in a lease as to the fitness of the property for the purpose intended, see *note* to *Clifton v. Montague* (W. Va.) 38 L. R. A. 449.
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beneficial enjoyment, either in whole or in part, or any entry of the landlord upon said premises in such manner as to unfit them for the purpose for which they were leased, will amount to an eviction.

7 Am. & Eng. Enc. Law, p. 37, note 5; Gear, Land. & T. § 47; Rowbotham v. Pearce, 5 Houst. (Del.) 135; Bissell v. Lloyd, 100 Ill. 214; West Side Bank v. Newton, 76 N. Y. 616; McAlester v. Landers, 70 Cal. 79.

It is not necessary to state facts constituting an eviction; it may be averred generally; no formal allegation is necessary.

1 Estee, Pl. § 1259; Rickert v. Snyder, 9 Wend. 416.

Action of third persons holding under the landlord may be shown, and knowledge of former acts is also admissible for the jury to consider.

Warren v. Wagner, 75 Ala. 188, 51 Am. Rep. 446; Story, Agency, § 452; City Power Co. v. Fergus Falls Water Co. 55 Minn. 176; McCarthy v. York County Sav. Bk. 74 Me. 315, 43 Am. Rep. 591; Carson v. Godley, 26 Pa. 111, 67 Am. Dec. 405.

The plaintiff, being the owner and in possession of the upper stories of the building, portions of which he had rented to different tenants of his own, was responsible for any acts of the tenants in allowing the overflow of the closets or fixtures, and any damage that might result to the defendants thereby.

Marshall v. Cohen, 44 Ga. 489, 9 Am. Rep. 170; Gear, Land. & T. § 46; Lawson, Rights, Rem. & Pr. § 2829, p. 4621; Dyett v. Pendleton, 8 Cow. 727; Lawrence v. French, 25 Wend. 443; Edgerton v. Page, 20 N. Y. 281; Crommelin v. Thies, 31 Ala. 412, 70 Am. Dec. 499; Jackson v. Eddy, 12 Mo. 209.

A surrender of a lease may be inferred from the circumstances and conduct of the parties, evincing that they both agree to consider a surrender as made.

Gear, Land. & T. § 192, p. 696; Beall v. White, 94 U. S. 382, 24 L. ed. 173; Bedford v. Terhune, 30 N. Y. 453, 86 Am. Dec. 394, note.

An executed verbal agreement to reduce rent is binding after the acceptance of the reduced rent in full.

Gear, Land. & T. § 132; Horgan v. Krumwiede, 25 Hun, 116; Nicoll v. Burke, 78 N. Y. 580; Copper v. Fretnoransky, 42 N. Y. S. R. 472.

It was competent for appellants to show the manner in which the second story of the building was used by plaintiff, to prove their allegation of damages, as an offset, if for no other purpose, to the claim for rent.

Jones v. Freidenburg, 66 Ga. 505, 42 Am. Rep. 86, note; Gliksauf v. Maurer, 75 Ill. 289, 20 Am. Rep. 238, note; Toole v. Beckett, 67 Me. 544, 24 Am. Rep. 54. See also Pike v. Brittan, 71 Cal. 159, 60 Am. Rep. 527.

Messrs. Charles O'Donnell and Francis Brooks, for respondent:

Nothing short of an actual eviction from the premises by the landlord, or through his agency, or by title paramount, or a surrender of the premises by the tenant, and their ac-

ceptance by the landlord, will at common law relieve the tenant from his liability for the rent for the full term.

Harrison v. North, 1 Cas. in Ch. 84; *Hart v. Windsor*, 12 Mees. & W. 78; *Whitbeck v. Skinner*, 7 Hill, 53; *Kelsey v. Ward*, 16 Abb. Pr. 98; *Myers v. Burns*, 35 N. Y. 269; *Willard v. Tillman*, 19 Wend. 358; *Gates v. Green*, 4 Paige, 355, 27 Am. Dec. 68.

There is no implied contract on the part of the landlord that the leased premises are tenantable.

Witty v. Matthews, 52 N. Y. 512; *Cowell v. Lumley*, 39 Cal. 151, 2 Am. Rep. 430.

The landlord cannot be treated as having impliedly covenanted to repair, or that the building is or shall continue to be fit for the purposes for which it was let.

Robbins v. Mount, 4 Robt. 553.

Where a man undertakes to pay a specific rent for a piece of land, he is obliged to pay that rent whether it answers the purpose for which he took it or not.

Laughin v. Kief, 15 Alb. L. J. 255; *Hartford & N. Y. S. B. Co. v. New York*, 12 Hun, 550.

Pigott, J., delivered the opinion of the court:

This is an action for rent alleged to be due upon a lease entered into between a plaintiff and defendants on December 31, 1892, by the terms of which plaintiff let to the defendants the storeroom and first basement of a three-story brick building in Butte for the term of twelve months, beginning with January 1, 1893, at the monthly rental of \$225 for the first six months, and of \$250 for each month thereafter. Provision is made in the lease that, if the rent be not paid monthly in advance, the lessor may re-enter, and take possession, and, at his option, may determine the lease. It contains the usual covenants against waste or alteration by the lessees, but expresses no covenant whatever on the part of the lessor. Upon issues framed by the complaint, answer, and reply the cause was tried by jury. A verdict was rendered, and judgment entered for the plaintiff. From an order refusing a new trial, and from the judgment, defendants have appealed.

1. Much difficulty has been experienced in the effort to determine the exact ground upon which the defendants, in their first defense and counterclaim, intend to rely. The matters there stated as constituting both a defense and a counterclaim are set forth in a manner so obscure, and with such disregard of the rule requiring conciseness and clearness, that a demurrer attacking the part of the answer now being considered, for want of certainty, as well as for ambiguity, would have been well interposed. Since, however, no objection was taken in the court below or here to the answer upon any ground whatsoever, we have examined the first defense and counterclaim as pleaded, and, after some hesitation, arrive at the conclusion that the pleader intended to aver, substantially, that, on, or just before, the execution of the lease, and while the defendants were negotiating with plaintiff therefor, plaintiff warranted that the building was in all respects suitable

for the purpose of carrying on therein the piano and musical instrument business, in which defendants were engaged; that the basement would be ceiled, and put in good condition, and a new sidewalk laid; that defendants, relying upon these representations and warranties, entered into the lease, and in pursuance of the lease went into possession of the building, and placed their stock of musical instruments therein, and remained in possession until August 31, 1893; that the building was defectively constructed; that it was unfit for defendants' business, and that by reason of the defective construction of the plumbing and water fittings in the second story, which was occupied by and in the possession of plaintiff, the sinks and closets situated in the second story, and under the control of plaintiff, were allowed to overflow, and the water permitted to run down into the defendants' place of business, and upon defendants' merchandise, whereby the stock of goods was injured; that defendants repeatedly notified plaintiff of the defective condition of the plumbing and fittings in the building, but that plaintiff refused and neglected to remedy such defects, by which default plaintiff permitted a continuing nuisance to exist; that, because of the defective construction of the building, it was unfit for the use for which it was rented by the defendants, and was untenable; and that by reason of the representations and warranties of the plaintiff as to the condition of the building, and by reason of its unfitness for the purposes for which it was warranted by plaintiff, and by reason of the injury done by the water, defendants were damaged in their business in the sum of \$250.

The first error assigned is the action of the court below in refusing to permit the introduction of evidence tending to prove an oral warranty of the condition of the building. The rule that, in the absence of fraud, accident, or mistake, oral evidence cannot be admitted to alter, add to, or contradict the terms of a written contract, is so familiar that it would seem needless to cite authorities. This rule is applicable to evidence offered for the purpose of establishing an oral warranty, where, presumptively, the parties have reduced their entire contract to writing. *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380; *McLean v. Nicol*, 43 Minn. 169; *Snead v. Tietjen* (Ariz.) 24 Pac. 324. See also *Sanford v. Gates*, T. & Co. 21 Mont. —, 53 Pac. 749; *Gaffney Mercantile Co. v. Hopkins*, 21 Mont. —, 52 Pac. 561; *Mast v. Pearce*, 58 Iowa, 579, 43 Am. Rep. 125; *Fisher v. Briscoe*, 10 Mont. 124; *Anderson v. Perkins*, 10 Mont. 154; *Stevens v. Pierce*, 151 Mass. 207; *DeWitt v. Berry*, 134 U. S. 306, 33 L. ed. 896; *Brady v. Henry*, 71 Cal. 481, 60 Am. Rep. 543. The court, therefore, did not err in excluding all evidence having a tendency to show that plaintiff, contemporaneously with the making of the lease, or prior thereto, warranted by word of mouth the condition of the building, or promised to lay a new sidewalk, or ceil the cellar. Nor may defendants base their defense and counterclaim upon the breach of an implied war-

ranty of fitness, for in the lease of a house there is no implication of warranty that the property is fitted for the use for which it is let, or that it is suitable for any purpose, or that it shall remain in a tenantable condition. *Blake v. Dick*, 15 Mont. 236; *Gear, Land. & T.* § 99. Defendants insist, however, that, having pleaded fraud, concealment, and misrepresentation in the making of the lease, it was competent for them to show the actual condition of the building, and its unfitness for the purpose intended. In answer to this contention it is sufficient to say that neither fraudulent misrepresentation nor concealment is pleaded. The answer, it is true, alleges that the plaintiff represented the building to be suitable, but it is silent as to whether or not the representation was fraudulently made. The averment that the representation was false is tantamount to saying that it was merely untrue. *Budd v. Power*, 8 Mont. 380. Defendants assign as error the rejection of evidence which they say was offered for the purpose of proving that the building was so defectively constructed in respect of the plumbing, fittings, water-closets, and sinks on the second floor, and in the possession of plaintiff, as to cause the water therein continually to overflow, and run down through the ceiling into defendants' storeroom, the effect of which was to deprive them of its beneficial enjoyment, to render it untenable, and to injure their goods; and that plaintiff failed, refused, and neglected to remedy the defect, although his attention was frequently called to it by the complaints of the defendants; and that by reason of the continuance of the nuisance defendants surrendered the demised property in August, 1893. That the evidence tendered and the offers of proof were as broad as defendants assume they were, is not perfectly apparent; but we are inclined to think that, when the pleadings and the whole course of the trial are considered, it may fairly be held that the evidence ruled out and the offers to prove comprehended, in substance, what is claimed by defendants. Would the evidence offered and excluded tend to establish the violation by plaintiff of any agreement or promise on his part contained in the lease? The usual words of demise import a covenant for quiet enjoyment, which signifies that the tenant shall not be evicted by title paramount, and also that his possession shall not be disturbed by the acts or wrongful omissions of the lessor. Any sort of annoyance, unless, perhaps, a mere trespass, affecting the occupation of the property let, which prevents the tenant from enjoying it in as ample a manner as he is entitled to by the terms of the lease, amounts to a breach. If the lessor disturbs the possession by an unlawful interference therewith, the lessee may, when sued for the rent, set up the damages arising from such disturbance as a counterclaim (*Hanley v. Banks*, 6 Okla. 79; *McDowell v. Hyman*, 117 Cal. 67) while at common law it seems he may recoup damages (*New York v. Mahie*, 13 N. Y. 151). Treating the evidence which was offered as received, it appears that the plaintiff owned and was in posses-

sion and control of that part of the building immediately over the room let by him to the defendants; that the plumbing and fittings in such part of the house were defectively constructed; and that, by reason of the refusal of the plaintiff to remedy the defect, water overflowed the sinks and closets of the plaintiff, and ran down into the storeroom of the defendants to such an extent as to deprive them of the beneficial use of their tenement. We are satisfied that such evidence would, at least, tend to establish a constructive eviction, occasioned by the omission of the lessor to abate a nuisance, originating in, and continuing to exist upon, the property owned and controlled by him. Anything which is an obstruction to the free use of property so as to interfere with its comfortable enjoyment is a nuisance. *Comp. Stat.* 1887, div. 1, § 361. It is well settled that defective water pipes become a nuisance when carelessly maintained. *Wood, Nuisances*, § 124. The landlord's acts or defaults may not amount to a physical eviction; nevertheless they may be of such character as to create or permit the continuance of a nuisance, "which, by preventing the reasonable use by the tenant of the premises, would affect directly the consideration of the contract between them." *Sully v. Schmitt*, 147 N. Y. 248; *McDowell v. Hyman*, 117 Cal. 67; *Kline v. Hanke*, 14 Mont. 361; *Marshall v. Oohen*, 44 Ga. 489, 9 Am. Rep. 170. If defendants, as tenants of the lower floor, were disturbed in their occupancy, or constructively evicted by the flowing of water from improperly constructed fixtures in a part of the building not let to them, but in the possession and under the control of plaintiff, the lessor, and the disturbance or eviction would not have resulted but for the omission of the lessor to remedy the defective construction within a reasonable time after notice thereof, then the lessor, at least in the absence of excusing facts, has violated the implied covenant for quiet enjoyment. This is clearly common sense as well as the law; indeed, the supreme court of Georgia, in *Freidenburg v. Jones*, 63 Ga. 612, which case is approved in *Jones v. Freidenburg*, 66 Ga. 505, 42 Am. Rep. 86, held that "where a tenant on a lower floor is injured by the flowing of water from the bathtubs and water fixtures situated above, he has a right of action against the landlord, if the overflow results from their improper construction; and this liability exists without reference to the occupation of the upper apartment by another tenant." But it is not necessary in the case at bar to approve or disapprove the doctrine there declared. *Blake v. Dick*, 15 Mont. 236, is cited by plaintiff as controlling, but nothing decided in that case is inconsistent with the principles applicable to the question raised in the case before us. For the error referred to, the motion for a new trial should have been granted.

2. During the trial the defendants asked leave to amend the answer by inserting an allegation to the effect that, owing to the negligent use of the upper story by the plaintiff and his tenants, the water fittings were allowed to overflow, and the water to run

down, so as to render the store untenable for defendants' purpose, or for any purpose. The request was denied. We perceive no error in the action of the court. It does not appear that defendants made any showing of the necessity to amend, nor was the amendment sought for the purpose of making the allegations correspond to the evidence already introduced. Some testimony had been received tending to prove that lodgers or tenants on the second floor had allowed water to overflow the sinks. But this evidence was received as one of the inducements for the alleged agreement for alteration or cancelation of the lease pleaded in the second defense, and not as supporting the averments constituting the first defense and counterclaim. It does not appear that court abused its discretion in refusing the application, which was made during the progress of the trial.

3. The second defense is, in effect, that the plaintiff, on July 1, 1893, in consideration of the prevailing business depression and of the untenable condition of the demised property, and of the defective construction of the water sinks on the second floor of the building, entered into a new agreement with defendants, by which he let the property to them from month to month, at a rental of \$225 monthly, and that on August 1, 1893, defendants notified plaintiff that they would quit the premises on September 1, 1893, and that they were never in possession after August 31st, and that they paid all rents accrued to September 1, 1893. Plaintiff admitted that the rent was paid to September

1st, and that defendants vacated the property in August, and did not thereafter occupy it. Plaintiff denied that there was any agreement whatever to change the terms of the lease, and testified that because of the stagnation of business he voluntarily reduced the monthly rent for July and August from \$250 to \$225. The testimony upon this question was in substantial conflict. The jury returned a verdict for the plaintiff in the sum of \$846, and thereby necessarily found that the only change made in the lease was a reduction of the rent to \$225 a month for the last half of the term.

Errors are also assigned upon the charge of the court and refusal of prayers for instructions relating to the second defense, Examination of the instructions given and of those refused has disclosed no reversible error. Some other matters of minor importance are specified as error, but, as they are not likely to arise again in the cause, their consideration is not deemed necessary. Let the judgment and order appealed from be reversed, and the cause remanded, with direction to the district court to permit the defendants to amend the answer as they may be advised, and within such time and on such terms as may to the court seem proper. It is further ordered that appellants do not recover the costs incident to the appeal, and that each party bear such of said costs as were incurred by him.

Reversed and remanded.

Hunt, J., concurs. Pemberton, Ch. J., not sitting.

OREGON SUPREME COURT.

Carl H. JACKSON, *Respt.*,

v.

Alex. McINNIS, *Appt.*

(.....Or.....)

Presentment and demand of payment made on a receiver pendente lite of an insolvent bank and notice of nonpayment by him are insufficient to bind an indorser of a negotiable certificate of deposit issued by the bank before its insolvency.

(October 31, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action against the indorser of a negotiable certificate of deposit. *Reversed.*

The facts are stated in the opinion.

Messrs. George, Gregory, & Duniway, for appellant:

The certificate of deposit sued upon is not an inland bill of exchange under our statute, because it contains no promise to pay

NOTE.—For presentment to receiver, see also *Hutchison v. Crutcher* (Tenn.) 37 L. R. A. 89.

For notice to assignee for creditors, see *American Nat. Bank v. Junk Bros. Lumber & Mfg. Co.* (Tenn.) 28 L. R. A. 492.

43 L. R. A.

any other person or his order, or unto bearer, any sum of money therein mentioned. 2 Hill's Code, § 3188.

The law raises a right of action in favor of the payee against the maker, which right of action is conditional. But this is not a bill of exchange, so that an indorsement to transfer the right of action can be treated as an indorsement of a bill of exchange under the law merchant.

Patterson v. Poindexter, 6 Watts & S. 227, 40 Am. Dec. 554; *Lebanon Bank v. Mangin*, 28 Pa. 458; *Charnley v. Dulles*, 8 Watts & S. 381; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. 498, 78 Am. Dec. 390; *Austen v. Miller*, 5 McLean, 156.

The indorsee in an action against the indorser can only recover the consideration which he has actually paid.

Coye v. Palmer, 16 Cal. 160; *Cook v. Cookrill*, 1 Stew. (Ala.) 475, 18 Am. Dec. 67; *Braman v. Hess*, 13 Johns. 52; *Youse v. M'Creary*, 2 Blackf. 243; *Ingalls v. Lee*, 9 Barb. 650.

An indorser's liability is contingent upon strict demand of payment on maker and notice of nonpayment.

2 Randolph, Com. Paper, §§ 758, 1067.

Demand of payment must be made upon the maker or authorized agent.

2 Randolph, Com. Paper, §§ 1083, 1086.

A bill drawn or a note made by a corporation must be presented for payment to the corporation, or to an agent duly authorized to pay its bills.

5 Am. & Eng. Enc. Law, pp. 528, 2105.

If the maker becomes bankrupt, still demand must be made upon him for payment.

Hawley v. Jette, 10 Or. 31, 45 Am. Rep. 129; *Phipps v. Harding*, 34 U. S. App. 148, 70 Fed. Rep. 468, 17 C. C. A. 203, 30 L. R. A. 513; 2 Randolph, Com. Paper, § 1086; Story, Bills, §§ 318, 326, 346; Tiedeman, Com. Paper, §§ 313-366; Story, Prom. Notes, §§ 241-252; Chitty, Bills, 11th Am. ed. pp. 330, 335.

Demand for payment upon the assignee to whom the maker has made statutory assignment for the benefit of creditors is not sufficient to hold the indorser.

Armstrong v. Thruston, 11 Md. 148; Story, Bills, §§ 318, 326, 346; Chitty, Bills, 11th Am. ed. pp. 330, 335; *Hawley v. Jette*, 10 Or. 31, 45 Am. Rep. 129.

The appointment of a receiver of a corporation is interlocutory, does not wind up the corporation, or revoke the appointment of the agents of the corporation.

Farmers' Loan & T. Co. v. Oregon P. R. Co. 31 Or. 237, 38 L. R. A. 424; *Rockwell v. Portland Sav. Bank*, 31 Or. 431, 20 Am. & Eng. Enc. Law, p. 11; 5 Thomp. Corp. § 6894, 6939, 6940; *Ballard v. Burton*, 64 Vt. 394, 16 L. R. A. 664.

Messrs. Spencer & Malarkey for respondent.

Bean, J., delivered the opinion of the court:

This is an action by an indorsee against an indorser of a negotiable certificate of deposit, issued by the Portland Savings Bank on October 26, 1894, in favor of the defendant, for \$399.76, and by him transferred and indorsed to the plaintiff, for value. After the indorsement, and before the maturity of the instrument, the Portland Savings Bank, becoming insolvent, closed its doors, and a receiver, *pendente lite*, was appointed by the circuit court of Multnomah county. Upon the maturity of the paper, presentment and demand of payment was made upon the receiver, and notice of nonpayment given to the defendant; and the only question necessary to consider on this appeal is whether such demand and notice is sufficient to hold the indorser. No authority directly in point has been cited by counsel on either side, nor have we been able to find any; but upon principle the demand in question was, in our opinion, insufficient. The contract of an indorser of a negotiable instrument is that if, when duly presented at maturity, the paper is not paid by the maker, he—the indorser—will, upon notice of dishonor, pay the same to the indorsee or other holder. It is a collateral and conditional contract, governed by the technical rules of the law merchant; and a demand of payment upon the maker or drawer and notice of nonpayment are conditions precedent to the indorser's liability. It would seem, necessarily, to follow, therefore, from the very nature of the contract, that the

presentment for payment must be made to the person whose duty it is to pay, or to an agent or person duly authorized to act in the premises. 1 Dan. Neg. Inst. § 588; Tiedeman, Com. Paper, § 313. Now, the receiver *pendente lite* of a corporation is not the agent of the corporation, nor is it his duty to pay or discharge any of its obligations, except as he may be directed by the court. He is an officer of the court, to preserve and distribute the assets of the insolvent corporation, and has no power other than that conferred upon him by the order of his appointment, or such as may be derived from the general practice of the courts of equity in such cases. High, Receivers, § 1; *Farmers' Loan & T. Co. v. Oregon P. R. Co.* 31 Or. 237, 38 L. R. A. 424. A demand upon him for the payment of the debts of the corporation would, therefore, be a useless proceeding, because he has neither the power nor authority to pay them. That duty still rests upon the corporation, notwithstanding its insolvency and the appointment of a receiver. Neither of these events amounts to a dissolution of the corporation, nor relieves it from the duty of paying its obligations. *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, 20 L. ed. 840; *Decker v. Gardner*, 124 N. Y. 334, 11 L. R. A. 480; *Chemical Nat. Bank v. Hartford Deposit Co.* 161 U. S. 1, 40 L. ed. 595. It continues to exist as a corporate entity, and its insolvency constitutes no excuse for neglect to make due presentment for payment of its paper, or to give notice of dishonor to an indorser thereof. *Hawley v. Jette*, 10 Or. 31, 45 Am. Rep. 129. The case of *Armstrong v. Thruston*, 11 Md. 148, is quite analogous to the case in hand, and supports the conclusion at which we have arrived. In that case the demand of payment was made upon an assignee of the maker of the note for the benefit of creditors, and it was held that it was not sufficient, because the insolvency of the maker did not excuse demand and notice, and the assignee was not his agent, nor was it his duty to pay the note; and the court says no case has been found in which a demand of payment on a person standing in such a relation to the maker of the note has been held sufficient. The case of *Ballard v. Burton*, 64 Vt. 387, 16 L. R. A. 664, cited by the defendant, is not in point. That was an action against a person who joined with the bank as maker of a certificate of deposit, and his undertaking was to pay the plaintiff the amount called for by the certificate when it, properly indorsed, should be returned to the bank. Before its maturity, the bank failed, and the question was whether a return of the certificate to the receiver was a sufficient compliance with the terms of the contract. There was no question in the case as to the rights or liabilities of an indorser, and no discussion or consideration of that question. The same may be said of the case of *Hutchison v. Crutcher*, 98 Tenn. 421, 37 L. R. A. 89. That was an action against an indorser of a note executed by a third person, payable at a certain bank; and the bank being, at the maturity of the note, in the hands of a receiver, it was held by a divided court that the

place of payment was at the office of the receiver, and not at the building formerly occupied by the bank.

It follows from these views that the demand for payment made by the plaintiff upon the receiver of the Portland Savings Bank was insufficient to charge the defendant as indorser, and *the judgment of the court below must be reversed*, and the case remanded for such further proceedings as may be proper, not inconsistent with this opinion.

A. H. CARSON, *Respt.*,
v.

C. F. GENTNER *et al.*, *Appts.*

(.....Or.....)

1. A prior appropriator of water from a natural stream flowing through state lands has such a vested right to the use of the water and to the ditch in which it flows, also constructed on said lands, as will defeat the claim of one who, with notice of such diversion and existence of the ditch, obtains from the state a deed of the premises, without any reservation of any water rights.
2. The reservation of vested rights of the owners of ditches provided by Hill's Anno. Laws, §§ 4057-4060, on the issue of patents for land by the state, is not the grant of a new easement, but the recognition of a pre-existing right.
3. A prior appropriator who owns a ditch across lands subsequently patented by the state to another person has the right to enter on such lands to clean and repair the ditch.

(March 15, 1898.)

NOTE.—*Right of appropriator to enter upon the land of an upper proprietor to clean out ditch.*

The rule which has been applied in this case is the ordinary rule applicable to the preservation of easements.

In *Darlington v. Painter*, 7 Pa. 473. It is said that the owner of a watercourse through the land of another, whether to lead the stream to his ground or to discharge it therefrom, may enter to remove obstructions from natural or artificial courses.

And this right was applied to a drainage ditch in *Roberts v. Roberts*, 7 Lans. 55.

In *Pico v. Colimas*, 32 Cal. 578, where the owner of the ditch entered upon the land of the upper owner and threw down a gate which the latter had placed in the ditch to divert water for his own use, the court said as ancillary to the reasonable enjoyment of plaintiff's easement he had a right to enter upon the upper proprietor's land for the purpose of keeping the ditch in repair and free it from obstructions prejudicial to the easement, and that if the enjoyment of the easement was not impaired by the gate there was no right to enter upon the upper land to remove it.

And that case was cited with approval in *Fitzell v. Leaky*, 72 Cal. 482.

And its doctrine applied in favor of the owner of an easement for a drainage ditch in *Durfee v. Garvey*, 78 Cal. 546.

The right to maintain the ditch is involved in the acquisition of it. *McGuire v. Brown*, 106 Cal. 660, 30 L. R. A. 384.

In Colorado the Constitution and laws permit the condemnation of a right of way for the construction and maintenance of an irrigation ditch. *United States Freehold Land & Emigration Co. v. Gallegos*, 89 Fed. Rep. 773.

APPEAL by defendants from a decree of the Circuit Court for Josephine County in favor of plaintiff in a suit brought to enjoin defendants from interfering with plaintiff's maintenance of a ditch across their premises. *Affirmed.*

Statement by Moore, Ch. J.:

This is a suit to enjoin defendants from interfering with plaintiff's maintenance of a ditch constructed across their premises. The evidence shows: That on December 23, 1859, the surveyor general of Oregon approved the plat of the survey of township 37 S., range 5 W., of the Willamette meridian, whereupon the legal title to section 16 of said township and range became vested in the state of Oregon for the support of common schools. 9 Stat. at L. 323, chap. 177; 11 Stat. at L. 383, chap. 33. That in 1868 one Lewis Strong constructed a ditch across the W. 1/4 of the N.E. 1/4 of said section, and thereby diverted from Board Shanty creek the waters thereof, which he used in working a mine in section 22, in said township and range; but, having abandoned his improvements, plaintiff, on April 1, 1876, took possession thereof, and with the water flowing in the ditch continued the operation of the mine, during nearly every season, to the commencement of this suit. That on November 21, 1883, defendants settled upon the land first above described, through which Board Shanty creek flows, and thereafter obtained a deed from the state of Oregon for said tract which contained no reservation of water rights. That on November 30, 1892, plaintiff endeavored to go on defendants' land to repair said ditch, but they refused to permit him to do so,

and the condemnation of a right of way for the construction and maintenance of an irrigation ditch. *United States Freehold Land & Emigration Co. v. Gallegos*, 89 Fed. Rep. 773.

In *Flickinger v. Shaw*, 87 Cal. 126, 11 L. R. A. 134, it appeared that the agreement under which the ditch was constructed provided that the owner of it should keep it in repair.

The right to clean out the ditch may extend to the entry upon the stream above the head of the ditch for the removal of obstructions which prevent the flow of the water through the ditch. *Crisman v. Helderer*, 5 Colo. 589.

In *Spear v. Cook*, 8 Or. 380, the deed gave the right to repair.

The mere right to maintain the ditch does not give the owner the right to use the soil adjoining the ditch for the purpose of repairing it. *Thompson v. Uglow*, 4 Or. 369.

As bearing upon the question of the right to repair, it has been held that a ditch owner is bound to keep his ditch in repair so that the water will not break through and overflow the land of adjoining proprietors. *Richardson v. Kier*, 34 Cal. 63, 91 Am. Dec. 681; *Campbell v. Bear River & A. Water & Min. Co.* 35 Cal. 679; *Childester v. Consolidated Ditch Co.* 59 Cal. 197.

In *Carson v. Gentner*, it seems to have been assumed by the parties that the right to repair the ditch accompanied the right to the ditch because defendant refused to permit the plaintiff to go upon land to repair the ditch, and defended his action in that respect by alleging that plaintiff had no right to construct the ditch. And the court held that the right to the ditch involved the right to repair. H. P. F.

whereupon he commenced this suit for the relief hereinbefore stated. The defendants, after denying the material allegations of the complaint, allege that plaintiff never had any license from the state of Oregon to enter upon its school lands, nor had he or his predecessors any privy of interest with the state, by which he or they were authorized to construct or maintain said ditch across the land now owned by them, or to use the waters of said creek. The reply having put in issue the allegations of new matter contained in the answer, a trial was had, and the court found, from the evidence, that plaintiff was the owner of said ditch, and for more than sixteen years had been in the adverse possession thereof, and was entitled to use the same to carry the waters of Board Shanty creek, of which he was also entitled to the use, and thereupon perpetually enjoined defendants from interfering with plaintiff's ownership of the ditch and right to enter upon their lands, at all times when necessary to repair the same, from which decree defendants appeal.

Mr. Davis Brower for appellants:

Messrs. G. W. Colvig and R. G. Smith,
for respondent:

Mining is a franchise which rests in a presumptive grant from the state. It is extended to all persons who choose to mine and construct canals to their properties, and is such a vested right as cannot be destroyed.

Gold Hill Quartz Min. Co. v. Ish, 5 Or. 106; *Irwin v. Phillips*, 5 Cal. 140, 63 Am. Dec. 113; *Conger v. Weaver*, 6 Cal. 548, 65 Am. Dec. 528; *Merced Min. Co. v. Fremont*, 7 Cal. 317, 68 Am. Dec. 262; *Black's Pomeroy, Riparian Rights*, § 26, note, § 29; Or. Const. art. 15, sub. 8; 2 *Lindley, Mines*, § 338.

The legislative assembly of Oregon recognized the right of miners to work their claims and appropriate water and construct ditches to the same at an early date.

2 *Hill's Code*, §§ 3830, 3832, 3833; 1 *Lindley, Mines*, §§ 44, 45.

The only reservation on an appropriation of water for mining purposes was that the local laws of miners should not conflict with the laws of the United States.

2 *Hill's Code*, § 3832.

A title by adverse possession is a perfect title, and will protect the possessor against every act of infringement that a paper title could.

Parker v. Metzger, 12 Or. 409.

Prescriptive title applies to water rights, ditches, and easements.

Johnson v. Knott, 13 Or. 315; *Coventon v. Seufert*, 23 Or. 548.

Possession is hostile and adverse if asserted under claim of right, and evidenced by exclusive use and occupation.

Rowland v. Williams, 23 Or. 515.

The statute of limitations runs against the state the same as against private persons.

Code, p. 138; *State v. Baker County*, 24 Or. 141; *Buswell, Limitations & Adverse Possession*, § 98, p. 150; *People v. Clarke*, 9 N. Y. 349; *People v. Columbia County Super.* 10 Wend. 363; *Jones v. Borden*, 5 Tex. 43 L. R. A.

410; *Wood, Limitations of Actions*, p. 93; *Hoadley v. San Francisco*, 50 Cal. 274; *Weber v. State Harbor Comrs.* 18 Wall. 57, 21 L. ed. 798; *St. Paul v. Chicago, M. & St. P. R. Co.* 45 Minn. 387; *State v. Baker County*, 24 Or. 141.

The right to go upon state lands for the purpose of acquiring water rights or constructing ditches has always been exercised by the people in this state.

An easement could be acquired by adverse use if title could.

Tolman v. Casey, 15 Or. 83; *Coventon v. Seufert*, 23 Or. 548.

Moore, Ch. J., delivered the opinion of the court:

The question presented for consideration by this appeal is whether a prior appropriator of water from a natural stream, flowing through state lands, has such a vested right to the use of the water and to the ditch in which it flows, also constructed on said lands, as will defeat the claim of one who, with notice of such diversion and existence of the ditch, obtains from the state a deed for the premises, without reservation of any water rights. Defendants' counsel contend that, prior to the appropriation complained of, the state of Oregon was a riparian owner of the land sought to be burdened with the easement, and entitled to have the waters of said stream continue to flow in its natural channel past said land; that the state, prior to the act of February 24, 1885 (*Hill's Anno. Laws*, §§ 4057-4060), having conveyed to defendants said premises without reserving any water rights therein, they acquired by their deed the ditch constructed thereon, and also a usufructuary interest in the flow of the waters of said creek in its natural channel; and that plaintiff, not having had possession of the ditch, or the use of the water of said creek, for a period of ten years after defendants' entry, the court erred in restraining them from utilizing their own property. Plaintiff's counsel insist, however, that the ditch in question was constructed in pursuance of a license from the state, upon the faith of which labor and money were bestowed and expended thereon, thus rendering such license irrevocable, and that plaintiff, having been in the adverse possession of the ditch and water flowing therein, for more than sixteen years, had in this manner acquired an easement in defendants' premises which entitled him to continue the use thereof unmolested by them.

The doctrine of the common law, that the waters of a stream must continue to flow in its natural channel, undiminished in quantity and unimpaired in quality, has been very much modified in the territory embraced in the Pacific Coast states, where a new rule, founded upon the necessities under which the early settlers labored, has been inaugurated. So much, only, of the common law was adopted by these settlers as was applicable to the condition of the country in which their lot was cast; and, realizing that water is a powerful agent in separating the precious metals from the baser materials in which they are embedded, and also serves, when used in

irrigating arid tracts, to cause the desert to bud, blossom, and bear fruit, and that without the use of such water a vast region must forever remain valueless and uninhabited, necessity compelled these primitive lawgivers to adopt for their government a code of customs which prescribed the extent of public land each was entitled to, and regulated the manner of appropriating water to the operation of mines and the cultivation of farms, orchards, and vineyards. This latter custom provided that he who first changed the course of a natural stream flowing through public lands, which at the time was common to all, and appropriated the water so diverted to some useful purpose, thereby acquired a superior right to continue the use thereof against every claimant except the United States. The justice of this custom was recognized by the courts, which enforced its provisions in opposition to the doctrine of the common law; and the legislative assemblies of these states, following the example set by the courts, have passed in many instances acts guaranteeing protection to prior appropriators in their possessory rights in the diversion of water against all claimants except the sovereign. The legislative action of this state on the subject is embodied in § 3832, Hill's Anno. Laws, approved October 24, 1864, which reads as follows: "Miners shall be empowered to make local laws in relation to the possession of water rights, the possession and working of placer claims, and the survey and sale of town lots in mining camps, subject to the laws of the United States."

The wisdom of this new rule was finally recognized by Congress, which, on July 26, 1866, passed an act, the 9th section of which, so far as applicable to the case at bar, provides "that, whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is hereby acknowledged and confirmed." 14 Stat. at L. 251, chap. 262; U. S. Rev. Stat. § 2339. It has been repeatedly held that the provisions of the section just quoted only confirm to the owners of ditches and water rights on the public domain the same privileges which they enjoyed under the local customs, laws, and decisions of the courts prior to its passage. *Atchison v. Peterson*, 20 Wall. 507, 22 L. ed. 414; *Basey v. Gallagher*, 20 Wall. 670, 22 L. ed. 452; *Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240; *Broder v. Natoma Water & Min. Co.* 101 U. S. 274, 25 L. ed. 790.

The custom of appropriating water to a beneficial use has been limited by this court, which holds that the act of Congress of July 26, 1866, applies only to government lands. *Curtis v. La Grande Hydraulic Water Co.* 20 Or. 34, 47, 10 L. R. A. 484, 488. Mr. Justice Lord, rendering the decision of the court in that case, and speaking of the diversion of

the waters of a stream claimed to have been made in pursuance of the provisions of the Federal statute above quoted, says: "While that act was passed a year later than the facts show the waters of the creek were diverted, yet it applies only to government land and streams flowing through it. In these, under the circumstances indicated in the act, the prior appropriation of the water may operate to secure a vested right to divert it, which shall be maintained and protected. But it has no application to the lands of individual owners, and, as against them, can confer no right to divert the waters of streams flowing through their lands."

In *Alta Land & Water Co. v. Hancock*, 85 Cal. 219, it is held that a stream flowing through the land of a riparian owner is an appurtenance thereto, which runs with the land as a corporeal hereditament, which might be segregated by grant or condemnation, or extinguished by prescription, but it could not be defeated by simple appropriation.

In *Santa Cruz v. Enright*, 95 Cal. 105, it was held that a riparian proprietor of private lands could not acquire any right by mere appropriation to the use of water flowing through his premises.

In *Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761, the facts were that in March, 1877, one John Smith settled upon a tract of public land in Dakota territory through which False Bottom creek flowed in a natural channel; that on March 25, 1879, he filed a homestead entry thereon, and, having made final proof in support of his claim on May 10, 1883, obtained from the United States a patent therefor and in May, 1884, conveyed said tract to Beck; that in June, 1877, Sturr settled on an adjoining tract of public land, filed a homestead entry thereon May 15, 1880, and made final proof in support thereof on May 10, 1883; that on May 15, 1880, Sturr, without any grant from Smith, went upon the latter's claim, located a water right thereon, and constructed a ditch, by means of which he diverted the waters of said creek and appropriated the same to his claim. In a suit by such appropriator against the owner of the tract through which said stream flowed, to enjoin him from interfering with the ditch constructed thereon and the use of the water diverted thereby, it was held that the filing of a homestead entry for a tract of public land across which a stream flows in its natural channel, with no right or claim of right to divert the water therefrom, initiates a right to have the stream continue to flow in such channel without diversion which ripens into a complete grant, upon obtaining a patent therefor which relates back to the date of filing, and thereby cuts off intervening adverse claims of the water. Mr. Chief Justice Fuller, in rendering the decision of the court, says: "When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded. As the riparian owner has the right to have the water flow *ut currere solebat*, undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take

the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy, with intent to appropriate the land, should have the same effect."

In *Vansickle v. Haines*, 7 Nev. 249, it was held that the rights of the defendant, a riparian owner, whose patent for public lands from the United States was issued without reservation of any water rights, and antedated the act of Congress of July 26, 1866, was superior to the claim of plaintiff, a prior appropriator of the waters of a natural stream flowing through defendants' land. Whitman, J., speaking of plaintiff's claim as a prior appropriator, says: "He acquired no right against Haines, prior to the date of the latter's patent, which could affect that grant, because there was no title in Haines to be affected by acts of the respondent. He could acquire no right against the United States, for, as to that government, he was a trespasser, in that he diverted water from its lands not sought to be pre-empted by him. No presumption of grant arises against the sovereign, and no statute of limitation runs, save in some excepted instances, of which this is not one."

In *Broder v. Natoma Water & Min. Co.* 101 U. S. 274, 25 L. ed. 790, Mr. Justice Miller, referring to the right of prior appropriation, says: "It is the established doctrine of this court that rights of miners, who had taken possession of mines, and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act of 1866. We are of the opinion that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

In *Jones v. Adams*, 19 Nev. 78, plaintiff was awarded seven tenths of the waters of a stream flowing through his land, and defendant, an upper riparian proprietor on said stream, the remaining three tenths,—the trial court having found that each was the first appropriator upon his respective land. Plaintiff, relying upon the rule announced in *Vansickle v. Haines*, 7 Nev. 249, contended that, inasmuch as the findings of the court showed that he obtained from the United States a patent for his land prior to the act of Congress of July 26, 1866, he, as a riparian owner, was entitled to the flow of the waters of said stream in the channel thereof; but Hawley, J., denying the point contended for, quotes with approval the above language of Mr. Justice Miller in *Broder v. Natoma Water & Min. Co.* and says: "The case of *Vansickle v. Haines*, in so far as the same is in conflict with the views herein expressed, is hereby overruled."

In *Lus v. Haggin*, 69 Cal. 255, it was held that the state of California, on September 25, 1850, became the owner of certain swamp 43 L. R. A.

lands situated within its borders; that a prior appropriation of the waters of a stream flowing through such lands was defeated by a subsequent grant of the state of such lands, without reservation; and that the rights of the state are not dependent upon or limited by the decision of the state courts with respect to controversies arising out of prior appropriations of water from streams flowing through the public lands of the United States. The force of that decision is very much weakened, however, by the very able dissenting opinion of Ross, J., in which he says: "From the foundation of the state, waters pertaining to the public lands of both the Federal and state governments have been appropriated and used for mining, agriculture, and other useful purposes. Such appropriation and use was first sanctioned by custom, next by the decisions of the courts, and, finally, by legislative action on the part of the United States, as well as the state. It thus became a part of the law of the land, of which every citizen was entitled to avail himself, and of which every purchaser from the United States, as well as the state, was bound to take notice. In protecting, therefore, the rights of the appropriators of water upon the public lands of the state and of the United States, no wrong is done to the purchasers from either government." Further on in the opinion the learned justice says: "The doctrine of appropriation thus established was not a temporary thing, to exist only until someone should obtain a certificate or patent for 40 acres, or some other subdivision of the public land, bordering on the river or other stream of water. It was as has been said, born of the necessities of the country and its people, was the growth of years, permanent in its character, and fixed the status of water rights with respect to public lands. No valid reason exists why the government, which owned both the land and the water, could not do this. It thus became, in my judgment, as much a part of the law of the land as if it had been written in terms in the statute books, and in connection with which all grants of public land from either government should be read. In the light of the history of the state, and of the legislation and decisions with respect to the subject in question, is it possible that either government, state or national, ever contemplated that conveyance of 40 acres of land at the lower end of a stream that flows for miles through public lands should put an end to subsequent appropriation of the waters of the stream upon the public lands above, and entitle the grantee of the 40 acres to the undiminished flow of the water in its natural channel from its source to its mouth? It seems to me entirely clear that nothing of the kind was ever intended or contemplated."

In *Krall v. United States*, 48 U. S. App. 351, 79 Fed. Rep. 241, 24 C. C. A. 543, the officers of the United States, in pursuance of a proclamation of the president in January, 1868, reserved 640 acres of land from the public domain in Idaho for a military post, through which a stream flowed, and from which a prior appropriation of the waters thereof was made for the use of the govern-

ment. Thereafter plaintiff went upon the public lands, and diverted and appropriated a certain quantity of the water of said stream from a point above the military reservation for the purpose of irrigating his own land; and it was held that the prior appropriation of the government did not defeat the right of a subsequent appropriation by the citizen. Mr. Justice Ross, with whom Mr. Justice Hawley concurred, speaking for the majority of the court, says: "The creation of the reservation for military post purposes did not destroy or in any way affect the doctrine of appropriation thus established by the government in respect to the waters of the non-navigable streams upon the public lands. They continued subject to appropriation for any useful purpose. The appropriation of a part of those waters for the uses of the military post secured it in the use of the portion so appropriated, but it did not take from others the right to make such appropriation above the reservation as would not interfere with its prior appropriation." Mr. Justice Gilbert, however, relying upon a *contra* rule, which he maintains was established in the case of *Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761, dissents from the conclusion reached by his associates.

The legislative assembly of Oregon passed an act, approved February 24, 1885, which granted to any individual or corporation a right of way over all lands belonging to the state, for the construction of water ditches, to be used for irrigation, manufacturing, or mining purposes, and provided that all patents issued by the state, for any of its school, university, tide, swamp, or overflowed lands, should be subject to any vested rights of the

owners of such water ditches. Hill's Anno. Laws, §§ 4057-4060. This statute was a legislative sanction, confirmatory of the customs of miners, and, like the act of Congress of July 26, 1866, was the recognition of a pre-existing right, rather than the granting of a new easement in its real property. Without it the common law of the Pacific Coast states, applicable alike to the arid and mining region, authorized the diversion of water flowing through public lands of the state, and an appropriation thereof for irrigating and mining purposes; and Strong, having taken advantage of this universal custom, made a diversion and appropriation, but, having abandoned his interests therein, his right reverted to the public, so that, in 1876, when plaintiff took possession thereof, it was the initiation of a new diversion and appropriation, but, having been made prior to defendants' settlement upon the state lands, it is superior to their interests therein, and hence plaintiff is entitled to the relief awarded, so far as it relates to an interference with his right to enter upon defendants' lands to clean and repair the ditch.

Counsel for the defendants insist that the court erred in its conclusion of law that plaintiff was entitled to the use of the water of Board Shanty creek, claiming that this was not in issue; but an examination of the answer shows that reference was made to this right, and that the question of such use was involved in the suit, and, this being so, the decree in that respect will not be disturbed.

It follows that *the decree must be affirmed*, and it is so ordered.

Rehearing denied June 20, 1898.

MISSISSIPPI SUPREME COURT.

STATE of Mississippi, *Appt.*,
v.

Joseph REED.

(.....Miss.....)

A railroad company has no right to give one hackman an exclusive privilege of entering, with his hacks, its inclosed station grounds to solicit passengers.

(December 19, 1898.)

A PPEAL by the state from a judgment of the Circuit Court for Warren County acquitting defendant of trespass upon property of the Alabama & Vicksburg Railroad Company. *Affirmed.*

The facts are stated in the opinion.

Messrs. **McWillie & Thompson**, for appellant:

The railway company was and is a common carrier of passengers. It was engaged in selling to passengers whose journeys ex-

tended beyond its own line coupon tickets, entitling them to through carriage: and this obligated the railway company to transport such passengers through the city of Vicksburg, from its own depot to the depots of other railroad companies, steamboat landings, etc.

Can it not authorize its own agents in such through transportation to enter its cars and premises for the purpose of facilitating its through business, and to promote the comfort and convenience of its through passengers?

Jencks v. Coleman, 2 Sumn. 221.

The railway company is the private owner of its enclosed grounds, subject only to the rights which the law gives against it.

Every right given by our Constitution, by our statutes, and by the common law of the land against railroad companies, as concerns entering their premises at least, are given, not to the public generally, but to their patrons; and they are given against the roads in their public employment and capacity as

NOTE.—The conflicting authorities respecting the right of a railroad company to give an exclusive privilege to one hackman are found in a note to *Cole v. Rowen* (Mich.) 13 L. R. A. 848. 43 L. R. A.

For later cases, see *Lladsey v. Anniston* (Ala.) 27 L. R. A. 436; *Lucas v. Herbert* (Ind.) 37 L. R. A. 376; and *New York, N. H. & H. R. Co. v. Scoville* (Conn.) 42 L. R. A. 157.

common carriers, and not against them in any other relation.

Barker v. Midland R. Co. 18 C. B. 46; *Perth General Station Committee v. Ross* [1897] A. C. 479; *Jencks v. Coleman*, 2 Sumn. 221; *Beadell v. Eastern Counties R. Co.* 2 C. B. N. S. 509; *Foulger v. Steadman*, L. R. 8 Q. B. 65; *Barney v. Oyster Bay & H. S. E. Co.* 67 N. Y. 301; *Cole v. Rowen*, 88 Mich. 219, 13 L. R. A. 848; *Old Colony R. Co. v. Tripp*, 147 Mass. 35; *Fluker v. Georgia R. & Bkg. Co.* 81 Ga. 461, 2 L. R. A. 843; *Com. v. Carey*, 147 Mass. 41, note; *Griswold v. Webb*, 16 R. I. 649, 7 L. R. A. 302; *Brown v. New York C. & H. R. R. Co.* 75 Hun, 355.

The authors of the notes to *Kalamazoo Hack & Bus Co. v. Sootsma*, 22 Am. St. Rep. 699, and 13 L. R. A. 848, fail to take or to present adequate notice of the fact that the decisions which they seem to approve are based on statutory or constitutional provisions.

Mr. R. L. McLaurin, for appellee:

The Constitution of 1890, §§ 184-186, 190, expressly forbids any discrimination on the part of railway corporations.

The case at bar is a palpable case of discrimination.

The effort is made to have the United States mail, baggage, and other things carted to the postoffice and to other places where the railroad company is under contract to take them, free of cost to the railroad company by giving one hack line and baggage man exclusive rights on the railroad premises in consideration of said hack line doing this hauling.

If it is lawful for the railroad company to give this special privilege by contract, then it would be in the power of the railroad company to practically control the hack and transfer business of any city or town, which is beyond and in excess of its charter rights.

Montana Union R. Co. v. Langlois, 9 Mont. 419, 8 L. R. A. 753; *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194, 10 L. R. A. 819; *Cravens v. Rodgers*, 101 Mo. 247; *Cole v. Rowen*, 88 Mich. 219, 13 L. R. A. 848; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 373, 64 Am. Dec. 667; *McConnell v. Pedigo*, 92 Ky. 465; 4 Elliott, Railroads, § 1678.

Woods, Ch. J., delivered the opinion of the court:

Joseph Reed, the appellee, was arrested upon affidavit charging him with trespassing upon private premises belonging to the Alabama & Vicksburg Railroad Company, and was, before the justice of the peace, tried and convicted. He appealed from that conviction to the circuit court of Warren county, and was there tried upon an agreed statement of facts, and was by the judgment of that court acquitted of the charge and discharged. From this judgment of the circuit court, the state prosecutes this appeal.

From the agreed statement of facts it appears that the depot of the railroad company in the city of Vicksburg is surrounded by a fence, and that there is a "considerable inclosure of the grounds adjacent thereto." It further appears, also, that, "within said in-

closure around the depot is the most convenient and best place for hackmen and busmen to discharge, solicit, and receive passengers departing and arriving on the passenger trains of said company, and that any hackman or busman who had the exclusive privilege of entering this inclosure and soliciting passengers there would have an advantage over hackmen or busmen excluded therefrom, so far as passengers arriving on said trains were concerned." These facts, moreover, appear in the agreed statement, viz.: That the railroad company granted in June, 1894, the exclusive privilege of entering said inclosure and soliciting passengers therein to said Peine, and that Peine was a person engaged in the hack, bus, and general transfer business in Vicksburg, and that, after said exclusive grant to Peine, all other hackmen and busmen were excluded from entering said inclosure for the purpose of soliciting passengers therein, and were notified not to enter said inclosure for that purpose under threat of being prosecuted as trespassers; that the appellee, Reed, after having been notified not to enter said inclosure for such purpose, drove his hack into the inclosure, and while therein solicited and received a passenger, and then drove away, and that in doing this he created a disturbance or disorder; that Cherry street is about 150 feet from the depot, and that from the depot to Cherry street, where hacks other than Peine's can stand, there is a good sidewalk. In a word, Peine's hacks have the exclusive privilege of entering the inclosure surrounding the depot and soliciting incoming passengers, while all other hacks are excluded from the inclosure, and must stand outside and about 150 feet from the depot, and in an open street.

It is admitted in the agreed statement that any hackman or busman having the exclusive privilege of entering said inclosure, and soliciting passengers there, would, to that extent, have an advantage over hackmen or busmen excluded therefrom, so far as concerned incoming passengers. The agreed statement of facts distinctly states the question to be decided by us, and to that we must confine ourselves. Says the agreed statement: "It is contended that the said company had the right to make the said contract, and thus exclude the defendant and others than the said Peine from the said inclosure, and to grant to the said Peine the exclusive right to enter the said inclosure for the purpose of there soliciting passengers for his hack line. Defendant controverts this position, in so far as it is claimed that the said company can grant the exclusive right to any particular person to enter the said inclosure with his hack, and there solicit passengers, and contends that the railroad company must exclude all or admit all into the said inclosure, so long as they conduct themselves in an orderly and peaceable manner." The single issue is thus sharply defined, viz.: Has a railroad the right to confer upon one hackman the exclusive privilege of entering with his hacks its inclosed stationhouse grounds, and of soliciting incoming passengers, and to exclude all others

from the inclosure, such privilege conferring advantages upon the favored hackman, and discriminating against all other hackmen by forbidding them to enter the inclosure to solicit passengers, and by placing the hacks of those excluded 150 feet from the depot, and in an open street? The question has never before been presented in our courts, but it is by no means a new one, and has been passed upon in other jurisdictions. Quite independently of constitutional or statutory provisions, it seems to be the prevailing doctrine in the United States that a railroad company may make any necessary and reasonable rules for the government of persons using its depots and grounds, yet it cannot arbitrarily, for its own pleasure or profit, admit to its platforms or depot grounds one carrier of passengers or merchandise, and at the same time exclude all others. The question is one that affects not only the excluded hackmen; it affects the interests of the public. The upholding of the grant of this exclusive privilege would prevent competition between rival carriers of passengers, create a monopoly in the privileged hackmen, and might produce inconvenience and loss to persons traveling over the railroad, or those having freights transported over it, in cases of exclusion of drays and wagons from its grounds, other than those owned by the person having the exclusive right to enter the railroad's depot grounds. To concede the right claimed by the railroad in the present case would be, in effect, to confer upon the railroad company the control of the transportation of passengers beyond its own lines, and in the end to create a monopoly of such business, not granted by its charter, and against the interests of the public. These are the views ably urged in *Kalamazoo Hack &*

Bus Co. v. Sootsma, 84 Mich. 194, 10 L. R. A. 819; *Montana Union R. Co. v. Langlois*, 9 Mont. 419, 8 L. R. A. 753; *Cravens v. Rodgers*, 101 Mo. 247, and *McConnell v. Pedigo*, 92 Ky. 465. These are the views held, too, by the three dissenting judges in the case of *Old Colony R. Co. v. Tripp*, 147 Mass. 35-41. The majority of the judges in that case held that a railroad might grant to one an exclusive right to solicit the patronage of incoming passengers; but this is the only American case making that distinct holding, and that opinion was delivered by four judges. The other three members of the court vigorously dissenting, and with better show of reasoning, in our judgment. The cases of *Barney v. Oyster Bay & H. S. B. Co.* 67 N. Y. 301; *Fluker v. Georgia R. & Bkg. Co.* 81 Ga. 461, 2 L. R. A. 843; and *Cole v. Rowen*, 88 Mich. 219, 13 L. R. A. 848; do not present the precise point involved in the case before us. They are all decisions of other questions, and can be readily distinguished from the case in hand. Counsel for appellant think that in *Cole v. Rowen*, 88 Mich. 219, 13 L. R. A. 848, the supreme court of Michigan has swung away from the doctrine announced in the earlier case of *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194, 10 L. R. A. 819. But that very able court did not so think, and was careful to disabuse the mind of counsel, who seems to have the notion which counsel here puts forward, and the court clearly distinguished the two cases.

We are of opinion that the railroad had no right to exclude Reed, the appellee, from its depot and inclosed grounds, on the facts appearing in the agreed statement on which the case is submitted to us, and hence that the action of the court below in discharging Joseph Reed was correct.

IOWA SUPREME COURT.

J. T. TREZONA

v.

CHICAGO GREAT WESTERN RAILWAY
COMPANY, Appt.

(.....Iowa.....)

1. One who gets upon a train with a ticket which he knows does not, upon its face, entitle him to passage because the time for which it purports to be valid has expired, although he thinks the limitation unreasonable, cannot recover damages for being ejected, if he refuses to pay fare.
2. A waiver relied upon to preclude a defense must be pleaded.
3. The holder of a railroad ticket who does not use it for a passage during its life for such a purpose is not entitled, as matter of law, to have the purchase price refunded.

(December 16, 1898.)

NOTE.—On the question of the right to eject a passenger for nonpayment of fare, see also *McGowen v. Morgan's L. & T. R. & S. S. Co.* (La.) 5 L. R. A. 817, and *note*; *Peabody v. Ore-43 L. R. A.*

APPEAL by defendant from a judgment of the District Court for Delaware County in favor of plaintiff in an action brought to recover damages for alleged wrongful ejection from defendant's train. *Reversed.*

Statement by Granger, J.:

On the 13th day of October, 1893, the plaintiff purchased from defendant's agent at Dubuque, Iowa, a passenger ticket from Dubuque to Lamont, Iowa, paying therefor \$1.75, that being the first-class regular fare. Across the face of the ticket in red ink were the words, "Not good after date of sale." The ticket was not offered for passage until November 17, 1894, when plaintiff and his wife took defendant's train at Dubuque for Lamont, and when a little out of Dubuque the conductor asked for plaintiff's ticket, and he presented the one described, which the conductor refused to receive, and demanded

gon R. & Nav. Co. (Or.) 12 L. R. A. 823, and *note*; see also *Louisville & N. R. Co. v. Turner* (Tenn.) *post*, 140.

fare, which was refused, and for failure to pay his fare he was ejected forcibly from the train at the next station, and only permitted to enter on payment of the regular fare, with 10 cents extra. Some additional facts will be noticed in the opinion. This action is for damages because of being ejected from the train. There was a verdict and judgment for plaintiff, and the defendant appealed.

Messrs. D. W. Lawler, D. E. Lyon, and D. J. Lemahan, for appellant:

Plaintiff knew the ticket was not good at the time he entered the car. He was so informed by the conductor at the fair grounds, only a mile from the depot, and he refused to pay his fare or get off the cars when requested, thereby becoming a trespasser.

Stone v. Chicago & N. W. R. Co. 47 Iowa, 82, 29 Am. Rep. 458; *Sherman v. Chicago & N. W. R. Co.* 40 Iowa, 45; *Way v. Chicago, R. I. & P. R. Co.* 64 Iowa, 48, 52 Am. Rep. 431; *Hoffbauer v. Davenport & N. W. R. Co.* 52 Iowa, 342, 35 Am. Rep. 278; *New York, L. E. & W. R. Co. v. Bennett*, 6 U. S. App. 95, 50 Fed. Rep. 496, 1 C. C. A. 544; *Ellsworth v. Chicago, B. & Q. R. Co.* 95 Iowa, 101, 29 L. R. A. 173.

A railroad company may lawfully limit the time within which a ticket shall be used. Thus, where the ticket is in terms "good for this date only," it is not good for any subsequent date.

Hutchinson, Carr. 2d ed. § 576; *Elmore v. Sands*, 54 N. Y. 512, 13 Am. Rep. 617; *Calaway v. Mellett*, 15 Ind. App. 367.

The carrier may by contract provide that passage shall be made within a time specified, and in one continuous trip.

Barker v. Coffin, 31 Barb. 556; *Oheney v. Boston & M. R. Co.* 11 Met. 121, 45 Am. Dec. 190.

As between the passenger and the conductor, the face of the ticket is conclusive evidence of the passenger's right to ride.

Bradshaw v. South Boston R. Co. 135 Mass. 407, 46 Am. Rep. 481; *McKay v. Ohio River R. Co.* 34 W. Va. 65, 9 L. R. A. 132; *Townsend v. New York C. & H. R. Co.* 56 N. Y. 295, 15 Am. Rep. 419; *Boylan v. Hot Springs R. Co.* 132 U. S. 146, 33 L. ed. 290.

The ticket is evidence of the contract between the purchaser and the railroad company.

Sleeper v. Pennsylvania R. Co. 100 Pa. 259, 45 Am. Rep. 380; *New York, L. E. & W. R. Co. v. Bennett*, 6 U. S. App. 95, 50 Fed. Rep. 496, 1 C. C. A. 544; *Terre Haute & I. R. Co. v. Fitzgerald*, 47 Ind. 79; *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 32 L. ed. 249.

Where a railroad passenger ticket by its terms limits the time within which it is to be used, it does not exonerate the holder from the payment of fare if he takes passage on the road after the expiration of the time, and on refusal to pay fare the conductor has the right to eject a person from the train.

Stone v. Chicago & N. W. R. Co. 47 Iowa, 82, 29 Am. Rep. 458; *Sherman v. Chicago & N. W. R. Co.* 40 Iowa, 45; *Hoffbauer v. Davenport & N. W. R. Co.* 52 Iowa, 342, 35 Am. Rep. 278; *Hill v. Syracuse, B. & N. Y.* 43 L. R. A.

R. Co. 63 N. Y. 101; *Elmore v. Sands*, 54 N. Y. 512, 13 Am. Rep. 617; *Pease v. Delaware, L. & W. R. Co.* 101 N. Y. 367, 54 Am. Rep. 609; *Condran v. Chicago, M. & St. P. R. Co.* 32 U. S. App. 182, 14 C. C. A. 506, 67 Fed. Rep. 522, 28 L. R. A. 749; *Way v. Chicago, R. I. & P. R. Co.* 64 Iowa, 48, 52 Am. Rep. 431, 73 Iowa, 463.

A passenger refusing to pay his fare, or conform to any lawful regulation of the railroad company, may be expelled from the car by the conductor.

Hibbard v. New York & E. R. Co. 15 N. Y. 455; *Townsend v. New York C. & H. R. R. Co.* 56 N. Y. 295, 15 Am. Rep. 419; *Bradshaw v. South Boston R. Co.* 135 Mass. 407, 46 Am. Rep. 481; *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 32 L. ed. 249; *Boylan v. Hot Springs R. Co.* 132 U. S. 146, 33 L. ed. 290; *Beebe v. Ayres*, 28 Barb. 275; *Condran v. Chicago, M. & St. P. R. Co.* 32 U. S. App. 182, 67 Fed. Rep. 522, 14 C. C. A. 506, 28 L. R. A. 749.

A railroad company has the right to require passengers to pay fare, and a rule directing its conductors to remove from the cars those who refuse to pay fare will be upheld.

Shelton v. Lake Shore & M. S. R. Co. 29 Ohio St. 214; *Beebe v. Ayres*, 28 Barb. 275.

When a passenger becomes a trespasser, he is not entitled to the rights of a passenger.

Stone v. Chicago & N. W. R. Co. 47 Iowa, 82, 29 Am. Rep. 458; *New York, L. E. & W. R. Co. v. Bennett*, 6 U. S. App. 95, 50 Fed. Rep. 496, 1 C. C. A. 544.

No damages can be recovered under the contract.

Dooley v. Burlington, O. R. & N. R. Co. 89 Iowa, 450; *New York, L. E. & W. R. Co. v. Bennett*, 6 U. S. App. 95, 50 Fed. Rep. 496, 1 C. C. A. 544; *Boylan v. Hot Springs R. Co.* 132 U. S. 146, 33 L. ed. 290, and cases cited therein; *Elmore v. Sands*, 54 N. Y. 512, 13 Am. Rep. 617; *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 32 L. ed. 249; *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82, 29 Am. Rep. 458.

Punitive or exemplary damages cannot be given on a state of facts such as disclosed by the evidence in this case.

Paine v. Chicago, R. I. & P. R. Co. 45 Iowa, 569; *Fitzgerald v. Chicago, R. I. & P. R. Co.* 50 Iowa, 79; *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82, 29 Am. Rep. 458; *Curly v. Chicago, R. I. & P. R. Co.* 63 Iowa, 417; *Hoffbauer v. Davenport & N. W. R. Co.* 52 Iowa, 342, 35 Am. Rep. 278; *Townsend v. New York C. & H. R. Co.* 56 N. Y. 295, 15 Am. Rep. 419; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374; *New York, L. E. & W. R. Co. v. Bennett*, 6 U. S. App. 95, 50 Fed. Rep. 496, 1 C. C. A. 550; *Bradshaw v. South Boston R. Co.* 135 Mass. 407, 46 Am. Rep. 481.

The rules in question are reasonable.

McDonald v. Chicago & N. W. R. Co. 26 Iowa, 124, 96 Am. Dec. 114; *State v. Chovin*, 7 Iowa, 204; *Hutchinson*, Carr. §§ 588, 589; *Hibbard v. New York & E. R. Co.* 15 N. Y. 455; *Pease v. Delaware, L. & W. R. Co.* 101 N. Y. 367, 54 Am. Rep. 609.

Messrs. Dunham & Norris for appellee.

Granger, J., delivered the opinion of the court:

1. It does not appear why the ticket was not used on the day of its purchase, nor does it appear that plaintiff did, on the day of the purchase, notice the limitation on the ticket, but he did know of it before he took the train on the 17th day of November, 1894. He says he had such knowledge, but thought the provision was unreasonable, and that, as he had paid for the passage, he had a right to it, notwithstanding the provision on the ticket. The arguments in this case take a wider range than the controlling legal proposition requires. A few significant facts first stated will do much towards clearing the way to the particular question that controls the case. Plaintiff had no ticket that purported to entitle him to a ride on the train from which he was ejected. It expressed on its face that he had no such right. The ticket contained the only evidence of the understanding under which it issued. Hence the conclusion is manifest and certain that the plaintiff was attempting to ride on a train for which he had no ticket, and for which neither he nor the company understood the ticket to be good. He expressly says that he knew of the limitation as to time for its use, but thought it was unreasonable. His evidence shows that he thought he was entitled to the ride "without any reference to the ticket;" that he was entitled to the ride, because he had paid for it. The arguments deal quite elaborately with the question whether such a limitation on a ticket is legal, the thought being that it is so unreasonable as to be against public policy. We do not think such a question is involved. It is not like a case where a ticket is apparently good on its face, as, where it is silent as to the time in which it may be used, and some rule or custom of the company limits its validity to a certain period, so that the purchaser has what he understands to be good, and what on its face appears to be so. The question that controls this case is not, Did the company, because of the payment at one time of a fare, owe plaintiff a passage to Lamont? but, Did he present to the conductor a ticket that entitled him to such a passage? It is not sufficient that he was entitled to a passage, but he must obtain it in the way provided by the regulations of the company, that are sustained by the law of the land. In *Ellsworth v. Chicago, B. & Q. R. Co.* 95 Iowa, 101, 29 L. R. A. 173, we considered a question quite akin to this, except that we there dealt with the obligations of the company when a ticket, good on its face, was presented, and a rule of the company made it void. We there collated some authorities, and quoted somewhat from the discussions bearing on the rights of passengers with and without tickets entitling them to transportation on particular trains. Speaking to the question of a proper remedy, we said, in the *Ellsworth Case*, that in determining such a question we should keep in mind the difficulties to be met with and overcome in a successful management of the railway passenger traffic of the country, both as to the public and the

carriers; and that to such an end it was clearly important that there should be rules for the guidance of the employees in the different parts of the service; and that such rules should be conclusive as to their course of conduct, even though at times the rule might operate to the prejudice of an individual passenger. As a conclusion of our discussion in that case, we said: "It is safe to state, as a rule of passenger traffic, that no person has a right to passage on a train without paying fare, unless a ticket or other evidence of a right to transportation is presented to the conductor." That language was used in considering what character of ticket a conductor might or might not refuse, which question was directly involved in the case. The statement is followed by a reference to cases on both sides of the proposition, being, as we there stated, not harmonious. This question, on principle, was to some extent involved and settled in *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82, 29 Am. Rep. 458. In that case there was a coupon ticket from Clinton to Sioux City, Iowa, the coupon first used being from Clinton to Missouri Valley. The conductor, out from Clinton, punched the coupon to Boone, Iowa, and returned it to the passenger. A conductor's check told him he must get a special check to stop over. At Marshalltown he left the train without a special check, and resumed his journey on the train the next day, and to that conductor he presented his ticket punched, and his conductor's check. These, properly read, showed him not entitled to transportation on that train to Boone, although he had paid his fare, and had not passed over that part of the route. It is true that that case turns largely on the fact that by leaving the train in violation of the regulations known to him his contract was at an end, so that he was not entitled to transportation until a new contract was made. The same is to be said in this case. By not using the ticket within the time fixed by it, his rights under the ticket were at an end, and, before he could rightfully claim a passage, he must obtain a ticket entitling him to one. For that purpose he should apply to the agent of the company authorized to issue tickets, and there urge his claim, if such he had, to a ticket, because of his former payment, and not attempt its adjustment with the conductor, whose duty it was to take up and cancel, and not to issue, tickets. Had he not presented the ticket, but claimed a passage, because, more than a year before, he had purchased one, and had not used it, we assume no one would contend that he was entitled to a passage, and why? Because public policy, as well as public sentiment, would condemn a rule so palpably unreasonable. How do the cases differ? In the case assumed, the conductor may deny the passage, because he is not required to accept the word of the passenger, even though it is true. In the case at bar he presents a ticket that on its face negatives his right to a passage. In *Bradshaw v. South Boston R. Co.* 135 Mass. 407, 46 Am. Rep. 481, it is said: "It is a reasonable practice to require a

passenger to pay his fare, or to show a ticket, check, or pass; and, in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car, upon his mere statement that he is entitled to a passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way." See also *McKay v. Ohio River R. Co.* 34 W. Va. 65, 9 L. R. A. 132, and other cases there cited, where the rule is announced that, as between the passenger and the conductor the ticket is the conclusive evidence of the passenger's rights. Appellee concedes the right of the company to limit the life of a ticket, but insists that the limit must be reasonable. This ticket was held for thirteen months before there was an attempt to use it, and, without determining the question of the limitation being unreasonable, it is to be said that the limitation expressed in no way operated to the prejudice of the plaintiff.

2. In this case the conductor took up the ticket, and then demanded the fare, and reliance is placed on that fact as being a waiver of the limitation, and the court instructed that the limitation on the ticket was reasonable, but that, if the company took up the same within the statute of limitations, then the passenger was entitled to ride thereon. Error is assigned on the instruction, and we dispose of the point on this theory: that the case presents no issue of waiver. The defendant pleaded the limitation of the ticket as a defense. If plaintiff relied on a waiver of the condition it must have been pleaded. *Eiseman v. Hawkeye Ins. Co.* 74 Iowa, 11, and numerous cases there cited. The invalidity of the ticket, after October 13, 1893, is pleaded in the answer, and, if plaintiff desired to show a waiver of the conditions, he must, under the authorities, have pleaded it in a reply, and no reply was filed; nor does such a plea appear in the pleadings filed. It was error to instruct on the question.

3. The court gave the following instructions: "(7) You are further instructed that a railroad company has a right to make a rule that upon the issuing of every first-class ticket the use of the same is limited to the day and trip for which the ticket was purchased, and such a rule is in law reasonable. (8) But in making such a rule as is named in the last instruction, they have no right to make one that would render the ticket absolutely void, and of no value, after the date and trip for which the ticket is issued; and such a rule, you are instructed, would be

unreasonable. (9) You are further instructed that a first-class railroad ticket, when purchased, and its value limited to the day of sale and trip for which it was sold, and it is not used within that limit, does not entitle the owner, as a matter of right, to transportation after that time, but it is, nevertheless, of value to the holder during the statute of limitation, and the value of such ticket, in the absence of any other proof is in law presumed to be the amount the purchaser paid therefor. (10) You are further instructed that a railroad company has a right to make a rule and direct its conductors to refuse to honor a ticket after the day and trip for which it was issued; and, if a conductor does so, and collects fare from the passenger, he is in the line of his duty; and, if a passenger refuses to pay said fare on demand, then the conductor has a right to remove him from the train unless he pays full fare between the points of his travel, with ten cents added, using no more force than is necessary therefor." Exceptions were taken to those numbered 8, 9, and 10. The 7th instruction is not questioned, and must stand as the law of the case. It holds, as a matter of law, that the limitation on the ticket was reasonable, in so far as a right of passage was concerned, and, with the question of waiver out of the case, there could be no recovery for the ejection from the train, for the plaintiff refused to pay his fare, and held no ticket that gave him a right of passage, and hence he was not a passenger, but a trespasser. See *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82, 29 Am. Rep. 458. The instructions hold, as a matter of law, that, notwithstanding the limitation was reasonable, the plaintiff might recover back the amount paid for it; that is, they hold that it would be unreasonable to make the ticket valueless if not used, and that its value would be the amount paid for it, in the absence of proof to the contrary. This must mean that the holder of a railroad ticket, who does not use it for a passage during its life for such a purpose, is entitled, as a matter of law, to have the purchase price refunded. No authority is cited to support such a rule, and we do not believe it is the law. It contravenes all general principles on the law of contracts. The contract of carriage imposed on the company an obligation to be prepared to perform the contract on its part by the equipment and operation of its train, and we do not see why, when the ticket was purchased so that the company was bound by its terms, the plaintiff was not alike bound; that is, he must accept what he has purchased, or lose it. This question received but a passing notice in argument, and we leave it without further elaboration.

The judgment must be reversed.

TENNESSEE SUPREME COURT.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, *Appt.*,
v.

J. O. TURNER.

(100 Tenn. 213.)

1. To limit a general ticket for passage on a railroad, for which full price is paid, to the date on which it is sold, there must be an express contract based upon a consideration, or the alternative must be given the purchaser to have a full and unlimited ticket.
2. The mere stamping or printing of a limitation upon a railroad ticket, and the acceptance of such ticket by a passenger, are not sufficient to bind him to such limitation in the absence of actual notice of it, and his assent thereto when he purchases the ticket.
3. Posting notices of intention to limit the time for passage on railroad tickets in the waiting rooms, ticket offices, and on the cars will not affect passengers with notice so that they will be bound by limitation by taking the ticket without agreeing to the limitation.
4. Three hundred dollars damages is excessive for putting a passenger off a train for attempting to ride after the time limited on the ticket has expired, although the limitation was unlawful, if no force was used, or purpose to humiliate shown, and the passenger was within a few miles of his destination, which he reached without further outlay only five hours later than he would had the train carried him.

(January 7, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for Montgomery County in favor of plaintiff in an action brought to recover damages for alleged wrongful ejection from defendant's train. *Reversed.*

The facts are stated in the opinion.

Messrs. Burney & Bailey for appellant.

Messrs. Daniel & Daniel, for appellee:

The ticket is a mere voucher that the passenger has paid his fare; it is not a contract, and before a passenger can be held bound by a declaration on the ticket for transportation on a passenger train, the restriction or limitation sought to be imposed must be made known to him, and he must have accepted the ticket with full knowledge of the restrictions of the company indorsed thereon.

New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 466; *Ray, Negligence of Imposed Duties, Passenger Carriers*, pp. 514, 516.

The burden of proof is on the carrier to show that there was assent by the passenger to the conditions on the ticket.

Baltimore & O. R. Co. v. Harris, 12 Wall.

NOTE.—For notice to passenger of conditions on ticket, see *note* to *Potter v. The Majestic* (C. C. App. 2d C.) 23 L. R. A. 746.

As to ejection of passengers, see *Trezona v. Chicago G. W. R. Co.* (Iowa) *ante*, 136, 43 L. R. A.

65, 20 L. ed. 354; *Ray, Negligence of Imposed Duties, Passenger Carriers*, p. 516.

The purchaser of a railroad ticket does not, by mere acceptance, bind himself and acquiesce in all the terms and conditions printed thereon, in the absence of actual knowledge thereof.

Ray, Negligence of Imposed Duties, Passenger Carriers, p. 518; *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 20 L. ed. 354.

A limitation in time upon a ticket is not binding on a passenger unless stated at time of purchase.

Pennsylvania R. Co. v. Spicker, 105 Pa. 142.

In this case plaintiff below called for a ticket to Clarksville, and did not ask for a limited ticket.

Under these circumstances the company is responsible if the agent gave him a ticket limited, and in consequence he was ejected.

St. Louis, A. & T. R. Co. v. Mackie, 71 Tex. 491, 1 L. R. A. 667.

The question of damages was for the jurors. They have decided it, and the verdict should not be disturbed unless the damages assessed are so excessive as to show to the court that the passion and prejudice of the jury was so great as to render them incapable of giving the defendant a fair trial.

Wilkes, J., delivered the opinion of the court:

This is an action for damages for unlawfully ejecting the plaintiff, Turner, from one of the passenger cars of the Louisville & Nashville Railroad Company. It was commenced before a justice of the peace, and on appeal was tried before the court and a jury, and judgment rendered for the plaintiff for \$300 and costs; and the railroad company has appealed and assigned errors.

The facts are that plaintiff bought what is called a "local ticket" at Guthrie, Kentucky, for Clarksville, Tennessee. Upon its face were stamped or printed the words, "Good for one continuous passage, beginning on date of sale, only." And the date of sale, "June 14, 1897," was stamped on its back. Plaintiff did not use or attempt to use the ticket upon the day of sale, being unexpectedly detained at Guthrie on business. On the next day he tendered the ticket for passage to Clarksville. The conductor took the ticket in his hand and punched it, and handed it back to plaintiff, with the remark that he could not ride upon it, that the rule of the company was that such ticket was good only on the day of sale, and that he would have to pay fare or get off the train. Plaintiff replied that he had bought the ticket and paid full price for it, and was entitled to ride upon it, and had no notice of such rule; that he had no money to pay his fare, and would not willingly leave the train, but would have to be put off. At the next station the conductor took him by the arm and led him through the car, and put him off, without any actual force or rudeness. He walked down the railroad 3 or 4 miles, and,

finding a conveyance going to Clarksville, went in it, reaching that city without further cost about 4 o'clock P. M., when by the train he would have reached there at 11 A. M. of the same day. Plaintiff states that he had no knowledge of the regulation of the road that a ticket must be used on the date of its sale, and had previously ridden upon tickets on days subsequent to the day of sale. It appears that about January 1, 1897, the railroad company had put this rule in force, and had posted notices of it in its various waiting rooms, and among others one was posted near the ticket window at Guthrie. This notice was as follows:

**Louisville & Nashville R. R. Co.
Notice.**

On and after January 1, 1897, local tickets sold by this company, except commutation and mileage tickets, will be void if not used for continuous passage through to destination, beginning on date of sale. Any ticket which cannot be thus used will be redeemed from the original purchaser, if sent to the general passenger agent, at Louisville, Ky., with satisfactory explanation of the cause which prevented its use.

Signed by the traffic manager and general passenger agent.

This notice was thus posted continuously from the date it went into effect, about January 1, 1897, up to the date of trial; and all local tickets sold after January 1, 1897, had stamped or printed on their face the provision above stated,—"Good for one continuous passage, beginning on date of sale, only." It is not shown that any special damage was done the plaintiff, beyond the indignity of ejecting him from the train and the inconvenience to which he was put on his journey. Many errors are assigned, but we will not treat them *seriatim*.

The court charged the jury in substance, that such a regulation and limitation in regard to tickets as the one in controversy would not be binding on a purchaser, unless the contents and conditions were made known to him when he bought the ticket, or it be shown otherwise that he knew of them, and purchased the ticket with that knowledge; that, in order to charge him with notice, it must be shown that he actually knew of them and consented to them, and the railroad company would be liable, if he bought a ticket without such actual knowledge, and attempted to use it, and was ejected from the train; that the fact that the notice was posted up in the waiting room, near the ticket window, and that the limiting words were stamped or printed on the face of the ticket, would not affect a purchaser with notice, if he bought the ticket in the usual way, and paid the usual price for it, and, if ejected for the refusal to pay fare while tendering such ticket, the road would be liable. This holding and ruling of the court is assigned as error, and it is also assigned as error that there is no evidence to support the verdict, and that the damages are excessive. It is held by this court that a railroad company may make,

and by its agents enforce, reasonable rules and regulations for the carriage of freight and passengers, and the transaction of its business generally. *Summit v. State*, 8 Lea, 413, 41 Am. Rep. 637; *Lane v. East Tennessee, V. & G. R. Co.* 5 Lea, 126; *Louisville & N. R. Co. v. Garrett*, 8 Lea, 438, 41 Am. Rep. 640; *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea, 129; *Memphis & C. R. Co. v. Benson*, 85 Tenn. 627. As to whether a rule is reasonable or not is a question for the court. *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea, 128. But such rules and regulations must be reasonable in their requirements, and must be executed in a reasonable and proper manner, so as not to be unnecessarily burdensome to the public. Such rules must not contravene any law or principle of sound public policy, and they must accord with the proper service and conduct of a railroad in its business and duty as a common carrier. The liability of the road cannot be restricted by such rules and regulations, nor can they be so shaped or enforced as unnecessarily to annoy and restrict the traveling public in its rights. 5 Am. & Eng. Enc. Law, 2d ed. p. 482, and notes. Thus, in *Lane v. East Tennessee, V. & G. R. Co.* 5 Lea, 124, it was held that a railroad company has the right to make regulations requiring passengers to purchase tickets before entering upon a freight train, and authorizing conductors to expel persons not having tickets, though they offer money in payment of fare. In *Summit v. State*, 8 Lea, 413, 41 Am. Rep. 637, it is held that a railroad may make all necessary reasonable rules for the proper and orderly management of its depots and other places open to the public, but not in such way as to infringe upon the rights of the public. A railroad may also make a rule that coupons from tickets shall be detached only by the conductor, and not by the passenger, and enforce such rule in a reasonable manner. *Louisville, N. & G. S. R. Co. v. Harris*, 9 Lea, 180, 42 Am. Rep. 668. So a railroad may by regulation establish a higher rate of fare if paid on the cars than in the case of a ticket purchased before going on the train. *Louisville, N. & G. S. R. Co. v. Guinan*, 11 Lea, 98, 47 Am. Rep. 279. It may also regulate the running of its trains, and the stopping of through trains at principal points only, and require passengers who are destined to way stations to ride upon such trains only as under the schedules stop at such stations. *Trottinger v. East Tennessee, V. & G. R. Co.* 11 Lea, 533. It may also require a person, on entering a train for purposes of travel, to exhibit his ticket, and afterwards to surrender it when called upon by the conductor. *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea, 129. It may also prescribe in what cars passengers may ride, provided equal and proper accommodations are furnished alike to all passengers holding first-class tickets, as that cars may be set apart for ladies, when alone or accompanied by gentlemen traveling with them; and different cars for colored and white people shall be furnished under the statute. *Memphis & C. R. Co. v. Benson*, 85 Tenn. 627; *Chesapeake, O. & S. R. Co. v.*

Wells, 85 Tenn. 613. Such rules and regulations, in order to be effective, must be made known to the public in such way and by such means as in the special case may be necessary, and best adapted to serve the convenience and purpose of the passenger as well as of the railroad. As to what notice or publication of rules is required or sufficient in order to reach and affect the public, the authorities are by no means agreed. From the very nature of the case, much must depend upon the provisions of the rule, and whether it is one intended to affect the entire public, and the usual and general business of passenger traffic, or one intended for certain trains and certain circumstances and individuals only. To illustrate: A person desiring to ride upon a freight train or a through train, when his destination is a way station, would reasonably expect regulations different from those affecting travel generally, and would be put on his guard to ascertain the rules by which his passage must be governed, when he would have no occasion to suspect such rules to apply to his passage upon the trains of the road generally. A rule relating to the former might be reasonable which would not be in the latter case, and notice might be sufficient in the former which would not be in the latter. So, in *Lane v. East Tennessee, V. & G. R. Co.* 5 Lea, 124, it was held that, when a railroad company has been in the habit of permitting persons to ride upon its freight trains without the purchase of tickets, it must inform persons personally that its rule has been changed so as to require tickets, if such is the case, until such time as will suffice to acquaint the public with the existence of such rule. So, in *Trottinger v. East Tennessee, V. & G. R. Co.* 11 Lea, 533, it was held that a passenger holding a ticket to a way station had no right to ride upon a through train which did not stop at such station, provided he had notice of such schedule regulations; and it was suggested that if such publicity had been given in the ticket office and on the cars, by posters, that a party of ordinary intelligence by the use of ordinary care and caution could or might obtain all requisite information as to the matters involved, then the passenger would be bound by such regulations; citing 1 Wait, Act. & Def. p. 67, and cases there collated, for authority for the latter proposition, as to publication and notice.

These regulations in regard to riding on freight trains and on trains only that stop at certain stations and do not stop at others have been held to be reasonable regulations, but they apply to only exceptional cases, and not to the general traveling public in passing over the road from one station to another. Such special cases may be regulated by rules, and such rules may very properly be brought to the knowledge of the traveling public by notices of publication; but a rule and notice which is intended to apply to all passengers, and to affect all travel and every individual who applies for passage, stands upon a different basis, and requires more direct notice. A notice which is intended to apply to the

entire public should be such as to leave no doubt but that it reaches all who are to be affected by it. While there is a conflict in the cases, the weight of authority is that time limitations or conditions stamped or printed upon the back or face of a general ticket are not binding upon a passenger, unless his attention is called to them when he purchases the ticket, and he assents thereto. *Potter v. The Majestic*, 23 L. R. A. 746, note; 20 U. S. App. 503, 60 Fed. Rep. 625, 9 C. C. A. 161; Ray, *Negligence of Imposed Duties, Passenger Carriers*, pp. 514, 518; 4 Elliott, *Railroads*, § 1593, note; *Cole v. Goodwin*, 32 Am. Dec. 505, and notes, 19 Wend. 251; *Rawson v. Pennsylvania R. Co.* 48 N. Y. 212, 8 Am. Rep. 545. While there may be some uncertainty, and even conflict, in the authorities, we are of opinion that the correct rule is that a person who purchases a general ticket, and pays the usual price therefor, is entitled to one passage, unlimited as to time, upon any train which under the proper and usual schedules of the road stops at the point of the passenger's destination. If a ticket limited or conditional is sold to a passenger, it can only be done upon an express agreement with him, either oral or in writing, and either based upon a consideration, or with the alternative presented to the passenger of a full and unlimited ticket. A similar rule obtains in regard to contracts for carriage of freight, and it has been held by this court that a carrier must hold itself in readiness to ship with common-law liability, and must offer to shippers a reasonable and bona fide alternative between that mode of shipment and one with restricted or limited liability. *Louisville & N. R. Co. v. Gilbert*, 88 Tenn. 430, 7 L. R. A. 162. So, in *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 16 Wall. 330, 21 L. ed. 303, it is said: Nothing short of an express stipulation by parol or in writing will be permitted to discharge a carrier from the duties which the law has annexed to his employment, and such agreement is not to be implied or inferred from a general notice to the public limiting the obligation of the carrier, which may or may not be assented to. See also *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. ed. 465. We are also of opinion that the mere stamping or printing of a limitation or condition upon the back or face of a ticket, and the acceptance of such ticket by a passenger, without more, are not sufficient to bind him to such condition or limitation, in the absence of actual notice to him of such condition or limitation, and his assent thereto, when he purchases his ticket. It cannot be presumed that every person buying a railroad ticket for ordinary and general use will, in the hurry and bustle of travel, stop to read and critically inspect his ticket. As a matter of fact, but little opportunity is afforded him to do so. He generally takes his place in the crowd at the ticket window, and produces and hands over his money, with a request for a ticket to destination. His money is received. The ticket is produced, and after being stamped, is handed to him through the

ticket window. He has had no opportunity to see what is upon it, and has no time, in the rush, to stop and read and consider what may be printed or stamped on its face or back; and when he has paid full fare, there is no occasion for his doing so, inasmuch as he can safely rely upon the contract which the law makes for him. Ordinary local tickets do not generally contain any terms of contract, and are not intended to do so. They are mere tokens to the passenger, and vouchers for the conductor, adopted for convenience to show that the passenger has paid his fare from one place to another,—very much in the nature of baggage checks. The contract is in fact made when the ticket is purchased, and, if it is different from what the law would imply, it must be so stated and assented to when the ticket is delivered. Nor will the posting of notices in the waiting rooms, ticket offices, and on the cars affect purchasers with notice in such cases. Passengers have but little time or opportunity to read such placards; and it would impose quite a serious burden upon travel, to hold that the public must read all these notices thus posted before taking passage on a train upon which they are willing to and do pay full fare. *Ravson v. Pennsylvania R. Co.* 48 N. Y. 212, 8 Am. Rep. 545; *Cole v. Goodwin*, 32 Am. Dec. 505, and note, 19 Wend. 251; *Ray, Passenger Carriers*, § 145; *Hutchinson, Carriers*, §§ 246, 580, 581; 4 Elliott, Railroads, § 1593. This rule, which we consider to be settled by the weight of authority and by reason, by no means prevents a railroad company from selling special tickets for special trains with limitations and conditions, such as excursion, round-trip, commutation, and mileage tickets, when the conditions and limitations are known to the purchaser, and assented to by him orally or in writing, and he has paid for such ticket less than the usual fare. When tickets are sold at reduced rates, it has been very wisely said that the purchaser should, in consideration of such reduced fare or greater privileges, expect and look for some conditions, limitations, and terms dif-

ferent from those attaching to tickets generally, and be on his guard to become informed of them. But there is no such obligation upon the ordinary passenger, who pays the usual or full fare, and asks for no reduced rates or special privileges; and he has a right to expect an unlimited ticket.

Under this view of the law, there is ample evidence to support the verdict in this case, and the only question remaining is, Are the damages of \$300 excessive? We do not find from the record any evidence of rudeness on the part of the conductor. The plaintiff declined to leave the car after the whole matter was explained to him, and notified the conductor he would have to put him off. While the record shows that plaintiff had no money to pay his fare, it fails to show that he made any effort to obtain it from any of his fellow passengers. The conductor led him through the train and put him off at the front end; but it does not appear that this was unusual, or done with any purpose to humiliate the passenger. It was attempted to be shown that the conductor made some remark after he had put the passenger off, but this was properly excluded by the court. The plaintiff was subjected to no pecuniary loss, was put off at a station not more than eight miles from his destination, and reached there a few hours later without any additional outlay of money. We think, under these circumstances, the question of his right to ride being at least doubtful, and the conductor being in the plain discharge of his duty to the road, and performing it in a reasonable manner, it does not present a case of malice and oppression on the part of the railroad which should be punished with excessive damages. The true rule in such cases is laid down in *Louisville, N. & G. S. R. Co. v. Guinan*, 11 Lea, 101-106, 47 Am. Rep. 279; and in *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea, 152.

For this latter reason we reverse the judgment of the court below, and remand the cause for another trial. Appellee will pay costs of appeal.

ARKANSAS SUPREME COURT.

Vincent GAGE *et al.*, Appts.,

v.

A. HARVEY.

(.....Ark.....)

The loss of money taken from the owner's pockets while he was intoxicated is not included in the damages occasioned by the sale of liquor to him, within the meaning of Sand. & H. Dig. § 4870, since the sale of the liquor is not the proximate cause of the loss, but this is due to the intervening wrongful act of a third person.

(December 24, 1898.)

APPEAL by defendants from a judgment of the Circuit Court for Garland County in favor of plaintiff in an action brought to hold defendants liable for money taken from plaintiff while he was intoxicated with liquor obtained at defendants' saloon. Reversed in part.

George Sargianovich was the keeper of a saloon in the city of Hot Springs. J. Kempner and David Beffa were sureties on his bond. Vincent Gage was the manager in charge of the saloon. Plaintiff went to the saloon on November 23, 1895, became intoxicated, and while in such condition a sum of

NOTE.—For recovery in civil damage cases, see also *Veon v. Creaton* (Pa.) 9 L. R. A. 814, and note; *Fletcher v. Forler* (Mich.) 10 L. R. A. 80, and note; *Belding v. Johnson* (Ga.) 11 L. R. A. 53; *Brockway v. Patterson* (Mich.) 1 L. R. A. 708; *Jones v. Bates* (Neb.) 4 L. R. A. 43 L. R. A.

495, and note; also note to *State v. Creeden* (Iowa) 7 L. R. A. on page 300.

As to liability in such case in the absence of statute, see *Riden v. Grimm Bros.* (Tenn.) 85 L. R. A. 587.

money was taken from his pockets, and he brought this action to hold defendants liable for the loss. The jury found that the manager, Gage, was the one who took the money and there was evidence tending to show that he may have encouraged plaintiff to drink in order to make him intoxicated for the purpose of securing an opportunity to take it.

Further facts appear in the opinion.

Messrs. Greaves & Martin, for appellants:

This was not a common-law action. It was purely a statutory action, based upon §§ 10 and 13 of "An Act to Regulate the Sale of Vinous, Ardent, Malt, or Fermented Liquors," approved March 8, 1879, §§ 4870, 4873, Sandels & H. Dig.

These statutes are to be construed strictly.

Freese v. Tripp, 70 Ill. 496; *Acidel v. Antis*, 71 Ill. 241; *Kellermen v. Arnold*, 71 Ill. 632; *Fentz v. Meadows*, 72 Ill. 540; *Hayes v. Phelan*, 4 Hun. 733.

The evidence must be confined to the cause stated in the complaint.

Hackett v. Smelsley, 77 Ill. 100.

Such a remedy did not exist by the rules of the common law.

Woody v. Oenan, 44 Iowa, 19; *Grant v. Owens*, 58 Ark. 52; *Dillon v. Linder*, 36 Wis. 344; *Struble v. Nodwitz*, 11 Ind. 64; *State v. Ludington*, 33 Wis. 107.

If our statute (Sandels & H. Dig. § 4873) means anything when it says: "Any person aggrieved by the keeping of said dramshop or drinking saloon . . . may have an action on said bond against the principal and securities for the recovery thereof,"—it cannot be extended, in the light of prior legislation, to mean that there is a remedy under it to the intoxicated person for injuries received while in an intoxicated condition. For such injuries the common law affords a civil remedy against the wrongdoer.

Brooks v. Cook, 44 Mich. 617, 38 Am. Rep. 262; *Franklin v. Schermerhorn*, 8 Hun. 112; *Brown v. Thompson*, 14 Bush. 538, 29 Am. Rep. 416; *Seiffer v. McLean*, 7 Tex. Civ. App. 168.

The injury complained of—the loss of appellee's money—must have been the natural, immediate, and proximate result of the intoxication produced, in whole or in part, by liquor sold by the appellant Gage.

Krach v. Heilman, 53 Ind. 517; *Collier v. Early*, 54 Ind. 559; *Schmidt v. Mitchell*, 84 Ill. 195, 25 Am. Rep. 446; *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 359; *Swintin v. Lowry*, 37 Minn. 345; *Lueken v. People*, 3 Ill. App. 375; *King v. Henkie*, 80 Ala. 505, 60 Am. Rep. 119; *Belding v. Johnson*, 86 Ga. 177, 11 L. R. A. 53.

If an injury has resulted in consequence of a certain wrongful act, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last proximate cause, and refuse to trace it to that remote.

Cooley, Torts, pp. 68, 69.

Messrs. Wood & Henderson, for appellee:

The question whether the liquor sold at

this saloon to appellee was the cause of the loss of his money, or contributed thereto, so as to render appellants liable under the statute, was for the jury.

Cornelius v. Hultman, 44 Neb. 441.

The condition of the bond is to pay to any person aggrieved all damages that may be occasioned by reason of liquor sold. Was not appellee aggrieved in this case by his loss, and is he not a person?

Liquor selling in Arkansas is a privilege, and the legislature has a perfect right to prescribe how it shall be sold, to whom it may be sold, and to provide a remedy for all damages that may be occasioned by reason of its sale to any person aggrieved thereby.

Drew County v. Bennett, 43 Ark. 364; *Edgar v. State*, 45 Ark. 356; *Berthalf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323.

Appellants not only kept appellee drunk, but got him drunker and kept him so until Gage got his money, and they should be held responsible for all damages occasioned thereby.

Hackett v. Smelsley, 77 Ill. 126; *Jones v. Bates*, 26 Neb. 693, 4 L. R. A. 495; *Boyd v. Watt*, 27 Ohio St. 259; *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 362, note.

A bond must be construed like any other contract or instrument of writing; it is enough that the intent appears though it be not fully and particularly expressed.

State v. Wood, 51 Ark. 208; *McLeod v. Scott*, 38 Ark. 72.

Battle, J., delivered the opinion of the court:

The question in this case is, Can one who becomes intoxicated upon liquor sold to him in a saloon or dramshop by the keeper thereof or his agents, and thereby incapacitated to hold and take care of his money, and who, while in that condition, loses it by having it forcibly or without his knowledge or consent taken from his pockets by some person, maintain an action against the keeper and the sureties on his bond to recover the money so taken?

This question arises under § 4870, Sandels & H. Dig., which provides: "Each applicant for a dramshop or drinking saloon license . . . shall enter into bond to the state of Arkansas, in the penal sum of \$2,000, conditioned that such applicant will pay all damages that may be occasioned by reason of liquor sold at his house of business, . . . which bond shall have two good securities thereto, to be approved of by the court;" and under § 4873 which reads as follows: "Any person aggrieved by the keeping of said dramshop or drinking saloon . . . may have an action on said bond against the principal and securities for the recovery thereof."

The answer to the question obviously depends upon the meaning of the words, "conditioned that such applicant will pay all damages that may be occasioned by reason of liquor sold at his house of business," which are used in § 4870. They should be construed according to the general rule fixing the limit of the liability of parties for the consequences of their acts in other cases,

as they in no way indicate an intent to make the liability of the saloon keeper an exception to such rule. According to their legal effect, they bind him to pay all damages that may be the natural and proximate result of the use or consumption of liquor sold by him or his agents at his place of business. Further than this the law does not extend the liability on his bond on account of the sale of liquor. As said by Lord Bacon: "It were infinite for the law to consider the cause of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Bacon, Max. Reg. 1; Broom, Legal Maxims, p. 165.

The material inquiry in this case is, therefore, whether the use or consumption of the liquor sold by the keeper or his agents at his place of business was the proximate cause of the loss of the money mentioned in the question propounded.

In determining whether an act of a defendant is the proximate cause of an injury, the rule is that the injury must be the natural and probable consequence of the act; such a consequence, under the surrounding circumstances of the case, as might and ought to have been foreseen by the defendant as likely to flow from his act; the act must, in a natural and continuous sequence, unbroken by any new cause, operate as an efficient cause of the injury. If a third person intervenes between the act of the defendant and the injury, and does a culpable act, for which he is legally responsible, which produces the injury, and without it the injury would not have occurred, and the act of the defendant furnished merely an occasion for the injury, but not an efficient cause, the defendant would not be liable; for no one is responsible for the independent wrong of a responsible person to whom he sustains no relation which makes him liable for his wrong independent of an actual participation therein or connection therewith,—as, for instance, the master for the acts of the servant in the scope, course, or range of his employment.

Mr. Wharton states the doctrine in question and answer as follows: "Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter [as to which I am not contractually bound]. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is liable to the person injured." Wharton, Neg. §§ 134 *et seq.*

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We will give a few illustrations of the rule stated, beginning with *Alexander v. New-castle*, 115 Ind. 51, in which a town was sued for injuries alleged to have been caused by a pit or excavation in a street, which the town wrongfully and negligently suffered and permitted to remain open and unclosed. The plaintiff was a special constable, and was thrown into the pit by a prisoner he had under arrest, as they were passing and opposite the pit, and was injured, the prisoner escaping. It was insisted that, as the pit or excavation so wrongfully and negligently permitted to remain open and unclosed afforded the prisoner the opportunity of throwing the plaintiff into it as a means of escape, it was, in legal contemplation, the proximate cause of the injuries which the plaintiff received. But the court held that the prisoner was clearly an intervening as well as an independent human agency in the infliction of the injuries of which the plaintiff complained, and that the town was not liable. In that case the pit afforded the opportunity to inflict the injury, but was not an efficient cause of it.

In *Vicars v. Wilcocks*, 8 East, 1, the plaintiff sued the defendant for slander, which was uttered in a conversation with persons who were not his employers, but was communicated to his master, and attempted to hold him liable for the damage he suffered by reason of his master discharging him in consequence of the slander, before the expiration of his term of service. And Lord Ellenborough said that the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration; and here it was an illegal consequence, a mere wrongful act of the master for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horse pond by way of punishment for his supposed transgression. And his lordship asked whether any case could be mentioned of an action of this sort sustained by proof only of an injury sustained by the tortious act of a third person. *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 31, 10 Am. Rep. 205.

In *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 359, the plaintiff's husband, while in a state of intoxication caused by liquors obtained by him from the defendant, insulted or menaced one McGraw, who thereupon stabbed him, inflicting a wound whereof he died shortly afterwards. The court held that the plaintiff was not entitled to recover under a statute which gave a wife "who shall be injured in person, property, or means of support" in consequence of the intoxication of any person "a right of action against the person who caused the intoxication, and made such person liable" for all damages sustained and for exemplary damages. Mr. Justice Scholfeld, for the court, said: "It has also been held that the intervention of the independent act of a third person, between the wrong complained of and the injury sustained, which was the direct or immediate cause of the injury, breaks the

causal connection; and, consequently, there can, in such case, be no recovery except as against the person whose immediate agency produced the injury. . . . Here, the death not resulting from intoxication or from any disease induced or aggravated by the use of liquor, but solely from the direct and wilful act of McGraw, we have a case clearly within this principle.

In the case before us the intervening act produced the injury complained of, and was the wrongful act of a third person for which he was legally responsible. The sale and consumption of the liquor may have fur-

nished the opportunity or occasion for the wrongful act of the third person, but was not the proximate cause of the injury. Hence the saloon keeper, who sold the liquor which produced the intoxication, and the sureties on his bond, are not liable for damages. *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 17, 10 Am. Rep. 205.

The judgment of the Circuit Court is reversed as to George Sargianovich, the keeper of the saloon, and J. Kempner and D. Beffa, the sureties on his bond, and is affirmed as to Vincent Gage.

VIRGINIA SUPREME COURT OF APPEALS.

W. N. CAMP *et al.*, Appts.,
v.

B. M. BRUCE.

(.....Va.....)

A contract to sell the bid or interest of a successful bidder at a judicial sale, before its confirmation, for more than the amount bid, is contrary to public policy, unless the advance on the bid inures to the benefit of the parties to the suit.

(December 7, 1898.)

A PPEAL by plaintiffs from a decree of the Circuit Court for Nansemond County in favor of defendant in a suit to compel specific performance of a contract to sell to plaintiffs a right to a sheriff's deed which defendant had procured by becoming the highest bidder at a judicial sale of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Mr. Jackson Guy, for appellants:

A contract to sell land must be in writing. But suppose one is sued for performance of a parol contract to sell land, and he answers and does not make the point that the contract is not in writing; will the court supply it for him? It will not.

2 Minor, Inst. 4th ed. 856; *Wren v. Moncure*, 95 Va. 369; *Potomac Mfg. Co. v. Evans*, 84 Va. 721; *Stuart v. Coalter*, 4 Rand. (Va.) 78, 15 Am. Dec. 731; *Welfley v. Shenandoah Iron, Lumber, Min. & Mfg. Co.* 83 Va. 768.

Inadequacy of price can only be a ground for setting a contract aside when it is so gross as to amount to a fraud by one party on the other.

Pom. Spec. Perf. §§ 187, 193, 195; *Young v. Ellis*, 91 Va. 297.

As soon as the contract of September 26

NOTE.—As to the effect of checking or preventing bids upon the validity of an auction sale, see *Hendon v. Gibson* (S. C.) 20 L. R. A. 545, and note.

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was executed by the parties a relation of trust was raised between them, and neither party could deal with the subject-matter of the contract to the prejudice of the other without violating that other's rights.

Dunsmore v. Lyle, 87 Va. 391; Pom. Spec. Perf. § 314.

Sales's determination to put in the upset bid was reached after September 26.

Moore v. Crawford, 130 U. S. 122, 32 L. ed. 878; *Thompson v. Myrick*, 20 Minn. 205.

The doctrines of the equity courts are satisfied if the vendor is able to procure and give a good title at the time of the decree, even though he could not do so at the time of commencing his suit.

Pom. Spec. Perf. § 421.

A chancellor will not compel a vendee to take an estate of which the vendor was not the owner at the sale, or at least had not the legal or equitable means to make himself so; and this because one who speculates on what is not within his control is not a bona fide contractor.

Ley v. Huber, 3 Watts, 367.

Where the seller, though not the owner of the fee, has an equitable estate in the premises under articles of agreement for its purchase and the right to acquire the legal title, and actually acquired it after the contract of sale, but before any laches could properly be imputed to him, he may compel a specific performance.

Tiernan v. Roland, 15 Pa. 429; *Lewis v. Madisons*, 1 Munf. 303; *Price v. Winston*, 4 Munf. 63; 1 Chitty, Contr. 11th ed. p. 431; *Townshend v. Goodfellow*, 40 Minn. 312, 3 L. R. A. 739; *Reeves v. Dickey*, 10 Gratt. 138; *Christian v. Cabell*, 22 Gratt. 82; *Hendricks v. Gillespie*, 25 Gratt. 181; *Hunter v. Bales*, 24 Ind. 299; *Bryant v. Booze*, 55 Ga. 438; *Bayler v. Com.* 40 Pa. 43, 80 Am. Dec. 551; *Ryan v. United States*, 136 U. S. 68, 34 L. ed. 447; *Central Land Co. v. Johnston*, 95 Va. 223.

Mr. J. B. Prince also for appellants.

Messrs. R. H. Rawles and R. E. Boykin for appellee.

Buchanan, J., delivered the opinion of the court:

The record shows that on the 11th day of June, 1894, at a judicial sale in the case of *Ranstead against Ranstead, etc.*, the appellee purchased a tract of land containing 2,900 acres, at the price of \$2,100; that he complied with the terms of sale by paying the cash required and executing his bonds for the deferred payments; that the sale was reported to the court, but pending confirmation he entered into a written agreement with the appellants by which, in consideration of their assuming payment of the purchase-money bonds held by the commissioner and the payment of \$1,565 to the appellee (which was \$500 profit on his bid), he sold and conveyed all his right, title, and interest in the land and in the sale and purchase thereof to the appellants, and agreed that he and his wife would unite with the commissioner in his conveyance of the land, which he was directed to ask the court to have made to the appellants. An upset bid having been put in, the sale to the appellee was set aside, and a resale ordered. After the land had been resold several times, upset bids having been put in from time to time, the appellee finally became the purchaser, at the price of \$4,850, at a sale which was confirmed.

Some months after the confirmation of that sale, the appellants filed this bill to compel the appellee to specifically execute its provision, upon the ground that he, in violation of his agreement with them and in fraud of their rights, had improperly and fraudulently procured the upset bid to be put in, which prevented the confirmation of the first sale made to him.

The appellee answered the bill, and, among other things, admitted the execution of the agreement, and alleged that he would have complied with its provisions if the sale had been confirmed, but denied that he procured the upset bid to be put in, which prevented its confirmation.

The first question to be determined is whether that agreement is one which a court of equity will enforce. If it be an illegal contract, as claimed in argument, this suit cannot be maintained, although that defense was not raised by the pleadings, nor relied upon in the circuit court. The law refuses to enforce illegal contracts, as a rule, not out of regard for the party objecting, nor from any wish to protect his interests, but from reasons of public policy. Whenever, therefore, the illegality of the contract appears, whether alleged in the pleadings or made known for the first time in the evidence, it is fatal to the case. That defect cannot be gotten rid of either by failure to plead it or by agreeing to waive it in the most solemn manner. The law will not enforce contracts founded in its violation. *Fry*, Spec. Perf. § 309; 1 Story, Eq. Jur. § 261; Pom. Contr. 2d ed. § 286; *Coppell v. Hall*, 7 Wall. 542, 19 L. ed. 244.

We have no statute declaring that con-

tracts like the one under consideration are unlawful; yet, under the principles of the common law, any contract that is made for the purpose of or whose necessary effect or tendency is to lessen competition and restrain bidding at judicial sales is held to be illegal, because opposed to public policy. The object in all such sales is to get the best price that can be fairly had for the property. The policy of the law, therefore, is to secure such sale from every kind of improper influence. To allow one bidder to buy off another, which is but a species of bribery, and thus prevent the property from bringing the best price, is condemned by the law, and the courts will not enforce contracts founded in such practices. *Underwood v. McVeigh*, 23 Gratt. 409, 428, 429; *Cocks v. Izard*, 7 Wall. 559, 562, 19 L. ed. 275, 276; *Fry*, Spec. Perf. § 308; Pom. Contr. § 283; *Greenhood*, Pub. Pol. pp. 183-189.

Tested by these principles, the agreement in question was clearly illegal.

If the parties had succeeded in having the sale confirmed by the court, and the appellants substituted as purchasers, in lieu of the appellee, at his bid of \$2,100, the agreement would have operated as a fraud upon the court and the parties whose lands were being sold for purposes of partition. It would have enabled the appellee to put \$500 in his pocket, for which he furnished no valuable consideration; would have taken from the co-owners that much of their inheritance, and enabled the appellants to get the property by buying off the court's bidder, instead of putting in an upset bid, and taking the chances of having to pay a higher price for it at a resale. Neither in this case nor in the case in which the land was sold could such an agreement be enforced. If the commissioner who made the sale in the case of *Ranstead against Ranstead* had reported to the court that since the sale to him the appellee had sold his bid to the appellants, at a profit of \$500, to be paid when the sale was confirmed (as he ought to have done, for he wrote the agreement, and knew all the facts, and the court, whose agent he was, had the right to know all that he knew about the appellants' dealing with their bidder that could affect the confirmation of the sale), instead of merely reporting that the appellee desired the conveyance for the land to be made to the appellants, the court would not have confirmed the sale at the appellee's bid of \$2,100, although no upset bid had been put in.

A court will never, where the facts are known to it, confirm a sale where the bidder has sold his bid at an advance, unless the advance paid or to be paid inures to the benefit of the parties to the suit. It does not allow bidders to trade behind its back, and speculate in that way on property which it is selling. 2 Dan. Ch. Pl. & Pr. 5th ed. p. 1285; *Hodder v. Ruffin*, 1 Tamlyn, 341.

In order to prevent this, it became the practice of the English chancery courts, in the time of Lord Eldon, it is said, to require the bidder who desired the court to substitute another in his stead to file an affidavit that there was "no underhand bargain be-

tween them." *Rigby v. Macnamara*, 6 Ves. Jr. 515; *Vale v. Davenport*, 6 Ves. Jr. 615; *Holroyd v. Wyatt*, 9 Jur. 1072, 2 Colly. Ch. Cas. 327.

The rule of the English chancery courts upon this subject is thus stated in 2 Dan. Ch. Pl. & Pr. 5th ed. p. 1285: "If, after becoming the bidder for an estate, the purchaser is desirous of being discharged from his contract, and of substituting another person in his stead, the court will, on motion, make an order to that effect. He must, however, support his motion by an affidavit that there is no underbargain, for the new purchaser may give the other a sum of money to stand in his place, and so deceive the court; and the rule appears to be that, if a purchaser resell behind the back of the court before the purchase is confirmed, the second purchaser is considered a substituted purchaser, and must pay the additional price into court for the benefit of the estate. When the highest bidder at an auction induced the auctioneer to accept another person in his

place, concealing the fact that he had sold his bargain at an advance, which he received, and then absconded, the property was ordered to be resold, reserving all questions of liability of the original or subpurchaser."

The English rule of requiring affidavits where one purchaser is asked to be substituted for another is a wise one, and in this case the agreement sought to be enforced shows the necessity for some such safeguard in our practice. It might be well for our courts in all such cases, unless the parties consent to the substitution, to adopt the English practice. It is of the utmost consequence that judicial sales, and especially sales for partition, where infants are generally interested, should be protected from practices and influences which may prevent the lands from bringing the best price.

The bill was properly dismissed by the Circuit Court, and its decree must be affirmed.

Cardwell and Riely, JJ., absent.

WEST VIRGINIA SUPREME COURT OF APPEALS.

John S. RITZ, Admr., etc., of Sarah Ritz,
Deceased, *Plff. in Err.*,
v.

City of WHEELING.

(.....W. Va.....)

*1. When, upon the facts conceded as shown, a verdict for the plaintiff would be against law, the court should, on motion, exclude the plaintiff's evidence, and direct a verdict for the defendant. So it is also where, if the essential facts claimed to be proved by the evidence, were proved, a verdict for plaintiff would be justified by the law, yet the evidence does not appreciably tend to prove them, but so plainly fails to do so that two reasonable men should not differ as to its insufficiency.

2. A landowner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is a child does not raise a duty where none otherwise exists. Such a trespasser, injured on such premises, cannot recover of the landowner by reason of the unsafe condition of the premises, unless this negligence be so gross as to amount to a wanton injury.

(November 23, 1898.)

ERROR to the Circuit Court for Ohio County to review a judgment in favor of defendant in an action brought to recover damages for the death of plaintiff's intestate

*Headnotes by BRANNON, P.

NOTE.—For negligence with respect to dangerous ponds, see *Stendal v. Boyd* (Minn.) 42 L. R. A. 288, and footnote thereto.
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which was alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Caldwell & Caldwell, for plaintiff in error:

If a corporation erects and maintains upon its own land for its own use a structure capable of inflicting injury on persons, and by its appearance and operation calculated to attract or allure children *non sui juris*, and to endanger their life or limbs, and leaves the same unguarded and injury results therefrom to such children, without the fault or negligence of their parents or guardians, it constitutes negligence on the part of such corporation for which a recovery may be had.

Thomas, Neg. Rules, Decisions, & Opinions, 1895, p. 1083.

The test of the permissible use of one's own land, is whether the act or use was a reasonable exercise of the dominion which the owner of property has by virtue of his ownership, having regard to all interests affected, his own and those of his neighbors, and having also in view public policy.

Thomas, Neg. Rules, Decisions, & Opinions, p. 1050; *Gunn v. Ohio River R. Co.* 36 W. Va. 173.

The rules applicable to adults are in some respects essentially modified when applied to children *non sui juris*. It is considered that the owner of private premises should use reasonable care not to permit unguarded upon his premises machinery, structures, or other dangerous conditions, to which children would be likely to be attracted, in proximity to places frequented by them, and

from an interference with which injury would be likely to result.

Thomas, Neg. Rules, Decisions, & Opinions, p. 1078; Whittaker's Smith, Neg. Webb's Notes, 2d ed. p. 77, notes; *Bronson v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154.

Reasonable care should be taken to prevent injury to children likely to enter upon private premises and be injured.

Coppner v. Pennsylvania Co. 12 Ill. App. 600; *Moynihan v. Whidden*, 143 Mass. 287; *Ferguson v. Columbus & R. R. Co.* 75 Ga. 637; *Whirley v. Whiteman*, 1 Head, 610; *Nashville & C. R. Co. v. Carroll*, 6 Heisk. 347.

A railroad company has been held liable for injuries to children caused by turntables left unguarded, even upon their own premises.

Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745; *Evansich v. Gulf, C. & S. F. R. Co.* 57 Tex. 126, 44 Am. Rep. 586; *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592; *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 303; *Houston & T. C. R. Co. v. Simpson*, 60 Tex. 103; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76, 25 Am. Rep. 269; *Nagel v. Missouri P. R. Co.* 75 Mo. 653, 42 Am. Rep. 418; *Dwyer v. Missouri P. R. Co.* 12 Mo. App. 597; *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332; *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421; *Union P. R. Co. v. Dunden*, 37 Kan. 1; *Bridger v. Asheville & S. R. Co.* 25 S. C. 24; *Waldh v. Fitchburg R. Co.* 78 Hun. 1.

Dangerous machinery cannot be distinguished on principle from other dangerous things placed on the ground by its owner.

Shearm. & Redf. Neg. 4th ed. § 705; *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206; *McDonald v. Union P. R. Co.* 42 Fed. Rep. 582; *Bishop v. Union R. Co.* 14 R. I. 314, 51 Am. Rep. 386.

There can be no contributory negligence by children of tender years.

Beach, Contrib. Neg. § 136; *Lynch v. Nurdin*, L. R. 1 Q. B. Div. 29; *Hughes v. Macfie*, 2 Hurlst. & C. 744; *Mangan v. Atterton*, L. R. 1 Exch. 239; *Clark v. Chambers*, L. R. 3 Q. B. Div. 327; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Mackey v. Vicksburg*, 64 Miss. 777.

Negligence cannot ordinarily be imputed to a child of the age of six years, for it would not be presumed of sufficient capacity or discretion to understand the danger of getting on and off street-railway cars and to guard against it.

Buck v. People's Street R. Electric Light & P. Co. 46 Mo. App. 555; *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. 421; *Dicken v. Liverpool Salt & Coal Co.* 41 W. Va. 512; *Gunn v. Ohio River R. Co.* 36 W. Va. 168; *Mackey v. Vicksburg*, 64 Miss. 782; *Hydraulic Works Co. v. Orr*, 83 Pa. 335.

Placing a dangerous excavation in public 43 L. R. A.

streets or grounds, or on the edge of such ground, and keeping such excavation or dangerous pool of water unguarded and unprotected, is negligence.

Barthold v. Philadelphia, 154 Pa. 109.

A public square or common is a highway, but not for vehicles.

2 Dill. Mun. Corp. § 646 (509 and notes).

The city of Wheeling is liable in this case, although it is a municipal corporation.

Clark v. Manchester, 62 N. H. 577; *Brown v. Guyandotte*, 34 W. Va. 299, 11 L. R. A. 121; 2 Dill. Mun. Corp. § 906 (1024, 1026); *Watkins v. Preston County Ct.* 30 W. Va. 662; *Gibson v. Huntington*, 38 W. Va. 178, 22 L. R. A. 561; *Wilson v. Wheeling*, 19 W. Va. 331, 42 Am. Rep. 780; *Chapman v. Milton*, 31 W. Va. 385.

The neglect of the city was the proximate cause of the accident in the case at bar.

Louisiana Mut. Ins. Co. v. Twced, 7 Wall. 52, 19 L. ed. 67.

Reasonable care should be taken to prevent injury to children likely to enter upon private premises and be injured.

Coppner v. Pennsylvania Co. 12 Ill. App. 600; *Ferguson v. Columbus & R. R. Co.* 75 Ga. 637; *Whirley v. Whiteman*, 1 Head, 610; *Nashville & C. R. Co. v. Carroll*, 6 Heisk. 347; *Bronson v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154; *Gunn v. Ohio River R. Co.* 36 W. Va. 173; *Raines v. Chesapeake & O. R. Co.* 39 W. Va. 50, 24 L. R. A. 226.

Messrs. Frank W. Nesbitt and Henry M. Russell, for defendant in error:

The question of negligence was a question for the court, and if the evidence of the plaintiff failed to show negligence, it was proper for the court to exclude it.

Klinker v. Wheeling Steel & I. Co. 43 W. Va. 219; *Reese v. Wheeling & E. G. R. Co.* 42 W. Va. 333.

In cases in which streets are not involved the burden of proving negligence, and of proving the elements of negligence, is upon the plaintiff.

Gibson v. Huntington, 38 W. Va. 177, 22 L. R. A. 561.

It is necessary for the plaintiff to show that the particular act of negligence was the proximate cause of the accident.

Gunn v. Ohio River R. Co. 36 W. Va. 165.

If this inclosure containing the reservoir had been instead an open street, the city could only have been held bound to keep it in a reasonably safe condition.

Van Pelt v. Clarksburg, 42 W. Va. 218.

Defendant did not owe any duty which it had failed to perform.

Woolwine v. Chesapeake & O. R. Co. 36 W. Va. 329, 16 L. R. A. 271; *Poling v. Ohio River R. Co.* 38 W. Va. 645, 24 L. R. A. 215; *Dicken v. Liverpool Salt & Coal Co.* 41 W. Va. 511; *Clark v. Manchester*, 62 N. H. 577; *Grindley v. McKechnie*, 163 Mass. 494; *Murphy v. Brooklyn*, 118 N. Y. 575; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Benson v. Baltimore Traction Co.* 77 Md. 535, 20 L. R. A. 714; *Mergenthaler v. Kirby*, 79 Md. 182; *Charlebois v. Gogebic & M. River R. Co.* 91 Mich. 59; *Hargreaves v. Deacon*, 25 Mich. 1; *Moran v. Pullman Pal-*

ace Car Co. 134 Mo. 641, 33 L. R. A. 755; *Overholt v. Vieths*, 93 Mo. 422; *Klia v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573; *Richards v. Connell*, 45 Neb. 467.

The *Turntable Cases* are not applicable.

Peters v. Bowman, 115 Cal. 345; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573; *Richards v. Connell*, 45 Neb. 467; *Overholt v. Vieths*, 93 Mo. 422; *Klia v. Nieman*, 68 Wis. 271, 60 Am. Rep. 354.

The *Turntable Cases* are not good law.

Dicken v. Liverpool Salt & Coal Co. 41 W. Va. 511; *Missouri, K. & T. R. Co. v. Edwards*, 90 Tex. 65, 32 L. R. A. 825; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573; *Chicago, K. & W. R. Co. v. Bookoven*, 53 Kan. 279; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L. R. A. 724; *Peters v. Bowman*, 115 Cal. 345.

There are a number of cases which, while not involving pools of water, do involve facts and circumstances which are not to be distinguished in principle from the case at bar, and which therefore will be found of value.

Gay v. Essex Electric Street R. Co. 159 Mass. 238, 21 L. R. A. 448; *Missouri, K. & T. R. Co. v. Edwards*, 90 Tex. 65, 32 L. R. A. 825; *Talty v. Atlantic*, 92 Iowa, 135; *Chicago, K. & W. R. Co. v. Bookoven*, 53 Kan. 279; *O'Connor v. Illinois C. R. Co.* 44 La. Ann. 339; *Ratte v. Dawson*, 50 Minn. 450; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847; *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Clark v. Richmond*, 83 Va. 355.

Brannon, P., delivered the opinion of the court:

Sarah Ritz, a child of less than five years, was drowned in a reservoir maintained by the city of Wheeling to furnish water for public use, and the administrator brought action against the city, and upon the trial the court excluded the whole of the plaintiff's evidence from the jury as insufficient to warrant a verdict, and directed the jury to find for the defendant, and upon such a verdict gave judgment for defendant, and the plaintiff appeals. The case is not one involving credibility of witnesses, or weight of evidence, or the proper inferences and deductions from evidence, which are matters proper for the consideration of a jury; for the material facts of the case are undisputed, and the case presents simply the question of law whether, upon the facts, a liability rests on the city. The question is, Was the city guilty of negligence? Negligence is most frequently a question of mixed law and fact, proper to go before a jury; but, where the facts are such that ordinarily men will not differ about their effect in not showing negligence, it becomes a question of law for the court, not one of fact for the jury, and, if the evidence is not colorably sufficient to show negligence, the court ought to take the case from the jury and direct a verdict against the plaintiff. When the evidence is so clearly deficient as to give no support to a verdict for plaintiff, if rendered, the evidence should be excluded from the jury. *Klinkler v.* 43 L. R. A.

Wheeling Steel & I. Co. 43 W. Va. 219; 1 Shearm. & Redf. Neg. 2d ed. § 56. Where the case turns on the weight and effect of the evidence in proving or not proving facts necessary to support the action, and the evidence appreciably goes to prove such facts, it ought to go to the jury, as a verdict upon such evidence gives it a force which it might not have with the judge before verdict, and fortifies his case more against the action of the court, as the court cannot set the verdict aside unless plainly and decidedly contrary to or without evidence; but where the case is not such, but one of undisputed or indisputable facts, leaving it only a matter of law whether the facts show a liability on the defendant, the court should take the case from the jury, and direct a verdict, if the evidence shows no case for the plaintiff, because, if there were a verdict for him, it would be a finding against law, and the court always annuls a verdict against law upon conceded or indisputable facts. It is different, then, from a motion for a new trial, where the verdict rests on the credibility of witnesses or the weight and effect of evidence. *Grayson's Case*, 6 Gratt. 712; *Poling v. Ohio River R. Co.* 38 W. Va. 645, 24 L. R. A. 215 (point 8). Likely this distinction is not always thought of. Plainly, if the court does right in excluding the evidence, it commits no error in directing a verdict, as such a verdict is the inevitable consequence of such exclusion. There cannot then be any different verdict.

Let us see, then, whether the city is liable. In maintaining the reservoir, the city was engaged in a lawful act, within its power and duty as a municipal corporation,—a governmental act; and I do not see, in the absence of a statute imposing liability, if an open question, how it could be held liable, even if guilty of negligence, under the principle stated in *Brown v. Guyandotte*, 34 W. Va. 299, 11 L. R. A. 121, and 1 Beach, Pub. Corp. § 749: "Where a city, under the authority of a general law, undertakes a work for the sole use and benefit of the public, it is not liable for an injury caused by the negligent or defective performance of such work by its agents or servants, unless some statute, either directly or by implication, gives a private remedy for such injury. This rule has been applied against a traveler injured by negligent blasting while excavating the foundation of a public schoolhouse, and against a child injured by reason of an unsafe staircase of a schoolhouse, and a dangerous excavation in a schoolhouse yard. The same rule has been applied in favor of cities in respect to town house and courthouses, and in respect to public grounds, like Boston Common. And it makes no material difference, in the application of the rule, whether the injury is caused by a negligent act done in the direct performance of the public work," or is received after the completion of the work. You cannot sue the state for such cause, unless it granted remedy. Why sue a city when performing a governmental function? One citizen is as much guilty of negligence as are others; all are guilty alike. Contrary doctrine holds a

city liable as if an individual engaged in private work for private ends. But most authorities oppose this view. The law seems to be that a city or town, in the use of its property, though for purely public purposes, is liable for negligence as private owners. *Gibson v. Huntington*, 38 W. Va. 177, 22 L. R. A. 561; 2 Dill. Mun. Corp. § 965; 15 Am. & Eng. Enc. Law, pp. 1141, 1149, 1155. But those authorities hold that, to make a municipal corporation liable for injury received from its use of its property, negligence must be shown. Thus we encounter in this case the question whether the city was guilty of negligence to which we can attribute the death of the little girl. There can be no negligence charged upon a person unless he rests under a duty to the person complaining of damage at his hands; for if there is no duty violated, though there may be grave damage befalling the complaining party, he has no ground of action. It is a case denominated in law as *damnum absque injuria*,—damage done, but without violation of a right in the injured party; a misfortune unaccompanied by a breach of duty by the party inflicting the injury. *Shearm. & Redf. Neg. § 8*. The reservoir and the land containing it were the private property of the city, used, not as a park or place of public resort or common, but only for reservoir purposes. The child was a trespasser, if you can say a child can be a trespasser. It was a trespasser, in legal sense; that is, it was on this property without right. The city was not bound to watch it. It could not be liable to it only for wilful or wanton injury. I would, as an original question, hold that the law testing this case is laid down in 1 Beach, Pub. Corp. § 754, as follows: "A municipal corporation is not liable to a trespasser who goes, without license or invitation, upon its land, though unmolested, for mere pleasure or to gratify curiosity, and there meets with an injury through the corporation's negligent management of its property; and no distinction is made in favor of an infant child so receiving an injury. In such a case the municipality owes no special duty to a child straying from its parents, and the duty of protecting it is not shifted from its parents to the municipality because it chances to escape from their care. This is the general rule applicable to those who trespass on private lands, and there is no reason why municipal corporations should not have the benefit of it; but, of course, it has no application to public highways, where all have a right to be."

I repeat, this is so, because no legal duty rests on the corporation. Our own cases sustain the doctrine of immunity where there is no duty placed by the law upon the party sought to be charged with damages. By reason of this doctrine, the case of *Woolwine v. Chesapeake & O. R. Co.* 36 W. Va. 329, 16 L. R. A. 271, denied relief to a man who visited a telegraph office kept by a railroad company to make a call of friendship on the operator, and was injured by negligence of the railroad's servants. And by reason of this doctrine, in *Poling v. Ohio River R. Co.* 38 W. Va. 645, 24 L. R. A. 215, no damages were

conceded for the death of a person standing on the railroad grounds, and killed by reason of a defective apparatus used to catch mail from a passing train. And by reason of the same doctrine, in *Dicken v. Liverpool Salt & Coal Co.* 41 W. Va. 511, recovery was denied for the injury of a little child crippled by a car while on a train road of a salt company. Such must be the ruling as long as private ownership in property is recognized, as to hold otherwise would detract from the lawful dominion of a man over his own property, and contravene the canon of property expressed in the *Dicken Case*, that "a party who is using his own property in a lawful way cannot be guilty of a breach of duty to anyone."

These cases of our own decide the case against the plaintiff, but the importance of the case and briefs of counsel justify reference to other states. In *Clark v. Manchester*, 62 N. H. 577, a child of four years was drowned in a reservoir which had once been used by a city, but its use had ceased, the fence was removed, it was partly filled up, and but a portion yet had water in it. Children played there. A field was near by, where ball playing and other amusements went on. The child, while passing along a path at the reservoir, fell into it. It was held that the city was not, without a statute, liable for neglect of a public corporate duty, and that the city owed no duty to one going upon its land for pleasure or curiosity, unless the negligence be so gross as to amount to a wanton infliction of injury, and that no distinction is made in favor of an infant. In *Grindley v. McKechnie*, 163 Mass. 494, a city kept a sewer, and by it a hole had been formed by the action of the water, and was filled with water, the hole being 50 feet from the street, along which was a fence, and some boards had been torn from it, and a path led from this opening to the sewer. A child went through this opening, along the path, to the sewer, and was drowned. It was held that the city owed no duty to the child to keep the sewer or hole in safe condition, and was not liable in damages. Similar decisions, based on principles above stated, are to be found in *Murphy v. Brooklyn*, 118 N. Y. 575; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Benson v. Baltimore Traction Co.* 77 Md. 535, 20 L. R. A. 714; *Charlebois v. Goebie & M. River R. Co.* 91 Mich. 59; *Moran v. Pullman Palace Car Co.* 124 Mo. 641, 33 L. R. A. 765; *Overholt v. Vieths*, 93 Mo. 422; *Klitz v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573; *Richards v. Connell*, 45 Neb. 467; *Omaha v. Bowman*, 52 Neb. 293, 40 L. R. A. 531; *Peters v. Bowman*, 115 Cal. 345. They are cases of small children drowning in reservoirs or pools of water, in most instances unprotected by fence, whereas in this instance the reservoir was well fenced. Those cases are apposite to this in similarity of source of injury and character of the persons injured. Many cases may be cited of injury from other causes to persons on ground occupied by others. They involve the same principle, regardless of different cause of injury; that

is, that the owner of the ground owed no duty to one having no legal right to be upon the ground. Recovery was refused in *Gay v. Essex Electric Street R. Co.* 159 Mass. 238, 21 L. R. A. 448, to a boy ten years old, who went on a car unlawfully standing in a street, and was injured by a recoiling brake not properly fastened. It was said that, if standing on the company's ground, it would be most clear that the company would not be liable; and, as it was, the court said that the defendant was not liable. In *Missouri, K. & T. R. Co. v. Edwards*, 90 Tex. 65, 32 L. R. A. 825, an eight-year-old child in a lot of the company open on one side was crushed by a pile of plank improperly piled. In *Talty v. Atlantic*, 92 Iowa, 135, child was injured by going down path from street, and crushed while digging sand, by a bank caving. It was held that the city was not bound to fence the path. In *O'Connor v. Illinois C. R. Co.* 44 La. Ann. 339, children usually played in a block with openings in fence and one of seven years was injured. In *Chicago, K. & W. R. Co. v. Bockoven*, 53 Kan. 279, a child of five years was killed while swinging, by a falling gate, which was defective and dangerous. In *Ratte v. Dawson*, 50 Minn. 450, a child of three years was playing in a pit caused by taking out sand, and wholly unguarded, in a vacant lot, and was killed by a falling embankment left in dangerous condition. Children usually played in the sand, as it was attractive to them. It was held there could be no recovery, as there was no duty on the owner to keep his premises safe. In *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, the railroad owned a yard not fenced, where children went to play, and one of six years jumped on a train and was injured. Held no duty to the child was on the company. In *Vanderbeck v. Hendry*, 34 N. J. L. 467, defendant owned a board yard in a populous part of city, frequented by children, and a child injured by a falling pile of lumber, not in safe condition, was denied recovery, because no duty as to the child rested on the defendant to pile the plank properly. In *Clark v. Richmond*, 83 Va. 355, the city had made excavation on land of another, who had erected a wall along the street, and a child of six years walked on the wall, and fell into the pit. The court said the city owed him no duty, as he went upon property where there was no duty owing him. *McGuinness v. Butler*, 159 Mass. 233, denied relief to a child injured by pulling upon himself a slab left by the owner leaning against his shop, one end in the street and the top a few inches inside his line.

But it is contended that, while this doctrine that no duty lies upon the owner of property to keep it in safe condition as to trespasser applies to persons who have attained years of discretion, the case is wholly different as to children of tender years; that as to them the owner cannot use the property as he chooses, but must so use it as not to injure them. Perhaps this is stating the position of plaintiff's counsel too broadly. The position is that the owner cannot erect or continue on his property any structure, establishment, or machinery that is at the

same time in dangerous condition, and calculated to attract and allure young children to it. It must be both to sustain a recovery. This position is sought to be supported by what are called the "*Turntable Cases*" (*Siouxs City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, and other cases following it). In that case a boy was injured while playing in a railroad turntable left unlocked, and was allowed a recovery. The case is most unsatisfactory. The opinion is not clear. It seems to go upon the idea, as an element of decision, that to deny a recovery it was necessary to impute contributory negligence to a child; whereas the matter in that case did not, nor does it in this case, involve contributory negligence, which is foreign to our question, which question is whether the defendant owes duty to a child wandering upon the defendant's premises and injured by its lawful works. And in the *Stout Case* the real point of the decision is that the case should have gone to the jury, rather than a flat decision of defendant's liability, though I do not say it was not involved. But the *Stout Case*, if carried to the length to which it is sought to be carried, would exact of every property owner the utmost watchfulness, vigilance, and expenditure to guard against hurt to children, else he would be every moment in danger of ruinous damages. It attacks the right of free use of one's property in lawful business. A railroad liable because it happened to leave a turntable unlocked, as turntables often are, on its own track,—a necessary appliance in a lawful business! Ought a farmer be liable for failing to put a picket fence around his pond necessary for his cattle? If he does not, some little boy will climb the fence into the farmer's field, drown in the pond, and sue the farmer, on the same principle. The dam that contains water to turn the mill wheel, having a path around it shaded with willows, is very alluring to the child and the man. Must the miller inclose it? The canal, with its towpath and frogs, is very attractive to the little boy or girl, and dangerous, too. If a child drown in it, is the company liable? How many more instances of things useful in lawful business, and withal very attractive to children, and very dangerous, might be put? And the rule contended for says that, if the thing causing the injury be attractive or seductive, the liability attends it. How many things are, or may be, so to children? "A child's will is the wind's will." Almost everything will attract some child. The pretty horse, or the bright red mowing machine, or the pond in the farmer's field, the millpond, canal, the railroad cars, the moving carriage in the street, electric works, and infinite other things, attract the child as well as the city's reservoir. To what things is the rule to be limited? And where will not the curiosity, the thoughtlessness, and the agile feet of the truant boy carry him? He climbs into the high barn and the high cherry tree. Are they, too, to be watched and guarded against him? As was well said in *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, this rule "would charge the duty of the protection of children

upon every member of the community except their parents." A very onerous duty! *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 462, holds that the same precautions by property owners apply to infants and adults.

I am guilty of no undue assumption in condemning the *Stout Case*, as it has received in some courts, the most eminent in the land, open condemnation, and in others criticism tantamount to condemnation; and some which followed it limit its application to its facts or desire to recant. *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L. R. A. 724; *Frost v. Eastern R. Co.* 64 N. H. 220; *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L. R. A. 248; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847; *Missouri, K. & T. R. Co. v. Edwards*, 90 Tex. 65, 32 L. R. A. 825; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573; *Chicago, K. & W. R. Co. v. Bookoven*, 53 Kan. 279; *Peters v. Bowman*, 115 Cal. 345; *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 461; *Bishop v. Union R. Co.* 14 R. I. 320, 51 Am. Rep. 386.

Here I may fitly add that the cases cited denying recovery were cases of infants of tender years. Are they all wrong, running through so many years? Is our own *Dicken Case* wrong? And the *Woolwine* and *Poling Cases*? Another reason against applying the *Stout Case* to mulct the city of Wheeling in damages is that, as often construed, that case only applies to "dangerous machinery." Several courts which followed it have since said it ought to be limited to its particular facts. Whether the distinction between "dangerous machinery" and other means of injury be clear or not, several courts and text-writers have made it. Railroad cars held not such "dangerous machines." *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847; *Catlett v. St. Louis, I. M. & S. R. Co.* 57 Ark. 461. Cars are attractive to children, but the law does not require a guard to keep children from standing cars. *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 265.

Now, I do not suppose this reservoir of the city would come under the head of "dangerous machinery." If so, what structure or establishment might not? At any rate, if that is "dangerous machinery," hundreds of necessary things would fall under this head of liability not heretofore regarded as dangerous and attractive to children, and greatly endanger the maintenance of many things necessary in life and business, and be an enormous burden to guard and watch with never sleeping eyes. Strange to me the idea that such a reservoir can be made to come under this rule. And I say that the reservoir is not "dangerous" in that sense. And I say, with yet greater confidence, that it is not specially "attractive" in that sense. If not, there can be no recovery in this case; for on that narrow ground the case hinges. Hence the *Stout Case* does not apply.

But a most important matter is, What is the negligence claimed to sustain this action? It is that there was a gate of entry into the inclosure containing the reservoir, which was

sometimes open, and that there was an opening under the picket fence several feet deep to allow water coming into the reservoir inclosure from the hill above, from rain, to pass out so as to keep it from entering the reservoir and polluting its water. The reservoir was inclosed with a high, strong picket fence. It does not appear how the child entered the inclosure, but likely through the opening under the fence. Now most of the cases above will show that the city was not bound to fence, but it did securely fence, the reservoir. It adopted a reasonable precaution, and did all that reasonable care would exact. Do the gate and drain, things indispensable, convict the city of want of ordinary care or gross negligence? Surely not. The place was reasonably safe. Though people and children did sometimes go upon the city land containing the reservoir, and along the narrow path along the fence on the east side over the high, steep ground, almost a precipice of hundreds of feet, to watch games of baseball in a field below, yet there was no invitation by the city to do so. The place was uninviting and dangerous, and there was no ground for the city to anticipate that parents would allow their children there, on very dangerous ground, or that one would crawl under the fence, through this single necessary opening. The city used all due precaution. This opening was at the remote end of the inclosure, away from houses a considerable distance, and at the end of the path. The path was along the fence, was only 2 feet wide, and very close to the fence, and the whole space between the fence and precipice was only that width,—a path, not a highway, and unlikely to invite people. It was not bound to use the utmost possible care to guard infallibly against all possible accidents. In *Gavin v. Chicago*, 97 Ill. 66, 37 Am. Rep. 99, it was held that the city must keep a bridge in a reasonably safe condition, and that, though it could be made to be free from accident to playing children, yet it was not bound to so construct it as to be safe for children playing upon and around it, or place guards or mechanical contrivances to keep children off the bridge. An owner is not required to provide against remote and improbable injuries to trespassing children. *Brinkley Car Co. v. Cooper*, 60 Ark. 545, 46 Am. St. Rep. 216, and note. One using his property in a lawful way is not under obligation to save others from inevitable accident. "He performs his duty when he uses reasonable care and precaution." *Cosulich v. Standard Oil Co.* 122 N. Y. 118. Even if the city owed a duty to the child, it was only of ordinary care. 2 Shearm. & Redf. Neg. 2d ed. § 705.

The city had a watchman there, though by no means was this required, as above authorities show. The watchman was not present or did not happen to see this child. The fact that it did keep a watchman did not bind the city to duty not fixed by law or a higher degree of duty than the law fixes, if any. The fact shows that the city took all reasonable precautions, and this is an unfortunate, inevitable accident, for which it is not responsible. The South Carolina

court stated the point clearly, saying, as to children, that there is a liability only "when, from the peculiar nature and open and exposed position of the dangerous defect or agent, the owner should reasonably anticipate such injury." How can we say in this case that a drain at the end of a narrow fringe of 2 feet, 200 yards long, between a fence and precipice, just where the fence butted up against a high hill cut down in the construction of the reservoir, not where people usually went, very inconvenient to walkers, we may say dangerous, where there was nothing to invite them, but everything to deter, and the common ground, if such, was on the other side of the reservoir inclosure, a good distance and cut off from this point,—the point where the drain emerged being secluded, and the best point for it, and where no one would be expected to go,—how can we say the city "should reasonably anticipate injury" there, in the language of the South Carolina court? Buswell, *Personal Injuries*, § 77, states the rule, as to children trespassing, to be that, to charge the defendant, it must appear that the act was "wilfully mischievous, as by leaving a ferocious dog at liberty," and that it is to be deemed mischievous or wanton only when the act was done "in the ordinary course of his business, and by the use of appliances which do not, obviously, and of necessity, expose all persons who may approach them to peril, or the exposure of which is not attended with some concealed danger." That is the test.

Now would a farmer or millowner be liable because he left a drain under his fence, and a child happened to crawl through it and fall into the pond? Certainly not. It is an unexpected, inevitable accident. Neither is Wheeling liable.

Counsel complain that the court would not allow as evidence a paper to show that the only title the city had to the land containing part of the reservoir was one vested in it in trust as a common, and that it misap-

propriated it when it devoted a part of it to use for a reservoir. The city had years ago made this reservoir; had been for years in actual use of it for the purpose. It never was used as a common, in the sense of a park. Now, if the party who conferred the land upon the city, or his heirs, could stop its use for a reservoir, or in any manner complain of the act as a misappropriation, or if anyone could do so, while the city was in the exclusive, unrestrained occupation of it, for reservoir purposes, it has the right to be looked upon as owner, and entitled to the immunity from damages, like any owner. Its title could not be put in question in this collateral way in this action. I think the paper was irrelevant.

Late reference is made to the case of *Rowzee v. Pierce*, 75 Miss. 846, 40 L. R. A. 402. That was an injunction to prevent a lot conveyed to a town for a park from being used as a site for a schoolhouse, and it was held that the use proposed to be made of it was against the purpose of the grant. To me it is plainly not relevant to this case. To restrain a city from diverting property to a different use from that contemplated in the grant is one thing; but the question whether it is, while in actual use of the land for such purpose, liable for an act claimed to be a negligent use of the property, which negligence does not consist in the application of the property to a use not contemplated, but in its mere handling of the property, is another question. The question here is whether the act of having the drain renders the city liable, no matter how it came by the land. Would the city be liable if the conveyance to it had been general, and not for a special purpose? I oppose imposing upon the innocent public heavy damages for the accidents and misfortunes which always have and always will attend human existence. The safety of the many is to be preferred to even the suffering and misfortunes of individuals.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Clarence MURPHY, *Plff. in Err.*,
v.
COMMONWEALTH of Massachusetts.

(.....Mass.....)

1. An *ex post facto* law is one which will increase the penalty or deprive a party of substantial rights or privileges to which he was entitled as the law stood when the offense was committed.
2. Deductions for good conduct and permits to be at liberty, to which pris-

NOTE.—For validity of law providing for indeterminate sentences, see also *Miller v. State* (Ind.) 40 L. R. A. 109.
42 L. R. A.

oners who were convicted of offenses committed when Stat. 1880, chap. 218, and Pub. Stat. chap. 222, § 20, were in force, are entitled as of right rather than by favor, for faithful observance of the rules and for not having been subjected to punishment, constitute rights which cannot be taken away or interfered with to their disadvantage by subsequent legislation.

3. A statute which alters or may alter in a substantial manner the positions of those committing offenses prior to its passage is unconstitutional as to such an offense, even if it is possible that in that particular case it might operate more beneficially than the prior law would have operated.

4. The duration of a sentence is not uncertain, and the determination of the term of imprisonment is not taken from the courts so as to make the act *ex post facto* as applied to an offense previously committed, merely because it provides for a sentence that is indeterminate between a maximum and minimum, and gives the prison commissioners, after the minimum term, power to release the prisoner on a permit approved by the governor and council.
5. A statute requiring the approval of the governor and council to a permit for the release of a convict after the expiration of the minimum term of his sentence is not an *ex post facto* law, but relates merely to a matter of procedure.
6. Act 1895, chap. 504, providing for indeterminate sentences, is to be construed prospectively and does not apply to sentences for offenses committed before it took effect.

(January 3, 1899.)

ERROR to the Superior Court for Essex County to review a sentence of imprisonment upon a conviction of defendant for embezzlement. *Reversed.*

The facts are stated in the opinion.

Messrs. Ezra R. Thayer and Edward F. McClennen, with *Messrs. Brandeis, Dunbar, & Nutter*, for plaintiff in error: The legislature cannot make any substantial change, other than a clear reduction, of the punishment for offenses previously committed.

Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506; *Re Medley*, 134 U. S. 160, 33 L. ed. 835; *Com. v. McDonough*, 13 Allen, 581; *Hartung v. People*, 22 N. Y. 95; *Shepherd v. People*, 25 N. Y. 406; 1 Hare, Const. Law, p. 564.

The statute of 1895 substantially changes, without reducing, the prisoner's punishment.

The act, by its terms, applies to all sentences passed after its enactment.

Com. v. Brown, 167 Mass. 144.

Under the previous law the prisoner would have received a determinate sentence, imposed by the court. From this sentence he would have been entitled to certain fixed deductions for good behavior. By the new law the court is forbidden to fix the term of imprisonment, but can only establish a maximum and minimum. The actual period of imprisonment remains uncertain, and depends on the pleasure of the commissioners of prisons and the governor and council.

The change in the tribunal imposing the sentence has been frequently held to be of controlling importance.

Re Medley, 134 U. S. 160, 33 L. ed. 835; *Marion v. State*, 16 Neb. 349; *People v. Cummings*, 88 Mich. 249, 14 L. R. A. 285; *Oliver v. Oliver*, 169 Mass. 592.

The change from a definite to an indefinite sentence also makes a serious change in the prisoner's position.

People v. Cummings, 88 Mich. 249, 14 L. R. A. 285; *Re Medley*, 134 U. S. 160, 33 L. ed. 835; *People, Henning, v. Allen* (Ill.) 29 Chicago Legal News, 176.

The legislature cannot make a change in the criminal law hostile in its nature or substance. 43 L. R. A.

stantially unfavorable in its operation toward prior offenders; and if such is the purpose or operation of the change, it is immaterial that it deals with a mere matter of procedure or penal administration.

Re Murphy, 87 Fed. Rep. 549; *Com. v. McDonough*, 13 Allen, 581; *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506; *Re Medley*, 134 U. S. 160, 33 L. ed. 835; *Re Canfield*, 98 Mich. 644; *Ex parte Hunt*, 28 Tex. App. 361.

The statute actually deprives the prisoner of rights which he enjoyed under the previous law.

The deductions for good behavior allowed by Pub. Stat. chap. 222, § 20, are important benefits to the petitioner.

Opinion of the Justices, 13 Gray, 619; *Re Murphy*, 87 Fed. Rep. 549.

A prisoner sentenced under Stat. 1895, chap. 504, is not entitled to the benefits of Pub. Stat. chap. 222, § 20.

The permit under the new act is wholly inadequate as a substitute for that granted by the old.

Com. v. McDonough, 13 Allen, 581.

Mr. J. M. Hollowell for the Commonwealth.

Morton, J., delivered the opinion of the court:

This is a petition for a writ of error to reverse a sentence of the superior court for the county of Essex, by which the petitioner is confined in the state prison. The plea is *in nullo est erratum*, and therefore admits the facts well assigned in the petition. *Bodurtha v. Goodrich*, 3 Gray, 508, 512; *Conto v. Silvia*, 170 Mass. 152. From those, and from the record of the superior court, it appears that the offenses of which the petitioner was convicted were committed between July 19, 1892, and November 17, 1893, but that he was sentenced under Stat. 1895, chap. 504, which took effect on the 1st day of January, 1896, and which provides in § 1 that "when a convict is sentenced to the state prison otherwise than for life or as a habitual criminal the court imposing sentence shall not fix the term of imprisonment but shall establish a maximum and minimum term for which said convict shall be held in said prison. The maximum term shall not be longer than the longest term fixed by law for the punishment of the offense of which he is convicted and the minimum term shall not be less than two and one half years." The petitioner was indicted under Pub. Stat. chap. 203, § 40, and was found guilty on sixty-three counts, each of which, except in a few instances, alleged the value of the property stolen to be more than \$100. The penalty is prescribed in § 20 of the same chapter, and is imprisonment in the state prison not exceeding five years, or fine not exceeding \$600 and imprisonment in the jail not exceeding two years, if the value of the property stolen exceeds \$100. The maximum sentence imposed in the present case was not more than fifteen years, and the minimum not less than ten. The maximum term was therefore only a small fraction of that authorized by law, and it is agreed that

it probably does not exceed the sentence which would have been imposed before the passage of Stat. 1895, chap. 504. The error assigned is that the sentence and the commitment pursuant to it were wholly unauthorized and void, because the statute under which the sentence was imposed was *ex post facto*, and contrary to § 10, art. 1, of the Constitution of the United States, and to article 24 of the Declaration of Rights of the Constitution of Massachusetts.

The statute was considered by this court in *Com. v. Brown*, 167 Mass. 144, 146, and again in *Oliver v. Oliver*, 169 Mass. 592. It was also before the court in *Com. v. Crowley*, 168 Mass. 121. In *Com. v. Brown* the court says that it sees no reason why the statute should not be construed to apply to all sentences in the cases referred to in it, passed after it went into effect. But it is evident that the attention of the court was directed more to the effect upon the constitutionality of the statute of the feature of indeterminate sentences than to other matters. The fact that the statute might interfere with his rights or privileges in regard to a permit to be at liberty, and was therefore objectionable as *ex post facto*, was not suggested in the defendant's brief. In *Oliver v. Oliver*, the point decided was that a sentence imposed under the statute in question must be regarded as a sentence for the maximum term, and not for the minimum or any intermediate term. The point now raised was not involved nor considered in that case. *Com. v. Crowley* followed *Com. v. Brown*. There was in the opinion no discussion of the statute, and the motion in arrest of judgment did not aver that the statute was unconstitutional because of its interference with defendant's right to a permit to be at liberty for good conduct, under Pub. Stat. chap. 222, § 20, or otherwise; and an examination of defendant's brief shows that the ground on which it was contended that the statute was unconstitutional was the indeterminate feature of the sentences. This had been fully considered and disposed of in *Com. v. Brown*, and hence a reference to that case was all that was necessary. We discover nothing in either of these cases which precludes us from examining the question now presented. The statute was also considered by the United States circuit court of the first circuit when this plaintiff was before it recently on a petition for a writ of habeas corpus, which it was led to deny, and to leave the petitioner to his writ of error, largely, as we infer, on account of the views concerning the statute which this court was supposed to have expressed in the two cases of *Com. v. Brown* and *Oliver v. Oliver*, referred to above. *Re Murphy*, 87 Fed. Rep. 549.

We have already quoted § 1 of the act. By § 2 it is provided that, at any time after the expiration of the minimum term, the commissioners of prisons may issue a permit to the convict to be at liberty on such terms and conditions as they may deem best, and may revoke the permit at any time previous to the expiration of the maximum term. The permit shall not be issued without the

approval of the governor and council, or unless the commissioners shall be of the opinion that the convict will lead an orderly life if set at liberty. Other provisions contained in the act were taken from Stat. 1884, chap. 152, §§ 1, 2, which will be referred to later. The statutes applying to the petitioner's case which were in force when he committed the offenses of which he was convicted are Pub. Stat. chap. 222, §§ 20-22, and Stat. 1884, chap. 152. There were and are statutes relating to the issue of permits to persons confined for drunkenness in jails, houses of correction, or other places under the jurisdiction of the county commissioners, or in the county of Suffolk under that of the board of directors of public institutions, and who have reformed, and also to persons imprisoned in the reformatory prison for women, who have reformed. But those are not applicable to this case. Pub. Stat. chap. 222, § 20, provides that every officer in charge of a prison or other place of confinement shall keep a record of each person whose term is not less than four months, and "every such prisoner whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment shall be entitled to a deduction from the term of his imprisonment to be estimated as follows" (stating it). Later in the section it is provided that "each person who is entitled to a deduction shall receive a written permit to be at liberty during the time thus deducted upon such terms as the board granting the same shall fix." The permits are to be issued to prisoners in the state prison by the commissioners of prisons, and they "may at any time revoke the same, and shall revoke it when it comes to their knowledge that the person to whom it was granted has been convicted of an offense punishable by imprisonment." Stat. 1884, chap. 152, § 1, provides that if the holder of a permit shall violate any of its terms or conditions, or any law of this commonwealth, "such violation shall of itself make void such permit." Section 2 provides that, when any permit has been revoked or has become void, the board granting it may cause the holder of it to be arrested and returned to the place in which he was confined, and when so returned he "shall be detained therein according to the terms of his original sentence," and "the time between his release upon said permit and his return to said place of confinement shall not be taken to be any part of the term of sentence." These provisions are embodied in Stat. 1895, chap. 504, and are the ones previously referred to. The other provisions of Stat. 1884, chap. 152, are not now material.

From this examination it appears that Stat. 1895, chap. 504, differs from the statutes which were in force at the time when the offenses were committed, and that the differences consist—First, in the matter of indeterminate sentences; secondly, in providing that the permit shall not be issued till after the expiration of the minimum sentence, and in omitting any provision for deductions for good behavior; and, thirdly, in leaving the issue of the permit to the discre-

tion of the commissioners, and in providing that it shall receive the approval of the governor and council. The petitioner contends that the effect of these differences may be to make the term of imprisonment longer than it would have been under the laws in force at the time the offenses were committed, and to change his position in other respects to his disadvantage, and that therefore the statute is unconstitutional and void. The commonwealth contends that the provisions are in the nature of prison discipline or of penal administration or criminal procedure, and are not therefore open to the objection of being *ex post facto*. As the term "*ex post facto*" has been construed, it applies only to penal or criminal matters. The objection to *ex post facto* legislation consists in the uncertainty which would be introduced thereby into legislation of a penal or criminal character, and the injustice of punishing an act which was not punishable when done, or of punishing it in a different manner from that in which it was punishable when done. But not all retrospective legislation is unconstitutional as being *ex post facto*. The question in each case is whether it will increase the penalty, or operate to deprive a party of substantial rights or privileges to which he was entitled as the law stood when the offense was committed, or, "in short, in relation to the offense and its consequences, will alter the situation of a party to his disadvantage." *Culder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366; *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506; *Medley, Petitioner*, 134 U. S. 160, 33 L. ed. 835; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061; *Hartung v. People*, 22 N. Y. 95; *Shepherd v. People*, 25 N. Y. 406; *Ratzky v. People*, 29 N. Y. 124. A statute which mitigates the penalty is not objectionable, though passed after the offense. *Com. v. Wyman*, 12 Cush. 237; *Com. v. Gardner*, 11 Gray, 438; *Dolan v. Thomas*, 12 Allen, 421, 424. Nor, speaking generally, are statutes which relate to procedure or penal administration or prison discipline, even though the effect may be, in the last two instances, to enhance the severity of the confinement. *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485; *Cook v. United States*, 138 U. S. 157, 34 L. ed. 906; *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262; *Gut v. Minnesota*, 9 Wall. 35, 19 L. ed. 573; *Com. v. Hall*, 97 Mass. 570; *Carter v. Burt*, 12 Allen, 424; *Hartung v. People*, 22 N. Y. 95; *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825; *Ex parte Bethurum*, 66 Mo. 545; *People v. Mortimer*, 46 Cal. 114; *Cooley*, Const. Lim. 3d ed. p. 272; *Black*, Const. Law, p. 513, § 184. No one has a right to insist that particular remedies shall remain unchanged, or that courts and their jurisdiction and the proceedings in them shall continue unaltered, or that there shall be no departure from established methods in prison discipline or penal administration. But the legislature, under the guise of laws relating to procedure or prison discipline or penal administration,

cannot take away or interfere with any substantial right or privilege which was secured to a party by the law as it was when the offense was committed. *Kring v. Missouri*, 107 U. S. 232, 27 L. ed. 510; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061; *Medley, Petitioner*, 134 U. S. 160, 33 L. ed. 835. To deprive him in any manner of such right or privilege would be to increase the penalty. In determining in any case whether this is or is not the effect of a statute, it is to be borne in mind that the constitutional provision was intended as a security to life and liberty, and as a safeguard against the infliction of any punishment except such as was duly authorized by law, and it is to be construed so as to promote these ends. As the law formerly stood in this state, the effect of good conduct on the part of the prisoner was to shorten his term of imprisonment, and to give him a right to his discharge at the expiration of the shortened term. Stat. 1857, chap. 284; Stat. 1858, chap. 77; Stat. 1859, chap. 108; Gen. Stat. chap. 178, § 47. This was so said in *Opinion of the Justices*, 13 Gray, 618. And although the act of 1857, chap. 284, was entitled "An Act Concerning the Discipline of the State Prison," and the acts of 1858 and 1859 were respectively entitled "An Act Concerning the Discipline of Jails and Houses of Correction," and "An Act to Amend 'An Act Concerning the Discipline of Jails and Houses of Correction,'" it does not seem to have occurred to the justices that the right of the convict was affected thereby. They declared, on the contrary, that the act of 1857, upon the construction of which the answer to the question proposed mainly depended, gave the convict a right to have his term reduced and shortened by the scale provided in it for good behavior, and bore upon the sentence, and shortened the term of imprisonment, and afforded "an assurance of the highest character that upon condition of good behavior the convict shall have the promised benefit of an earlier release." And, again, they said that "the benefit promised in consideration of good behavior was intended to be an actual reduction of sentence as a right, and not as a favor," and "therefore operated upon the sentence itself." It would seem plain, therefore, that a subsequent statute, which interfered to his disadvantage with the right of deduction for good behavior to which a convict was entitled, at the time of the commission of the offense, under the acts of 1857, 1858, and 1859, would have been unconstitutional and void, notwithstanding the fact that those acts related, according to their titles, to the discipline of the state prison and to that of jails and houses of correction, and therefore appeared to pertain to prison regulation. To have taken away the right of deduction for good behavior, or to have interfered with it to the disadvantage of the convict, would have been, in effect, to lengthen the sentence which was provided by law for the offense at the time when it was committed; and a statute which did that clearly would have been *ex post facto*. See *Opinion of the Justices*, 13 Gray, 618; *Kring v. Mis-*

souri, 107 U. S. 232, 27 L. ed. 510; *Medley, Petitioner*, 134 U. S. 160, 33 L. ed. 835; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061; *Com. v. McDonough*, 13 Allen, 581; *Re Canfield*, 98 Mich. 644; *Ex parte Hunt*, 28 Tex. App. 361.

The question, then, is whether the changes made in regard to deductions for good behavior by Stat. 1880, chap. 218, which were subsequently incorporated into and are now found in Pub. Stat. chap. 222, § 20, have so modified the rights which convicts had under statutes previously in force that those committing offenses after the passage of Stat. 1880, chap. 218, cannot be said to have anything in the nature of a right to deductions for good conduct, and to a permit to be at liberty, which could not be interfered with to their disadvantage by subsequent legislation; in other words, whether the effect of Stat. 1880, chap. 218, and of the Public Statutes, has been and is to make deductions for good behavior and the issuing of a permit a matter of favor, and not in any sense a matter of right. It should be noted in passing that the words "with the consent of the governor and council," were inserted in Gen. Stat. chap. 179, § 51, which, with one other amendment that is not now material, is a re-enactment of Stat. 1857, chap. 284, § 1. These words were not in the commissioners' report (chap. 180, § 50), and it does not appear how they came to be inserted. They were not in Gen. Stat. chap. 178, § 47, and were omitted from Stat. 1880, chap. 218, and are not found in any subsequent statute. It seems to us that under Stat. 1880, chap. 218, and Pub. Stat. chap. 222, § 20, the convict was and is entitled to deductions for good conduct, and to a permit to be at liberty for the time thus deducted, rather as a matter of right than of favor. The object was to furnish an incentive to good conduct while the convict was in confinement, by offering him a reward therefor. Applying the language of *Opinion of the Justices*, 13 Gray, 618, the provisions of Stat. 1880, chap. 218, and of the Public Statutes, "afford an assurance of the highest character that, upon condition of good behavior, the convict shall have the promised benefit" of certain deductions, and a permit to be at liberty for the time thus deducted from the term of his sentence. Though the provisions of the Statutes of 1880 and of the Public Statutes may not bear as directly upon the sentence as those of the Statutes of 1857 did, we cannot doubt that the purpose was to secure to the convict a substantial advantage as a reward for his good conduct, which practically would have the effect of shortening his sentence. It is true that the prison commissioners could revoke the permit without cause shown, or for a violation of its terms, and that they are bound to revoke it when they have knowledge that the convict has been convicted of an offense punishable by imprisonment. But this does not affect the right of the convict to deductions and to a permit in the first instance. Besides, it is not to be assumed that the power

of revocation will be exercised capriciously. Unless the provisions of the statute were intended to secure a substantial advantage to the convict as a reward for his good conduct, to the enjoyment of which he could look forward with reasonable certainty if he did not violate the terms of the permit, nor commit an offense punishable by imprisonment, it is difficult to understand what object the legislature had in view. *Conlon's Case*, 148 Mass. 168, is relied on as tending to show that the convict had no right to a permit. One of the contentions of the petitioner in that case was that his confinement in the reformatory was unlawful because his removal to it from the state prison to which he had been sentenced interfered with or took away his right to deductions for good conduct under Pub. Stat. chap. 222, § 20. But neither that statute nor Stat. 1880, chap. 218, of which it was a re-enactment, was in force at the time when the petitioner committed the offense of which he was convicted, and no question under either was properly before the court. Further, deductions for good conduct under Pub. Stat. chap. 222, § 20, are not limited to persons confined in the state prison, but extend to those confined in "a prison or other place of confinement," and the legislature had the right to change the place of confinement of any prisoner, so long as the penalty was not thereby aggravated. *Carter v. Burt*, 12 Allen, 424. Lastly, the permit in that case was issued under Stat. 1884, chap. 258, and was revoked by the commissioners for a violation of its conditions, as they had the right to do. The decision would have been the same if the permit had issued under Pub. Stat. chap. 222, § 20, and had been revoked for a like cause. The nature of the right to a permit under Pub. Stat. chap. 222, § 20, was therefore not material to the decision. For these reasons, the case, though rightly decided, cannot be regarded as authoritative on the question now before us. And we think, as has been already observed, that Stat. 1880, chap. 218, and Pub. Stat. chap. 222, § 20, secured to prisoners who were convicted of offenses committed when they were in force, and who came within their scope, deductions for good conduct and permits to be at liberty, as something to which they were entitled as of right, rather than by favor, for faithful observance of the rules, and for not having been subjected to punishment, and that their rights in these respects could not be taken away or interfered with to their disadvantage by subsequent legislation.

The next question is whether Stat. 1895, chap. 504, alters or may alter to their disadvantage, in a substantial manner, the position of those committing offenses prior to its passage, and while Pub. Stat. chap. 222, § 20, was in force. We think that it is clear that such might be its effect. In case the maximum sentence was for fifteen years, the convict would be entitled, for good conduct, to deductions under Pub. Stat. chap. 222, § 20, which would shorten the term to twelve.

Under Stat. 1895, chap. 504, however, he could be sentenced for a maximum term of fifteen years and a minimum of thirteen, or of any number less than fifteen and more than twelve. In the present case the minimum was ten, and it is possible that the statute might operate more beneficially in the case of the petitioner than Pub. Stat. chap. 222, § 20, and Stat. 1884, chap. 152, would have operated. But that cannot avail. A law cannot be constitutional as to some cases, and unconstitutional as to others falling within the same class. If it is unconstitutional as to any, it is unconstitutional as to all. It is suggested in *Re Murphy*, 87 Fed. Rep. 549, that the supposed leniency of Stat. 1895, chap. 504, might have led the court to make the maximum sentence longer than it otherwise would, and the implication is that this also would render the statute objectionable as to past offenses. But it is obvious that this argument might prevent the application of any mitigative statute to past offenses, and we should hesitate to pronounce the act unconstitutional on that ground. It is also said in *Re Murphy*, 87 Fed. Rep. 549, that under Stat. 1895, chap. 504, "important conditions were added which would permit the recall of a permit, and still others which would revoke it absolutely. The most serious new provision is that the act of 1895 directs that, if a permit is revoked, no portion of the time the prisoner may have been at liberty under it shall be taken to be any part of the term of his sentence." But this last provision, which is called "the most serious new provision" of the act of 1895, is found in Pub. Stat. chap. 222, § 21, and in Stat. 1884, § 2, and was not, therefore, new, and was in force when the offenses were committed of which the petitioner was convicted, and applied to persons confined in the state prison. So far as the revocation of permits is concerned, it is doubtful if Stat. 1895, chap. 504, adds anything new. Under Pub. Stat. chap. 222, § 20, the commissioners have power, as already observed, to revoke permits without cause shown. They have the same power under Stat. 1895, chap. 504. Under Stat. 1884, chap. 152, a violation by the holder of a permit of any of its terms or conditions, or of any law of this commonwealth, rendered the permit void. The same is true under Stat. 1895, chap. 504. And the provisions as to the return of the holder of a permit which has been revoked or has become void are the same in Stat. 1895, chap. 504, as in Stat. 1884, chap. 152, except that the latter contains a provision that the order for the arrest and return of the convict may be served by any officer authorized to serve civil or criminal process in any county in the commonwealth, which is omitted from Stat. 1895, chap. 504. So far, therefore, as revocation and the results which follow it, and violation of the terms and conditions of the permit, or of any law of the commonwealth, and the results which follow that, are concerned, there would seem to be nothing in the act of 1895 which, as compared with the 42 L. R. A.

laws in force when the offense was committed, changed the situation of the petitioner for the worse.

The petitioner further contends that, independent of the effect of the statute upon his right to deductions for good behavior and to a permit to be at liberty, the statute is inoperative as an *ex post facto* act, because it renders the duration of his sentence uncertain, and gives to the prison commissioners the power to fix the term of his imprisonment. But there is no uncertainty in the sentence itself. That, it has been held, is in effect for the maximum term. *Oliver v. Oliver*, 169 Mass. 592; *Com. v. Brown*, 167 Mass. 144, 146; *People, Bradley, v. Illinois State Reformatory*, 148 Ill. 413, 23 L. R. A. 139, *State, Atty. Gen., v. Peters*, 43 Ohio St. 629. The convict may be released before its expiration, either by an absolute or conditional pardon from the governor (Pub. Stat. chap. 218, §§ 12 *et seq.*), or after the expiration of the minimum term by a permit from the commissioners approved by the governor and council. In the latter case he is under sentence till the expiration of the maximum term. *Oliver v. Oliver*, 169 Mass. 592. It is as correct, it seems to us, to say that the duration of his sentence is uncertain because the governor may pardon him absolutely or conditionally at any time, as it is to say that it is uncertain because, after the expiration of the minimum term, the commissioners may release him before the expiration of the maximum term on a permit approved by the governor and council, and as correct to say that, in case of a pardon, the governor fixes the term of imprisonment, as to say that, in case of release upon a permit, the commissioners fix it. Moreover, "the form of sentence," as was said in *Com. v. Brown*, 167 Mass. 144, 146, "is made to recognize and carry out a policy familiar to our legislation, and acted on heretofore without question." In no just sense can it be said, we think, that the duration of his sentence is uncertain, or that the determination of the term of the imprisonment is taken from the courts, where it belongs, and left to the prison commissioners. See *People, Bradley, v. Illinois State Reformatory*, 148 Ill. 413, 23 L. R. A. 139; *George v. People*, 167 Ill. 447; *State, Atty. Gen., v. Peters*, 43 Ohio St. 629; *Miller v. State*, 149 Ind. 607, 40 L. R. A. 109. Contra, *People v. Cummings*, 88 Mich. 249, 14 L. R. A. 285.

The petitioner also insists that requiring the approval of the governor and council to a permit is a serious interference with his rights, and, without anything more, would render the statute void as an *ex post facto* law. But we think that the provision does not affect any substantial right to which the petitioner was entitled when the offenses were committed, but relates rather to a matter of procedure. There can be no doubt, we think, that in the matter of permits the legislature could have substituted some other tribunal for the prison commissioners, or could have added to the number of commissioners, on the same principle that it could

have abolished the court which existed when the offenses were committed, and have created another court for the trial of such offenses, or have added to the number of the judges of the existing court. If this had been the only change, the effect of it would have been merely to require that so many more persons should act in regard to the matter of permits. The petitioner would have still been entitled to deductions for good behavior, and to a permit to be at liberty during the time of such deductions, and there would have been no increase in the penalty for the offense, or other change to his disadvantage. It is not contended that the terms and conditions of permits issued when the offense was committed, or the rules of government of the prison then in force, must remain the same. By Stat. 1898, chap. 371, which is in amendment of and in substitution for § 2, chap. 504, Acts 1895, and which went into effect since the indictment was found in this case, it is now provided that a convict who has faithfully observed all the rules, and has not been subjected to punishment, shall be entitled to release at the expiration of the minimum term, and shall be given a permit to be at liberty during the unexpired portion of the maximum term, which permit shall be issued by the commissioners of prisons. The approval of the governor and council is no longer required, and the permit is no longer to be issued at the will and pleasure of the commissioners. We think, therefore, that the statute of 1895 could not be declared unconstitutional as an *ex post facto* act because it requires the approval of the governor and council to permits to be at liberty, or because it renders the duration of the sentence uncertain, or gives the prison commissioners power to fix the term of imprisonment; but we think that, as the law stood when the offense was committed, the petitioner was entitled to a deduction for good behavior, and to a permit to be at liberty for the time thus deducted, or such terms as the prison commissioners should fix, and subject to revocation by them, and, if sentenced under the statute of 1895, this right might be interfered with to his disadvantage, and that the statute is therefore inoperative and void as an *ex post facto* law. We do not see how the statute can be construed as merely a measure of prison discipline or regulation, and therefore liable to change from time to time, as the legislature

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may see fit, without interfering with any rights on the part of the convict.

We have assumed thus far that the act of 1895 applied to all cases of convicts sentenced to the state prison after it took effect, except such as are sentenced for life or as habitual criminals. But we think that it is doubtful, notwithstanding the generality of the language, whether it should be so construed. It is manifest that convicts sentenced under the statute of 1895 are not entitled to the benefits of Pub. Stat. chap. 222, § 20. The sentence is intended to be different in character from that referred to in § 20, and the provisions of that section in regard to deduction for good behavior could not be applied to a sentence under the act of 1895. Pub. Stat. chap. 222, § 20, so far as it relates to convicts sentenced to the state prison, is not repealed in terms by the statute of 1895. To hold that that statute operates, by necessary implication, as a repeal of it to that extent, as it would seem that we should be obliged to do if the statute of 1895 is construed to apply to all sentences to state prison after it took effect, whether the offenses occurred before or after it went into operation (*Flaherty v. Thomas*, 12 Allen, 428; *Com. v. McDonough*, 13 Allen, 581), would result in the discharge of all persons who might have been sentenced under it to the state prison for offenses committed before it took effect. On the other hand, by construing it,—as we think properly may be done, pursuant to the general rule that statutes are to be construed prospectively,—to apply to sentences for offenses committed after it took effect, this difficulty will be avoided. See Pub. Stat. chap. 3, § 3, cla. 1, 2; *Com. v. Sullivan*, 150 Mass. 315; *Com. v. Desmond*, 123 Mass. 407; *King v. Tirrell*, 2 Gray, 331; *North Bridgewater Bank v. Copeland*, 7 Allen, 139; *Gardner v. Lucas*, L. R. 3 App. Cas. 582, 590; *Re Lambard's Appeal*, 88 Me. 587.

The result is that, the only error being an error in the sentence, and the superior court having jurisdiction to impose such sentence as should be imposed, *the sentence in question, in the opinion of a majority of the court, must be reversed*, and the case remanded to that court for sentence according to the law as it was before the passage of Stat. 1895, chap. 504. *Jacquins v. Com.* 9 Cush. 279; Pub. Stat. chap. 187, § 13.

So ordered.

TENNESSEE SUPREME COURT.

Wilberforce SULLY, Appt.,
v.
CAMPBELL & POWDER.

(99 Tenn. 434.)

1. A joint promise by the purchasers of real estate to pay the price cannot be modified by a mistaken construction placed upon the writing by the holder and makers, that each is to be liable for his share only.
2. The other makers of a joint note which by statute is made joint and several remain liable for the amount unpaid on it including the sum not realized by a suit against one maker for his proportionate share although that proceeded to judgment and execution against his property.

(September 25, 1897.)

A PPEAL by plaintiff from a decree of the Court of Chancery Appeals affirming a decree of the Chancery Court for Washing-

NOTE.—Effect of judgment in an action against part of the obligors on a joint or joint and several contract to release or limit the liability of other obligors.

- I. Where the prior judgment is in an action on a joint obligation.
- II. Where the prior judgment is in an action on a partnership obligation.
- III. Where the common-law rule is affected by statute.
- IV. Where some of the debtors are nonresidents.
- V. Where the prior judgment is on a separate obligation.
- VI. Where the prior judgment is on a joint and several obligation.
- VII. Where prior proceedings affect subsequent proceedings in the same action.
- VIII. Where the obligors are principal and surety.
- IX. Classification by states and countries.
- I. Where the prior judgment is in an action on a joint obligation.

It is generally held, in the absence of statutory provisions to the contrary, that a judgment on a joint obligation against part of the obligors is a bar to a subsequent suit on the original cause of action against the remaining obligors. *Mitchell v. Brewster*, 28 Ill. 163; *Barnett v. Juday*, 38 Ind. 86; *Archer v. Helman*, 21 Ind. 29; *Root v. Dill*, 38 Ind. 169; *Holman v. Langtree*, 40 Ind. 349; *Kennard v. Carter*, 64 Ind. 31; *Lawrence v. Sample*, 97 Ind. 53; *Cox v. Maddux*, 72 Ind. 206; *Hunt v. Terrill*, 7 J. J. Marsh. 67; *Kingsley v. Davis*, 104 Mass. 178; *Peters v. Sanford*, 1 Denio, 225; *Smith v. Kibbe*, 31 Hun, 390; *Candee v. Smith*, 93 N. Y. 349; *Smith v. Kibbie*, 19 N. Y. Week. Dig. 118; *Slooc v. Lea*, 18 Ohio, 279; *Beasley v. Sims*, 81 Va. 644; *Corbin v. Planters' Nat. Bank*, 87 Va. 661; *Lauer v. Bandow*, 48 Wis. 638; *Trafton v. United States*, 3 Story, 654; *Mason v. Eldred*, 6 Wall. 231, 18 L. ed. 783; *Willings v. Consequa*, Pet. C. C. 301; *King v. Hoare*, 13 Mees. & W. 494, 2 Dowl. & L. 382, 14 L. J. Exch. N. S. 29, 8 Jur. 1127; *Harris v. Dunn*, 18 U. C. Q. B. 352.

And the same was said to be the rule in the following cases: *Ferrall v. Bradford*, 2 Fla. 43 L. R. A.

ton County denying a portion of the relief claimed in a suit to recover the amount alleged to be due on a promissory note. *Modified*.

The facts are stated in the opinion.

Messrs. Kirkpatrick, Williams, & Bowman, for appellant:

The note in suit, though joint in form, is, under the statute, joint and several in character.

Mill. & V. Code, 3483-5; *Jarnagin v. Stratton*, 95 Tenn. 619, 30 L. R. A. 195.

A covenant not to sue one of two joint and several obligors will not release the other.

Rowley v. Stoddard, 7 Johns. 207; *Winslow v. Brown*, 7 R. I. 97, 80 Am. Dec. 638; *Enow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; 2 Dan. Neg. Inst. §§ 1291-1296; *Beach*, Modern Contr. 482, 492.

The doctrine of release of joint obligors has its origin in technical logic, and is not favored in equity.

Williams v. Hitchings, 10 Lea, 329; *State*,

508, 50 Am. Dec. 298; *Moore v. Rogers*, 19 Ill. 348; *People v. Harrison*, 82 Ill. 84; *Kittering v. Norville*, 89 Ind. 183; *Robinson v. Snyder*, 74 Ind. 110; *Martin v. Baugh*, 1 Ind. App. 20; *Sayre v. Coleman*, 9 Dana, 174; *Gibbs v. Bryant*, 1 Pick. 118; *Pierce v. Kearney*, 5 Hill, 82; *Yoho v. McGovern*, 42 Ohio St. 11; *Bowen v. Hastings*, 47 Wis. 232; *Sessions v. Johnson*, 95 U. S. 347, 24 L. ed. 596.

So where the prior judgment was against plaintiff. *Reynolds v. Pittsburgh, C. & St. L. R. Co.* 29 Ohio St. 602; *Pfau v. Lorain*, 1 Ctn. Super. Ct. Rep. 73; *Roby v. Rainsberger*, 27 Ohio St. 674.

So, a judgment in an action as to part of the obligors bars suit against all. *Fullington v. Killen*, 65 Ga. 575.

But there are some exceptional cases wherein a judgment on a joint obligation as to part of the obligors was held not to be a bar to a subsequent action against others. *Collins v. Lemasters*, 1 Bail. L. 348, 21 Am. Dec. 469, following *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. ed. 215.

And where the first judgment was obtained by the fraud of the second defendant. *Ferrall v. Bradford*, 2 Fla. 508, 50 Am. Dec. 293.

And where the prior judgment was set aside. *Martin v. Baugh*, 1 Ind. App. 20; *Maghee v. Collins*, 27 Ind. 83; *Clodfelter v. Hulett*, 92 Ind. 426; *Lawrence v. Sample*, 97 Ind. 53.

And where the prior judgment was void. *Wetherwax v. Paine*, 2 Mich. 555.

And where an exception was made in case of husband and wife. *Avery v. Vansickle*, 35 Ohio St. 270.

And where the first judgment was against plaintiff on a personal defense. *Nevill v. Hancock*, 15 Ark. 511.

And the same was said to be the rule in *Detroit v. Houghton*, 42 Mich. 450.

And in such a case where the cause of the prior judgment was not shown. *Phillips v. Ward*, 2 Hurst. & C. 717, 33 L. J. Exch. N. S. 7, 9 Jur. N. S. 1182, 9 L. T. N. S. 345, 12 Week. Rep. 106.

II. Where the prior judgment is in an action on a partnership obligation.

The rule as to a judgment on a partnership debt is the same as that on a joint obligation,

Midgett, v. Matson, 44 Mo. 305; *Miller v. Fenton*, 11 Paige, 18; *Clagett v. Salmon*, 5 Gill & J. 314.

Words of release are often given the force and effect of a covenant not to sue. A *fortiori* should an estoppel to further sue be treated as a covenant not to further sue.

Bradford v. Prescott, 85 Me. 482; *Crane v. Alling*, 15 N. J. L. 423; *Kendrick v. O'Neil*, 48 Ga. 631; *Parmelee v. Laurence*, 44 Ill. 405; *Tryon v. Hart*, 2 Conn. 120.

In joint and several obligations each obligor is principal as to his aliquot part, and as to the other shares he is surety for his co-obligors.

Ackerman's Appeal, 106 Pa. 1; *Williams v. Alley*, Cooke (Tenn.) 257; 1 Addison, Contr. p. 39; 3 Pom. Eq. Jur. § 1418.

The release of a surety, although he be the comaker of the note, cannot be set up as the release of the principal.

Ragsdale v. Gossett, 2 Lea, 733.

and a judgment on a partnership liability against one partner is a bar to a subsequent suit against the remaining members of the firm. *Thompson v. Emmert*, 15 Ill. 415; *Wann v. McNulty*, 7 Ill. 355, 43 Am. Dec. 58; *Henderson v. Reeves*, 6 Blackf. 101; *Nicklaus v. Roach*, 8 Ind. 78; *Crosby v. Jeroloman*, 87 Ind. 264; *North v. Mudge*, 13 Iowa, 496, 81 Am. Dec. 441; *Harford v. Street*, 46 Iowa, 594; *Ward v. Johnson*, 13 Mass. 148; *Robertson v. Smith*, 18 Johns. 459, 9 Am. Dec. 227; *Olmeade v. Webster*, 8 N. Y. 413; *Penny v. Martin*, 4 Johns. Ch. 566; *Farnsworth v. Halstead*, 18 N. Y. Civ. Proc. Rep. 227; *Smith v. Black*, 9 Serg. & R. 142, 11 Am. Dec. 686; *Woodworth v. Spafford*, 2 McLean, 168; *Ex parte Higgins*, 3 DeG. & J. 33, 27 L. J. Bankr. N. S. 27, 4 Jur. N. S. 595; *Kendall v. Hamilton*, L. R. 4 App. Cas. 504, 48 L. J. C. P. N. S. 705, 41 L. T. N. S. 418, 28 Week. Rep. 97.

And the same was said to be the rule in the following cases: *Jansen v. Grimshaw*, 125 Ill. 468; *Lingenfelter v. Simon*, 49 Ind. 82; *Garrison v. Garrison*, 67 How. Pr. 271.

There are a few cases which deny the general doctrine, and hold that a subsequent suit may be maintained against the remaining members of the firm, although the weight of authority is decidedly to the contrary in the absence of a statute reserving the right to pursue the remaining partners. *Stoddard v. Van Dyke*, 12 Cal. 437 (where the prior judgment is on a personal defense); *Jansen v. Grimshaw*, 125 Ill. 468 (where the prior judgment was vacated); *Kantrowitz v. Kulla*, 20 Abb. N. C. 321 (based on a statute, but disapproved in *Heckemann v. Young*, 53 Hun, 406, which latter case was reversed in 184 N. Y. 170); *Union Bank v. Hodges*, 11 Rich. L. 480 (admitting that the rule in South Carolina differs from that of other states).

III. Where the common-law rule is affected by statute.

In some states there are statutory provisions known as joint-debtor acts, which prevent a judgment against one joint debtor or a partner from barring a subsequent suit against the remaining obligors; and so it has been held that a second action can be maintained under such statutes. *Ellis v. Bone*, 71 Ga. 466; *Kitterling v. Norville*, 39 Ind. 183; *Yoho v. McGovern*, 42 Ohio St. 11; *Citizens' Sav. Bank v. Oleson*, 47 Iowa, 492; *Burrus v. Anderson*, 3 Met. (Ky.) 500; *Cruzen v. McKaig*, 57 Md. 461; *Hyman v. Stadler*, 63 Miss. 362; *Scharff v. Noble*, 67 43 L. R. A.

A discharge of one of two joint and several obligors for a portion of the debt is only a release as to such part, and his co-obligor is still liable for the remainder due.

Rogers v. Hemsted, Kirby, 44.

The judgment against Hunt for less than the entire note did not satisfy the note, and defendants are yet liable for the balance uncollected at this date.

Day v. Hill, 2 Speers, L. 628, 42 Am. Dec. 390; *Haw v. Davis*, 68 N. C. 233.

Messrs Burrow Brothers and O. H. Jennings for appellees.

Beard, J., delivered the opinion of the court:

The complainant as the holder of a note for \$3,600, made by Mathes, Hunt, and Campbell & Pouder, file this bill against the two last-named parties for the purpose of obtaining a personal decree against them for the balance due on this note, and also to secure

Miss. 143; *Knox County Sav. Bank v. Cottey*, 70 Mo. 150; *Wiley v. Holmes*, 28 Mo. 286, 75 Am. Dec. 126; *Phillips v. Fitzpatrick*, 84 Mo. 276; *Dando v. Doll*, 2 Johns. 97; *Taylor v. Pettibone*, 16 Johns. 66; *Carman v. Townsend*, 6 Wend. 206; *Bank of Columbia v. Newcomb*, 6 Johns. 98; *Oakley v. Aspinwall*, 4 N. Y. 515; *Dean v. Eldridge*, 29 How. Pr. 218; *Mervin v. Kumbel*, 23 Wend. 293; *Harbeck v. Pupin*, 123 N. Y. 115; *Tripp v. Saunders*, 59 How. Pr. 379; *Wann v. Pettengale*, 14 Pa. 313; *Moore v. Hepburn*, 5 Pa. 399; *Myers v. Nell*, 84 Pa. 369; *Vanemen v. Herdman*, 3 Watts, 202; *Campbell v. Steele*, 11 Pa. 394; *Bennett v. Cadwell*, 70 Pa. 253; *SULLY v. CAMPBELL & POWDER* (under a statute making joint contracts joint and several); *Nichols v. Cheairs*, 4 Sneed, 229; *Lowry v. Hardwick*, 4 Humph. 188; *Mason v. Eldred*, 6 Wall. 231, 18 L. ed. 783.

And the same was said to be the rule in the following cases: *Poole v. Hintrager*, 60 Iowa, 180; *Williams v. Rogers*, 14 Bush, 776, overruling *Nichols v. Burton*, 5 Bush, 322; *Odum v. Denny*, 16 Gray, 114; *Knapp v. Abell*, 10 Allen, 485; *Ruffy v. Claywell*, 93 N. C. 306; *Navassa Guano Co. v. Willard*, 73 N. C. 521; *Miller v. Reed*, 27 Pa. 247, 67 Am. Dec. 459; *Hawkins v. Humble*, 5 Coldw. 531.

But there are some cases in which the joint-debtor acts are held not to prevent a judgment against one from being a bar to a subsequent suit against the remaining obligors on a joint obligation.

Where the statute was not followed. *Archer v. Helman*, 21 Ind. 29; *Root v. Dill*, 38 Ind. 169. And so where the subsequent suit was against all. *Taylor v. Claypool*, 5 Blackf. 557.

See also subd. VII.

IV. Where some of the debtors are nonresidents.

It is generally recognized that the nonresidence of the party subsequently sued prevents the prior judgment from being a bar to such subsequent suit. This is an exception to the rule that a judgment upon a joint or partnership obligation bars a subsequent suit against the remaining obligors. *Merriman v. Barker*, 121 Ind. 74; *Cox v. Maddux*, 72 Ind. 206; *Rand v. Nutter*, 56 Me. 339; *Dennett v. Chick*, 2 Me. 191, 11 Am. Dec. 59; *Wiley v. Holmes*, 28 Mo. 286, 75 Am. Dec. 126; *Olcott v. Little*, 9 N. H. 250, 32 Am. Dec. 357; *Brown v. Birdsall*, 29 Barb. 549.

So, where the prior judgment was against plaintiff. *McLelland v. Ridgeway*, 12 Ala. 462.

a foreclosure of a specific lien retained in a deed to certain real estate, for the purchase money of which this note, and one other that has been paid, was executed.

The facts that have brought about this controversy, as far as they need be stated, are as follows: The assignor of the complainant conveyed by deed to Mathes, Hunt, and Campbell & Powder certain real estate, stating in the deed that the conveyees took the same in undivided interests of one third, the defendants Campbell & Powder together taking one of these thirds. For the purchase money two notes were executed by the vendees, the note sued on being one of them. These notes were in the usual form of joint paper, all the parties agreeing to pay to the payee, or order, the sums specified in them. Notwithstanding the notes were thus written, yet, from the beginning, the parties seemed to have acted upon the assumption that, as the vendees took a one-third each in the land, each was liable

only for his one-third of these notes. This record discloses that the first of the purchase-money notes was paid by these makers in thirds, and that on the last—the one sued on—Mathes paid one third of the whole sum due at the date of his payment, Hunt made some payments, which were put by the holder to the credit of his one third, and so with payments made by these defendants. Subsequently, however, Hunt being much in default, the complainant, acting upon the assumption above indicated, filed a bill in the chancery court to recover from him the balance due from him on his one third of the note, and also to sell his undivided interest in the property to satisfy the decree. In his bill complainant alleged that these defendants, as to their one third, and Mathes as to his one third, of the note, had made an arrangement to his satisfaction; so there was no effort to disturb them, or their undivided interests in this realty. That cause pro-

A few cases hold that the prior judgment is not a bar, but do so by applying a statute. *Shirley v. Shattuck*, 13 Met. 256; *Odum v. Denny*, 16 Gray, 114; *Bonesteel v. Todd*, 9 Mich. 371. 80 Am. Dec. 90; *Snydam v. Barber*, 18 N. Y. 468, 75 Am. Dec. 254; *Campbell v. Steele*, 11 Pa. 304; *Bennett v. Cadwell*, 70 Pa. 253; *Tibbetts v. Shapleigh*, 60 N. H. 487.

But in the following cases a prior judgment was held to be a bar to a subsequent suit. *Candee v. Clark*, 2 Mich. 255 (applying common-law rule); *McMaster v. Vernon*, 8 Duer, 249; *Sloo v. Lea*, 18 Ohio, 279 (prior judgment by confession against both parties, and set aside as to one, held a bar to subsequent suit against both).

V. Where the prior judgment is on a separate obligation.

On the question whether a judgment upon a personal obligation given by a joint obligor is a bar to a subsequent suit upon a joint debt against the other obligor there is some conflict. The leading case in this country is *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. ed. 215, where judgment was taken on a note against the maker, and subsequently a suit was brought against other parties upon that note and the original debt, alleging that they were members of a firm doing business under the name of the maker, and it was held that the prior judgment was not a bar. But this case has been attacked on all sides, and is not recognized as sound law. The cases holding that such a judgment is a bar are as follows: *Sydam v. Cannon*, 1 Houst. (Del.) 431; *Averill v. Loucks*, 6 Barb. 19; *Benson v. Palne*, 2 Hilt. 552; *Moale v. Hollins*, 11 Gill & J. 11, 33 Am. Dec. 684; *Moran v. Vredenburg*, 1111 & D. Supp. 392; *Lewis v. Williams*, 6 Whart. 264, overruled in *Potter v. McCoy*, 26 Pa. 458; *United States v. Ames*, 99 U. S. 35, 25 L. ed. 295, overruling *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. ed. 215; *Cambeport v. Chapman*, L. R. 19 Q. B. Div. 229, overruled in *Wegg Prosser v. Evans* [1895] 1 Q. B. 108, 64 L. J. Q. B. N. S. 1.

And the same was said to be the rule in *Lingenfelter v. Simon*, 49 Ind. 82.

But some cases hold that such a judgment is not a bar. *Wallace v. Fairman*, 4 Watts, 378 (where the prior suit was on the single bond of one partner); *Potter v. McCoy*, 26 Pa. 458 (on the ground that the debt and parties were not identical), *Overruling Lewis v. Williams*, 6 Whart. 264; *Drake v. Mitchell*, 8 East, 251 43 L. R. A.

(prior suit on bill of exchange given by one); *Scott v. Colmesnil*, 7 J. J. Marsh. 416 (second suit against party discovered to have been a partner); *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. ed. 215 (second suit against party discovered to have been a partner; authority denied in subsequent cases); *Watson v. Owens*, 1 Rich. L. 111; *Bell v. Banks*, 3 Mann. & G. 267, 3 Scott, N. R. 497 (where one partner had given a warrant of attorney to third party as trustee); *Wegg Prosser v. Evans* [1895] 1 Q. B. 108, 64 L. J. Q. B. N. S. 1 (prior judgment on bill of exchange given by one partner) overruling *Cambeport v. Chapman*, L. R. 19 Q. B. Div. 229.

VI. Where the prior judgment is on a joint and several obligation.

It is generally held that where the obligation is joint and several, a judgment against one of the obligors does not prevent a subsequent action against the remaining obligors. But there are some cases which hold the prior judgment to be a bar on the ground of election. The following cases hold that such a judgment is not a bar. *Fitzgerald v. Burke*, 14 Colo. 559; *People v. Harrison*, 82 Ill. 84; *Moore v. Rogers*, 19 Ill. 348; *Giles v. Canary*, 99 Ind. 116; *Harlan v. Berry*, 4 G. Greene, 212; *Gilman v. Foote*, 22 Iowa, 560; *Sherman v. Christy*, 17 Iowa, 322; *Smith v. Coopers*, 9 Iowa, 376; *Sayre v. Coleman*, 9 Dana, 174; *Armstrong v. Prewitt*, 5 Mo. 476, 32 Am. Dec. 838; *Townsend v. Bidde*, 2 N. H. 448; *Hix v. Davis*, 68 N. C. 231; *Clinton Bank v. Hart*, 5 Ohio St. 33; *Rhoads v. Frederick*, 8 Watts, 448; *Day v. Hill*, 2 Speers, L. 628, 42 Am. Dec. 300; *Christian v. Hoover*, 6 Yerg. 505; *Sawyer v. White*, 19 Vt. 40; *Corbin v. Planters' Nat. Bank*, 87 Va. 661; *Brooklyn City & N. R. Co. v. National Bank of the Republic*, 102 U. S. 14, 26 L. ed. 61; *United States v. Cushman*, 2 Sumn. 426 (prior judgment against both not a bar to suit against one) *Overruled in United States v. Price*, 9 How. 83, 13 L. ed. 56; *Whiteacres v. Hamkinson*, Cro. Car. 75; *Blumfield's Case*, 5 Coke, 86b; *Ayrey v. Davenport*, 2 Bos. & P. N. R. 474; *Hayling v. Mullhall*, 2 W. Bl. 1235; *Claxton v. Swift*, 1 Lutw. 362; *Brown v. Wootton*, Cro. Jac. 78, Yelv. 67; *Dyke v. Mercer*, 2 Show. 394.

And the same was said to be the rule in the following cases: *Thompson v. Emmert*, 15 Ill. 415; *Nicklaus v. Roach*, 3 Ind. 78; *First Nat. Bank v. Indianapolis Piano Mfg. Co.* 45 Ind. 5; *Jenks v. School Dist. No. 38*, 18 Kan. 356;

ceeded to a sale, under a decree of foreclosure pronounced in accordance with the prayer of the bill, which realized to the complainant an amount far short of discharging his decree. Mathes having paid his assumed share of the original note, and there being a considerable sum due upon the other two thirds of the note,—this bill was filed against Campbell & Poudet to obtain a personal decree against them for this balance, and to enforce the lien against their undivided one-third interest in the property for the payment of that balance. Neither Mathes nor Hunt is a party to this proceeding.

The defendants set up the foregoing facts, and insist by way of defense: (1) As a matter of fact and law, that they have never been bound for more than one third of this note. (2) That, if wrong in this, then that, by bringing his separate bill against Hunt for one third of this note, and obtaining a decree for the sale and afterwards selling, his one

third of this real estate, he has, in law, released defendants and their property from any balance due on the Hunt one third, leaving them liable only for the balance due on their one third of the note, which they set out specifically in their answer, and express a willingness to pay.

1. We agree with the court of chancery appeals that the first ground of insistence is not well taken. If there was any ambiguity in this note, the words and conduct of the parties might be looked to, in order to enable the court properly to interpret it. It is, however, in clear and unambiguous terms, the joint promise of the makers to pay in *solido* the fixed sum of \$3,600, and the legal effect of this plain undertaking cannot be modified by the mistaken construction placed on the writing by the holder and the maker. While we think the rule here announced is too well established to require in its support a citation of authorities, yet it is not improv-

Elliot v. Porter, 5 Dana, 299; Ward v. Johnson, 13 Mass. 148; McReady v. Rogers, 1 Neb. 124, 98 Am. Dec. 338; Wlitcher v. Oldham, 4 Sneed, 220; King v. Hoare, 13 Mees. & W. 494, 8 Jur. 1127, 2 Dowl. & L. 382, 14 L. J. Exch. N. S. 29; Higgins's Case, 6 Coke, 44b.

And under various statutes it has been held that the prior judgment was not a bar. Maiden v. Webster, 30 Ind. 317; Hawkes v. Phillips, 7 Gray, 284; Cruzen v. McKaig, 57 Md. 461; Beals v. Smith, 91 Mich. 146; Wolford v. Bowen, 57 Minn. 267.

And the same was said to be the rule in the following cases: Smith v. Exchange Bank, 26 Ohio St. 141; Dill v. White, 52 Wis. 456.

So where the plaintiff was defeated in the prior action on a personal defense. Kirkpatrick v. Stingley, 2 Ind. 269; Stingley v. Kirkpatrick, 8 Blackf. 186.

But in a few cases a judgment on a joint and several obligation was held to be a bar to a subsequent action against other parties upon the same contract on the ground of election. Bangor Bank v. Treat, 6 Me. 207, 19 Am. Dec. 210; Downey v. Farmers' & M. Bank, 13 Serg. & R. 288; Sessions v. Johnson, 95 U. S. 347, 24 L. ed. 596.

And the same was said to be the rule in United States v. Price, 9 How. 83, 13 L. ed. 56 (that an election to have a debt joint would bar a subsequent separate suit), Overruling United States v. Cushman, 2 Sumn. 426.

And where the plaintiff failed in a prior action on a defense of payment, a subsequent suit was barred. Spencer v. Dearth, 43 Vt. 98.

VII. Where prior proceedings affect subsequent proceedings in the same action.

It is generally held, in the absence of statutory provisions to the contrary, that in joint actions on a joint or partnership obligation there should be but one final judgment, and that dismissing as to one party, or taking a judgment as to one party at one time, bars a judgment against others; that an action should not be split into several judgments. The cases holding such prior proceeding a bar to subsequent proceedings are as follows: Hughes v. Lindsey, 10 Ark. 555 (new trial as to one vacated judgment as to both); Exchange Bank v. Ford, 7 Colo. 314; Hale v. Crowell, 2 Fla. 534, 50 Am. Dec. 801; Pollak v. Hutchinson, 21 Fla. 128; Davidson v. Bond, 12 Ill. 84; Rose v. Comstock, 17 Ind. 1; Fletcher v. Andrews, 1 A. K. Marsh. 52; Sullivan v. Frankfort Bldg. & L. Asso. 13 43 L. R. A.

Ky. L. Rep. 48; Hempstead v. Stone, 2 Mo. 65; National Broadway Bank v. Hitch, 29 Abb. N. C. 403; Perkins v. Richmond, 17 How. Pr. 309; Clinton Bank v. Hart, 19 Ohio, 872; Williams v. McFall, 2 Serg. & R. 280; Beltzhoover v. Com. 1 Watts, 126; Murtland v. Floyd, 153 Pa. 99; American Bank's Appeal, 153 Pa. 98; Campbell v. Floyd, 153 Pa. 94; Noble v. Laley, 50 Pa. 281; Finch v. Lamberton, 62 Pa. 370; O'Neal v. O'Neal, 4 Watts & S. 180; Greer v. Miller, 2 Overt. 187; Tipton v. Harris, Peck (Tenn.) 414; Hutchins v. Sims, 7 Humph. 236; Whiting v. Turley, Dallam, Dec. 453; Jenkins v. Hurt, 2 Rand. (Va.) 446; Taylor v. Beck, 3 Rand. (Va.) 316; Peasley v. Boatwright, 2 Leigh, 196; Early v. Clarkson, 7 Leigh, 83; Baber v. Cook, 11 Leigh, 606; Steptoe v. Read, 19 Gratt. 1; Gibson v. Beveridge, 90 Va. 696; Snyder v. Snyder, 9 W. Va. 415; Nichols v. Crittenden, 74 Wis. 459.

And the same was said to be the rule in the following cases: Byers v. First Nat. Bank, 83 Ill. 423; Martin v. Baugh, 1 Ind. App. 20; Maynard v. Penniman, 10 Mich. 153; Brooks v. McIntyre, 4 Mich. 316.

So, where the plaintiff failed against some of the defendants, he could not recover. Winslow v. Heprick, 9 Mich. 380; Mace v. Page, 33 Mich. 38; Lee v. Bolles, 20 Mich. 46; Bailou v. Hill, 23 Mich. 60; Reading v. Beardsley, 41 Mich. 128; Andre v. Fitzhugh, 18 Mich. 98; Anderson v. White, 39 Mich. 130; Post v. Shafer, 63 Mich. 85; Searles v. Reed, 63 Mich. 485; Seligman v. Gray, 66 Mich. 341.

But in some cases where there was a statutory provision authorizing the remaining obligor to be proceeded against, the prior proceedings in the same case as to others were held not to be a bar.

And the same was said to be the rule in the following cases: Parke v. Meyer, 27 Ark. 551; Long v. Ciapp, 15 Neb. 417; Choen v. Guthrie, 15 W. Va. 100; Enos v. Stansbury, 18 W. Va. 477.

And where the prior judgment was on a personal defense it did not bar further proceedings. Lawrence v. Sample, 97 Ind. 53.

So, where the prior judgments were reversed or vacated. Martin v. Baugh, 1 Ind. App. 20; Maghee v. Collins, 27 Ind. 83; Clodfelter v. Hulett, 92 Ind. 426; Heckemann v. Young, 184 N. Y. 170.

And where the prior judgment was not final. Loney v. Bailey, 43 Md. 10.

And where a judgment was given for one de-

er to say that the contention made in this case was urged in *Ripley v. Crooker*, 47 Me. 370, 74 Am. Dec. 491, and it was there held, where several parties were jointly indebted, and one of them paid a specific share of the debt, under the misapprehension that it was all he owed, and it was accepted and receipted for by the creditor as such, under a similar misapprehension, that such payment did not exonerate the party making it from his liability for the balance of the debt.

2. But we cannot agree that the defendant's second ground of defense is tenable. The note sued on, though joint in its terms under the law of this state, where it was executed, is a joint and several obligation. *Jarnagin v. Stratton*, 95 Tenn. 619, 30 L. R. A. 495. Its holder could maintain either a joint action against all its makers, or a several action against each one. While, at common law, a judgment against one of several joint obligors was a merger of the contract,

and thus a bar to a subsequent action against his co-obligors, it was otherwise when the contract was joint and several. On such a contract, nothing short of satisfaction would prevent the obligee from maintaining as many suits as there were obligors (1 Herman, Estoppel, § 173); and this is the necessary effect of our statute, declaring every contract, though joint in its terms, several as well as joint (*Lowry v. Hardwick*, 4 Humph. 188). Nor does the well-established rule that a plaintiff shall not split an indivisible cause of action apply in this case. The reason of this rule is expressed in the maxim, *Nemo debet bis vexari pro una et eadem causa*; and the rule itself was established to prevent the unnecessary vexation of the defendant, and to protect him from the burden of the costs of a multiplicity of suits involving the same cause of action. This rule could be invoked by Hunt, if complainant was here seeking to hold him liable for

defendant and against another. *Ryan v. State Bank*, 10 Neb. 524; *Smith v. Cassell*, 70 Wis. 567; *Moffett v. Bickle*, 21 Gratt. 280.

And where the judgment was against some defendants at one time and some at another. *Thomas v. Mohler*, 25 Md. 86; *Bush v. Campbell*, 26 Gratt. 403; *Pitts v. Spotts*, 86 Va. 71; *Cahoon v. McCulloch*, 92 Va. 177; *Hoffman v. Bircher*, 22 W. Va. 537.

And where the defense of the first obligor was insufficient. *Bean v. Seyfert*, 12 Phila. 224.

And where the plaintiff dismissed or discontinued as to some and proceeded against others. *Garrison v. Hollins*, 2 Lea, 684; *Burleson v. Henderson*, 4 Tex. 49; *Forbes v. Davis*, 18 Tex. 268; *Wooters v. Smith*, 56 Tex. 198; *Muse v. Farmers' Bank*, 27 Gratt. 252; *Carlson v. Ruffner*, 12 W. Va. 297.

And where proceedings were had to bind the parties not originally served. *Erwin v. Scotten*, 40 Ind. 389; *Prince v. Cujas*, 7 Robt. 76; *Harper v. Bangs*, 18 How. Pr. 457; *Foster v. Wood*, 30 How. Pr. 284; *Decker v. Kitchen*, 26 Hun, 176.

And where by statute the contract was joint and several. *Burns v. Moore*, 76 Ala. 339, 52 Am. Rep. 232.

VIII. Where the obligors are principal and surety.

Where the relationship is that of principal and surety the following cases hold that a judgment against one obligor is a bar to a subsequent suit against the remaining obligors. *Brady v. Reynolds*, 13 Cal. 31.

And the same was said to be the rule in *Irwin v. Heigenberg*, 21 Ind. 106.

And a judgment against one surety where both are sued releases the other. *Waggoner v. Walrath*, 24 Hun, 443.

And a prior judgment discharging the principal is a merger. *Gill v. Morris*, 11 Helsk. 614, 27 Am. Rep. 744.

But the following cases hold that a judgment against one obligor is not a bar to a subsequent suit or proceeding against the remaining obligors in matters of principal and surety, where the contract is joint and several. *State Bank v. Robinson*, 18 Ark. 214; *Phoenix Mut. L. Ins. Co. v. Landis*, 50 Mo. App. 116; *Phelps v. Church*, 65 Mich. 231.

And a prior judgment in favor of one surety was not a bar to an action against another surety, where the prior defense was not shown. *Hill v. Morse*, 61 Me. 541. 43 L. R. A.

And where the second action was on a separate contract. *McCullough v. Hellman*, 8 Or. 191; *White v. Smith*, 33 Pa. 186, 75 Am. Dec. 589; *Cambria County Comrs. v. Canan*, 2 Watts, 107.

And where the prior judgment was void. *Treasurers of the State v. Bates*, 2 Ball. L. 362.

And where the right to proceed against the second party was saved by statute. *Garrison v. Hollins*, 2 Lea, 684; *Cahoon v. McCulloch*, 92 Va. 177; *Citizens' Sav. Bank v. Oleson*, 47 Iowa, 492; *Ryan v. State Bank*, 10 Neb. 524; *Wooters v. Smith*, 56 Tex. 198.

And the same was said to be the rule in *McReady v. Rogers*, 1 Neb. 124, 93 Am. Dec. 333.

IX. Classification by states and countries.

Alabama.

A judgment in favor of one partner, obtained in another state, is no bar to a subsequent suit against another partner in this state. A judgment against some, and in favor of some, defendants jointly bound was held to be erroneous. But the Code has since changed the rule in such a case, and now all joint contracts are by statute made joint and several.

A judgment in favor of one partner in a suit in which he was the defendant in Mississippi is not a bar to another suit by the same plaintiff against another party in Alabama on the same cause of action. *McLelland v. Ridgeway*, 12 Ala. 482.

This was held because of the principle that a verdict shall not be used as evidence against a man where an opposite verdict would not have been evidence for him.

Where a judgment was rendered against a firm and an action brought upon the judgment against a member individually, it was held that the original claim was merged in the judgment, and that under Ala. Rev. Code, § 2539, making judgments joint and several and changing the common-law rule, this action was properly brought. *Cox v. Harris*, 48 Ala. 538.

Arkansas.

It seems that by statute in this state all contracts are joint and several, and therefore a judgment against one party is not a bar to a subsequent action against the other obligors.

In *Parke v. Meyer*, 27 Ark. 551, it was said that Ark. Code, § 401, provides that in an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper.

the balance due on this note, but it cannot avail these defendants, who were not parties to that suit.

But the defendants insist that the separate suit against Hunt, followed by the decree against him and his property, operating to relieve him from the remainder of the debt, as a legal consequence, released them from liability for any balance due on his one third; in other words, their contention is that this judgment against Hunt had so far the effect of a common-law release as to protect them from all liability for the balance which Hunt should have paid. It will be seen that, while seeking an analogy in this several or separate judgment against Hunt, with a technical common-law release, the defendants fall far short of claiming the full effect of such a release on a joint contract at common law, for we find that they only insist upon a discharge of themselves and property from the balance remaining due from Hunt. But we see nothing in the nature of

a release in that proceeding. Instead of a release to Hunt, it is an adjudication against him of liability on this joint and several debt. It is true that this judgment is for an aliquot part, rather than for the whole, of the debt, and that complainant would be barred from maintaining a suit against him for the balance; but this is not because the judgment is in the nature of a release of this balance, but rather by reason of the policy of the law, which forbids the splitting an indivisible demand. This policy, however, as has been said already, is adopted for the protection of the party so sued. It cannot be successfully invoked by these defendants.

It is very apparent from this record that the holder of this note, as well as its makers, acted under a mistake of law as to the liability of these makers on this paper, and that, at the time payments were made and accepted, all parties understood that a payment of one third by any one of the obligors would discharge him and his undivided in-

In *State Bank v. Robinson*, 13 Ark. 214, it was held that under Ark. Dig. 621, making all obligations joint and several, a judgment in favor of a principal sustaining a plea of payment and accord and satisfaction is no defense to a subsequent action by the creditor against a surety.

In this case the surety did not rely upon the fact that the debt had been paid by the principal, but relied upon the technical estoppel of the judgment in favor of the principal as a bar to any inquiry as to the fact of payment or satisfaction.

Where a suit was instituted against the maker and indorser of a note jointly, and the plaintiff failed to make out his case against the indorser for want of proof of demand and notice, such failure did not inure to the benefit of the maker. *Nevill v. Hancock*, 15 Ark. 511.

In this case, the court said: "This court has held that, where several are sued upon a joint contract, a successful plea by one going to the validity of the contract, or to the satisfaction or discharge of the debt, operates as a discharge to all the defendants; but it is otherwise where the plea goes to the personal discharge of the party interposing it."

In *Hughes v. Lindsey*, 10 Ark. 555, where a judgment was rendered against two defendants on a joint contract, the granting of a new trial to one was held to vacate the judgment as to both.

California.

It appears that when the prior action is upon a joint contract, a judgment thereon would bar a subsequent action upon the same contract against other obligors.

A judgment against an accommodation indorser was held a merger of the debt, so as to bar an action against other accommodation indorsers. *Brady v. Reynolds*, 13 Cal. 31.

This was because the indorsement was made upon an agreement that each would become surety if the other would, or, in other words, that they would become sureties together.

Colorado.

Joint obligations are made joint and several by statute, and a judgment against one is not a bar to a further suit against another obligor. But this does not apply to oral contracts.

Where an action was brought against F. and others on a note, and judgment was rendered against the defendants defaulting, and before the trial against F. the complaint was amended

abandoning the note and resting the action upon the original partnership debt, and was tried against F. as upon an unwritten contract, the former judgment against the codefendants was held to be a merger of the entire cause of action. It was also held that the equitable doctrine that partnership debts are joint and several does not obtain in a purely legal action. It was further held that Colo. Gen. Stat. § 1834, providing that "all joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants," and § 14 of our Code of Procedure, to wit, "all persons jointly or severally liable upon the same obligation or instrument . . . may all or any of them be included in the same action," does not refer to and include joint oral contracts. *Exchange Bank v. Ford*, 7 Colo. 814.

But where a contract sued upon was made joint and several by statute a plea that the plaintiff had already recovered judgment against one of the obligors in another suit was insufficient where it did not allege that the judgment was satisfied. *Fitzgerald v. Burke*, 14 Colo. 559.

Delaware.

A judgment upon an obligation given by part of the firm is a merger of the debt and prevents a suit against the remaining members. By statute in this state contracts made by several persons are joint and several unless otherwise expressly stipulated, but this does not affect partnership contracts.

A bond given by two members of a firm for a debt and a judgment confessed upon it by them discharged the original joint liability of the third partner, as the original debt was merged in the new debt by giving the bond and confessing the judgment. *Sydam v. Cannon*, 1 Houst. (Del.) 431.

In *Currey v. Warrington*, 5 Harr. (Del.) 147, it was held that Del. Dig. 325, providing that obligations or contracts by several persons shall be joint and several unless otherwise expressly stipulated, does not apply to partnership obligations which are joint and not several.

Florida.

A judgment against one joint debtor is a bar to a subsequent action against the other. A plaintiff cannot split his case by taking a judgment against part of the joint debtors where all are served with process and prosecute the action as to others, as he cannot have but one judgment. A statute now provides for a further

terest in the property from all further obligation. It is equally clear that the suit against Hunt was prosecuted under this misapprehension. But this misapprehension cannot be used to repel complainant, when he has discovered his rights, and is now proceeding to enforce them in a proper form.

The case of *Day v. Hill*, 2 Speers, L. 628, 42 Am. Dec. 390, is a direct authority on this point. The facts of that case were as follows: H. and B. made a joint and several note. B. was sued, and, by mistake, judgment for less than the amount due was recovered against him. This judgment was satisfied, and plaintiff sued H. for the balance, and he set up a defense similar, in effect, to that relied on here. Evans, J., delivering the opinion of the court, said: "I take it to be very clear that the plaintiff is not estopped from bringing his action against this defendant by his judgment against the other maker of the note. The judgment in that case is a conclusive bar to any other action

against the same defendant for the same cause; yet it is no bar to an action against another, who is severally liable, unless the judgment be paid, and then it will avail the defendant, not by way of estoppel, but as payment or satisfaction of the debt. Satisfaction or payment is no bar, unless the whole debt is paid, or something accepted in full of it. For less than this, the defendant is only entitled to a deduction from the debt for the amount paid, and the plaintiff is entitled to a judgment for the balance." We think, therefore, the court of chancery appeals was in error in holding that the defendants were liable only for the balance due on their one third of the note. *The decree of that court is modified*, and a decree will be entered against them for the balance due on the whole note, and subjecting their interest in the land to its payment. The costs of this court will be paid by defendants, and the costs of the lower court will remain as adjudged by the chancellor.

prosecution of the parties not served with process.

In *Ferrall v. Bradford*, 2 Fla. 508, 50 Am. Dec. 293, it was said that a judgment recovered against one of two or more joint debtors is a bar to an action against the other. But it was held that the plaintiff could avoid the effect of the prior judgment as a bar by showing that he was induced to take a judgment against part of the obligors by reason of the fraud of the defendant last sued.

In this case it was said that the case of *Sheehy v. Mandeville*, 6 Cranch, 263, 3 L. ed. 218, has been directly overruled in this country and in England.

In a joint action upon a joint contract, a judgment entered up against one defendant after having discontinued as to the other, who had been in court as a codefendant, was erroneous. But as the discontinuance was entered by negligence of the attorney it was ordered to be set aside, and the judgment of the trial court was reversed. *Hale v. Crowell*, 2 Fla. 534, 50 Am. Dec. 301.

So, in a suit against two partners as joint debtors, where a final judgment was taken by plaintiff against one of them after default and in favor of the other on a verdict, the plaintiff could not have such judgment in favor of the successful partner reversed for new trial because he had a final judgment against the other partner, and he could not obtain two judgments upon the same cause of action in the same suit against two partners or joint debtors. *Pollak v. Hutchinson*, 21 Fla. 128.

Florida Rev. Stat. 1892, § 1179, act February 24, 1873, chap. 1338, § 9, provides that where a suit is brought against two or more defendants, and service of summons is not made on all, a judgment obtained in one action shall not prevent the plaintiff from bringing a suit against any defendant not served for the same claim or demand, but that the plaintiff can have only one satisfaction.

Georgia.

Under the statutes of this state a judgment against a joint obligor is not a bar to subsequent suit against the other obligors not served in the first suit.

In *Ellis v. Bone*, 71 Ga. 466, it was held that a judgment against a member of a firm did not merge the debt of a member of a partnership who was not served with process, and that he was still liable to suit notwithstanding such 43 L. R. A.

judgment under Ga. act 1820, Cobb, p. 485, Code, §§ 3350-1, providing that where two or more joint, or joint and several, contractors or copartners are sued in the same action, and service shall be perfected upon one or more of the joint contractors or copartners, and the officer serving the writ shall return that the rest are not to be found, the plaintiff may proceed to judgment and execution against such as were served in the same manner as if they were the sole or only defendants.

This holds that the common-law rule as to joint contracts has been changed in Georgia.

In an action against all the obligors on a note, it was held that the note could not be used to give jurisdiction against obligors not residing in the county of suit, where a judgment had been taken against the resident obligors in a prior action against the same parties, in which action the resident obligors were the only parties served with process. It was further held that as to the resident obligors the debt was merged in the judgment. *Fullington v. Killen*, 65 Ga. 575.

Illinois.

Starr & C. Ill. Stat. 1896, vol. 2, p. 2321, chap. 76, § 3, provides that all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants. This is identical with Rev. Stat. 1845, p. 299, § 3. Notwithstanding this statute the cases in Illinois hold that a recovery against one of several persons jointly liable releases the other. So with regard to a partnership debt. But a judgment on a joint and several obligation is not a bar to a subsequent action. The decisions holding that a judgment against one party on a joint obligation is a bar to a subsequent suit, do not refer to this statute. But in *National Bank v. Jennings Trust Co.* 44 Ill. App. 285, the court says: "Twice at least, the supreme court has decided that the statute, chap. 76, *Joint rights and obligations*, covers contracts not under seal. *Marine Bank v. Ferry*, 40 Ill. 255; *Gage v. Mechanics' Nat. Bank*, 79 Ill. 62. This may not be consistent with decisions that a judgment against one of several joint promisors is a bar for the others. *Jansen v. Grimshaw*, 125 Ill. 468; nor with *Union Nat. Bank v. Bank of Commerce*, 94 Ill. 271, and cases there cited; but that is not our affair."

The decisions have been as follows:

A recovery against one of several persons jointly liable releases the others not served with

process, and is a bar to a subsequent action against them. *Mitchell v. Brewster*, 28 Ill. 163.

So, where the prior suit is on a partnership contract. *Thompson v. Emmert*, 15 Ill. 415; *Wann v. McNulty*, 7 Ill. 355, 43 Am. Dec. 58.

In *Moore v. Rogers*, 19 Ill. 348, and *People v. Harrison*, 82 Ill. 84, it was said that a judgment against one or more of several joint obligors or promisors is a bar to another action upon the same contract against the same or other obligors, for the contract is merged in the judgment, and can no longer be made the subject of the action.

So, in *Jansen v. Grimshaw*, 125 Ill. 468, the same was said to be the rule on a joint partnership note.

In *Davidson v. Bond*, 12 Ill. 84, a default entered against part of the defendants, without notice taken of the other defendants who had been served with process, was held to be erroneous. But it was held that the plaintiffs could have their own judgment reversed because it was a bar to their obtaining another judgment, and of itself afforded no security.

In *Byers v. First Nat. Bank*, 85 Ill. 423, it was said that if one of several defendants jointly liable should stay the proceedings as to himself, and the plaintiff take judgment against his codefendant, the defendant obtaining the stay would be released from the debt.

But where a judgment was taken against part of the obligors on a partnership note, and the case removed to the Federal court and remanded, and then such judgment was vacated, it was not a bar to further proceedings in the same action against the other obligors. *Jansen v. Grimshaw*, 125 Ill. 468.

And where a contract was joint and several a judgment against one was not a bar to an action against the other on the several liability. The court said that contracts which are joint and several may be regarded as furnishing two distinct remedies, one by a joint action against all the obligors, and the other by a several action against each. *People v. Harrison*, 82 Ill. 83; *Moore v. Rogers*, 19 Ill. 348.

In *Thompson v. Emmert*, 15 Ill. 415, it was said that the law is different in respect to a judgment against one upon a joint and several cause of action operating as a bar to an action against others from what it is where the contract is joint.

Where a creditor took a judgment against the maker of a note in one suit, and against a guarantor in another, a satisfaction of the judgment against the maker was a satisfaction of the other also. *Frankel v. Stern*, 50 Ill. App. 54. *Indiana*.

A judgment against one party on a joint or partnership obligation is a bar to a subsequent suit against other obligors. The statutory provision in regard to procedure does not prevent a bar unless strictly followed. The exceptions to the rule as to a prior judgment being a bar are in case of nonresidence of a party and where the prior judgment is reversed. Where the statute is followed a dismissal as to one not served will not be a bar, and proceedings may be taken under another statute to have parties not served bound by the judgment. A judgment against one on a joint and several obligation is not a bar to a subsequent action against another party.

Where steps are not taken to preserve the liability of the other obligors under the statute, a judgment against part of the obligors on a joint contract merges the debt, and is a bar to a further action against the remaining obligors. *Barnett v. Juday*, 38 Ind. 86; *Archer v. Helman*, 21 Ind. 29; *Root v. Dill*, 38 Ind. 169; *Holman v. Langtree*, 40 Ind. 349; *Kennard v. Carter*, 64 43 L. R. A.

Ind. 81; *Lawrence v. Sample*, 97 Ind. 53; *Cox v. Maddux*, 72 Ind. 206.

And the same was said to be the rule in *Kittering v. Norville*, 39 Ind. 183; *Robinson v. Snyder*, 74 Ind. 110; *Martin v. Baugh*, 1 Ind. App. 20.

The same was held in an action on a partnership contract. *Henderson v. Reeves*, 6 Blackf. 101; *Nicklaus v. Roach*, 3 Ind. 78; *Crosby v. Jeroloman*, 37 Ind. 264.

And the same was said to be the rule in *Lingensfelder v. Simon*, 49 Ind. 82.

In *Irwin v. Helgenberg*, 21 Ind. 106, where the holder of a joint note made by A with B and C as sureties took judgment by default against B and C, process having been returned not found as to A, it was said that it was by no means clear that afterwards the holder could maintain an action upon it against the maker.

As affected by nonresidence.

A judgment against one of the joint makers of a note does not merge or bar a separate action against the other maker who was not a party to the former suit because he was a nonresident. *Merriman v. Barker*, 121 Ind. 74; *Cox v. Maddux*, 72 Ind. 206.

Where the prior judgment is vacated.

A judgment taken against one of two joint obligors on a promissory note, but afterwards reversed or set aside, is not a bar to another action upon the note. *Martin v. Baugh*, 1 Ind. App. 20; *Maghee v. Collins*, 27 Ind. 88; *Clodfelter v. Hulett*, 2 Ind. 426; *Lawrence v. Sample*, 97 Ind. 53.

In the latter case one of two joint makers of a promissory note succeeded in a personal defense not involving the merits of the action, and upon appeal the judgment was reversed, and it was held not to be a bar to further proceedings.

This was on the ground that the plaintiff did not elect to pursue a single one of the joint debtors, but brought suit against all of them, and obtained a judgment which would have been against both but for an erroneous verdict in favor of one, and therefore the cause of action was not merged in the judgment first obtained.

In *Rose v. Comstock*, 17 Ind. 1, where a judgment against A was a merger of the note as to B and C, who had answered in the same action, the court said that setting aside such judgment would not put B and C back into court as parties to the suit, because it had been at a previous term finally disposed of and ended by taking a judgment against one and failing to reply to the answers of the others.

As affected by statutes.

Where all the joint obligors were sued and judgment taken against one and the action dismissed as to the others who had been served with process, a new suit could not be brought against such dismissed defendants, under 2 Ind. Rev. Stat. p. 120, practice act, § 362, providing that when summons has been served in due time upon part only, the plaintiff may dismiss or continue for further proceedings his action as to those not summoned, or not summoned in time, and proceed to trial as to the others or continue as to all of them at his option. *Archer v. Helman*, 21 Ind. 29.

In this case it was further held that joint makers were to be deemed collectively as one party, and if the holder of a note sued less than all the parties, he should see all the makers or all the indorsers who may be jointly liable, under Ind. Acts 1861, p. 145, § 16, providing that the holder of any negotiable note or bill of exchange may institute one suit against the whole or any number of the parties liable to such holder, but may not at any time institute more than one suit on such note or bill.

It was further held that there was no provision in the statute which conflicted with the common-law rule.

And where one of three joint makers of a note was sued upon the note on a *ca. ad res.* and judgment rendered without any steps being taken to bring in the other parties or preserve the remedy against them, such judgment merged the entire cause of action. *Root v. Dill*, 38 Ind. 169.

In this case it was said that the plaintiff should issue his process against all and then he could take either one of two courses, under 2 *Gavin & H. (Ind.) Stat.* 593, § 63, providing that when a summons is returned not found as to part of the defendants, the plaintiff may continue for alias process or dismiss the cause as to the defendants not found and proceed against the others served, and such plaintiff may at any time afterwards proceed against those not found. But in this case these steps were not taken.

And in a suit against two persons on a joint note a judgment against one of them where the other was not found was a bar to a subsequent suit against both on the same note, although *Ind. Rev. Stat.* 1838, p. 446, provided that if a suit on a joint contract be brought against two, and only one can be found, judgment may be taken against him alone on whom process has been served. *Taylor v. Claypool*, 5 Blackf. 557.

In this case, as the present action was against both, a judgment against the one served with process could not be obtained, unless the plaintiff could show that he had then a good cause of action subsisting against both.

So, in an action on a joint note against A, B, and C, where B and C answered and judgment was taken by default against A, and there was a failure to reply to the answer of B and C, the taking of the judgment against A was a discontinuance of the cause as to B and C. *Rose v. Comstock*, 17 Ind. 1.

It was held that the case as to B and C was not saved by 2 *Ind. Rev. Stat.* 1852, p. 121, § 369, providing that the court may, in its discretion, render a judgment against one or more of the defendants, leaving the action to proceed against the others whenever a several judgment is proper.

In this case the court did not exercise its discretion or make any order, and no several judgment could be rendered, as they were only jointly liable, and when final judgment was taken against A it finally disposed of the cause as to B.

In *Martin v. Baugh*, 1 *Ind. App.* 20, it was said that *Ind. Rev. Stat.* 1881, § 320, providing for further proceedings against joint debtors where only part are served, does not apply to a case where both are served.

But where one of the joint makers of a note was not served with process, which fact was entered on the record, and after two continuances judgment was taken against the other, it was the same as a dismissal as to the party not served, and was not a bar to a subsequent action against him, under 2 *Gavin & H. (Ind.) Stat.* 593, § 63, providing that when a summons is returned not found as to part of the defendants the plaintiff may continue for alias process or suggest a return on the record, dismiss the cause as to the defendants not found, and proceed against those served, and afterwards proceed against those not served. *Kittering v. Norville*, 39 Ind. 183.

In a similar case it was held that the plaintiff could have the party not served bound by the judgment in the same manner as if he had been originally summoned, under *Ind. Code*, § 641, 2 *Gavin & H. Stat.* 297, providing that

when a judgment shall be recovered against one or more persons jointly indebted upon contract, as provided in § 41, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment in the same manner as if they had been originally summoned. *Erwin v. Scotten*, 40 Ind. 389.

Section 41, cl. 1, provides that if the action be against defendants jointly indebted on contract, he may proceed against the defendants served, and if he recover judgment it may be enforced against the joint property of all and the separate property of the defendants served.

In this case it was said that this section of the Code did not change the common-law rule that a judgment against one joint promisor is a bar to a subsequent suit upon such obligation against another joint promisor.

Joint and several obligations.

A judgment against one of several makers of a joint and several note is not a bar to a subsequent action against another party. *Giles v. Canary*, 99 Ind. 116.

And where a suit was brought upon a joint and several obligation of A, B and C against all three, and the judgment determined that A and B were not jointly liable with C, but did not determine that A was not severally liable on the obligation which was the question in the second suit, the judgment in the former suit was no bar to a suit against A. *Kirkpatrick v. Stingley*, 2 Ind. 269.

So, in an action of debt against A, B and C, on a joint and several promissory note, where the plaintiff failed on the ground that the note was invalid as to C, the judgment was no bar to a subsequent suit against A on the note. *Stingley v. Kirkpatrick*, 8 Blackf. 186.

And where the plaintiff in a joint action against two as makers of a joint and several note, both of whom had been served with process, dismissed as to one by leave of court and took judgment against the other, such judgment was no bar to a subsequent suit against the former. *Malden v. Webster*, 30 Ind. 317.

In this case it was held that the dismissal as to one party changed the joint action to a several action against the remaining party, and hence the judgment in that suit was no bar to a subsequent action against the other party, under *Ind. Code*, § 20, providing that persons severally liable upon the same obligation may all or any of them be included in the same action, and § 41, cl. 3, providing that if all the defendants have been served judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against any or either of them alone, and § 99, providing that the court may at any time, in its discretion, correct the name of any party to be added or struck out.

In *First Nat. Bank v. Indianapolis Piano Mfg. Co.* 45 Ind. 5, and *Nicklaus v. Roach*, 3 Ind. 78, it was said that on a joint and several obligation there may be as many actions and judgments as there are parties severally liable. *Iowa*.

An early statute provided that a judgment against one or more jointly bound should not be a bar to a subsequent action against other obligors. Where this section has been referred to it has been followed. But several decisions apply the common-law rule holding the prior judgment a bar, making no reference to the statute. It seems impossible to reconcile these decisions with the other cases and the statute.

Iowa Rev. 1860, § 2764, *Code* 1888, § 8755 (2250), *Code* 1897, § 3465, provide that where two or more persons are bound by contract

whether jointly only or jointly and severally or severally only, the action thereon may at the plaintiff's option be brought against any or all of them, and that an action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against others.

Under this statute a judgment by confession against a maker of a joint note was not a bar to a subsequent action against the remaining obligor who was a surety. *Citizens' Sav. Bank v. Oleson*, 47 Iowa, 492. In this case no reference was made to any other Iowa case.

In *Footle v. Hintrager*, 60 Iowa, 180, it was said that under Iowa Code, §§ 2550-3, where parties are jointly bound by contract, or as partners, an action may be maintained against any one of them.

In *Ryerson v. Hendrie*, 22 Iowa, 480, it was said that "this section is full of innovations upon the common law, as to the nature or relation of liability, the right of action, and the effect of judgment." The dissenting opinion in this case questions if a person sues a partner individually for a debt of the firm, whether he can afterwards sue the firm or the other members.

But in *North v. Mudge*, 13 Iowa, 496, 81 Am. Dec. 441, it was held that a judgment confessed by one member of a firm merged the contract debt and was a bar to another action on the same demand against the firm.

In this case Iowa Rev. 1860, § 2764, was not cited, although it was in force. The judgment confessed against the firm was held void as to the party not confessing; but was a bar to a further action against the firm or the members.

So, a judgment obtained against a firm without service of process on a party who was claimed to be a member was held to merge the note, and prevent a subsequent action against the firm in which it is alleged that this party was a member of the partnership at the time of the execution of the note. *Harford v. Street*, 46 Iowa, 594.

In this case the court said: "The note sued on became merged in this judgment under the law in force when the judgment was rendered, and it cannot now be the subject of a cause of action. *North v. Mudge*, 13 Iowa, 496, 81 Am. Dec. 441." The court further said that the confession of judgment by one partner did not bind the other.

Joint and several obligations.

An unsatisfied judgment against one of the obligors of a joint and several obligation is no bar to an action against the other. *Harlan v. Berry*, 4 G. Greene, 212; *Gilman v. Foote*, 22 Iowa, 560; *Sherman v. Christy*, 17 Iowa, 322; *Smith v. Coopers*, 9 Iowa, 376.

In *Gilman v. Foote*, 22 Iowa, 560, the recovery of a judgment against a member of a firm on his several liability on a note signed in the firm name, and individually by this member, was not a bar to a subsequent action against the firm where there had been no actual satisfaction of such judgment.

In this case the court said that "the note in suit being several as to Foote it is plain that he might thereon be severally sued, and a recovery against him without satisfaction would be no merger of the note as to the other makers."

So, in *Sherman v. Christy*, 17 Iowa, 322, a judgment confessed by one member of the firm on a joint and several note made by him in the firm name, bound only the member confessing, and was not a bar to a subsequent action against the other member upon the note.

In this case *North v. Mudge*, 13 Iowa, 496, 81 Am. Dec. 441, was distinguished, as in that case the debt was joint and not joint and several.

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And in *Smith v. Coopers*, 9 Iowa, 376, a judgment rendered against one of the makers of a joint and several promissory note, and the case continued as to the others, did not bar the plaintiff's right to recover against the other parties.

In this case it was held that the doctrine of merger and release by taking a judgment against one of the makers did not apply, under Iowa Code, 1825-6, § 1682, providing that persons jointly and severally liable upon the same instrument may all or any part of them be sued at once, that judgment may be rendered against one or more of several plaintiffs or defendants, and that this may be done against one or more before the case is ripe for decision as to all.

Kansas.

In *Jenks v. School Dist. No. 38*, 18 Kan. 356, it was said that under the Kansas statute, providing that a bond is a joint and several obligation, where suit was brought against joint and several obligors, in which process was not served on all the defendants, judgment could be taken against those served, and such judgment was no bar to subsequent proceedings against those not served at the rendition of such judgment.

Kentucky.

Prior to the Code provision there was some conflict as to whether or not a judgment against a joint obligor was barred by another action against a remaining obligor. Some of the early cases favored the case of *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. ed. 215, whilst other cases indicated a desire to follow the weight of authority. Since the Code provision, however, a judgment against one joint obligor is no bar to another suit against the remaining obligor. A judgment on a joint and several obligation is no bar to a subsequent suit against the remaining obligors.

A judgment in favor of one heir and co-obligor, which would bar any other suit against him for the same cause of action, extinguished the obligation of his coheir or co-obligor where the judgment had not been obtained in consequence of a defense applying particularly and alone to the party in whose favor it had been rendered. *Hunt v. Terril*, 7 J. J. Marsh. 67.

So, in *Sayre v. Coleman*, 9 Dana, 174, it was said that a judgment against part of the joint obligors would merge the liability, and would be a bar to a subsequent suit either against them or against others.

But a judgment upon a contract against the only obligor was not a bar to a subsequent action against another party who was alleged to be a dormant partner in a firm doing business under the name of the obligor. *Scott v. Colmesnil*, 7 J. J. Marsh. 416.

In this case it was said: "Though it has been frequently said by judges and lawyers that the Supreme Court of the United States in the case of *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. ed. 215, declared that a judgment against one joint obligor does not so merge or change the character of the contract as to bar a suit upon the same contract against his co-obligor, yet a careful examination of the opinion in that case will, we think, show that no such doctrine was therein settled and no such point decided." But the court said that case held that where the first suit was on a sole contract of one party that a second suit may be brought against another party alleging that he was a partner.

In *Williams v. Rogers*, 14 Bush, 776, it was said that under Ky. Civ. Code, § 27, providing that an action or judgment against one or more of several persons jointly bound shall not be a bar to proceedings against others, abolished the common-law rule as to joint and several lia-

bilities upon contracts. This case denies the authority of *Nichols v. Burton*, 5 Bush, 322, but admits that at common law where the terms of a partnership agreement did not make it several or joint and several, the effect of a judgment against one obligor was to merge the claim against the other of the obligors, and prevent any proceedings against them either severally or jointly.

In *Nichols v. Burton*, 5 Bush, 322, it was held that a judgment against one partner on an individual acceptance given by him in payment of an account against the firm merged the original debt of the firm and barred a suit against the other members of the firm for the same debt, and the court said: "Our Code does not authorize separate suits at different times against the partners."

So far as this case intimates that a suit and judgment against one partner is of itself a merger and satisfaction of the claim against the other partner, the same was overruled in *Williams v. Rogers*, 14 Bush, 776.

And where a judgment was taken against two defendants on a note executed by three, and process was not served as to the third, and the judgment was replevied and execution issued on the replevin bond and returned no property found, this was no bar to the prosecution of the action against the third, under Ky. Civ. Code, § 399, providing that in an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper. *Burrus v. Anderson*, 3 Met. (Ky.) 500.

It was irregular to render a joint judgment against all the plaintiffs in error in a joint action, where a judgment in the same action had been previously rendered against one of them and was unreversed. *Fletcher v. Andrews*, 1 A. K. Marsh. 52.

In this case it was said that as it now appears the judgment first rendered has been reversed since obtaining the last judgment against all the parties and on the return of this cause to the court below, as all the parties would then be legally before the court, judgment may then be rendered against all unless there is some sufficient plea presented to bar the action.

A judgment rendered against persons jointly liable is an entirety, and if void as to one defendant is void as to all, although where the parties are severally liable it would be different. *Sullivan v. Frankfort Bldg. & L. Asso.* 13 Ky. L. Rep. 48.

Joint and several obligations.

A judgment against two of three joint and several obligors in which the two defendants had not pleaded the nonjoinder of the third obligor in abatement, could not be pleaded in bar to a subsequent suit against the third obligor. *Sayre v. Coleman*, 9 Dana, 174.

In *Elliot v. Porter*, 5 Dana, 299, 30 Am. Dec. 683. It was said that in cases of contract a judgment against one is no bar to a suit on the same contract against another jointly and severally bound.

Maine.

An election to sue one of the makers of a joint and several note is held to be an election to treat it as a several contract and a bar to a subsequent suit against the other two jointly. A judgment in favor of a surety is held not a bar to an action against another surety where the grounds for the first judgment were not shown. A judgment in an action on a joint contract against one defendant is held not to be a bar to a suit against another where the first judgment was obtained in another state, and 43 L. R. A.

only one defendant was found. This is in accord with the general doctrine.

A suit and judgment against one of the makers of a joint and several note signed by three is an election to treat it as a several contract as to all, and was a bar to a subsequent suit against the other two jointly. *Bangor Bank v. Treat*, 6 Me. 207, 19 Am. Dec. 210.

But a judgment in favor of a surety in an action against him is not a bar to a subsequent action against another surety. *Hill v. Morse*, 61 Me. 541.

In this case it did not appear upon what ground of defense the former judgment was rendered, or that in the former case the defendant prevailed upon any facts which went to the merits of the case or extinguished the cause of action, or that the facts involved in that judgment were such as would be available to the defendant as a bar to a subsequent action if the same were proved.

Nonresidence.

A judgment against one of several joint defendants found within the state in an action against all is not a bar to a subsequent action on the same obligation against them all, where service was only made upon another defendant who had come within the state, and discontinuance entered as to the others, as this is within an exception to the common-law rule that "where the claim is joint the action must be against all who are jointly liable." *Rand v. Nutter*, 56 Me. 389.

So, a judgment rendered in another state against one joint obligor where the other was not served is no bar to a subsequent action against the remaining obligor in another state. *Dennett v. Chick*, 2 Me. 191, 11 Am. Dec. 59.

Maryland.

It was originally held that the common-law doctrine applied in this state, and a judgment against one of a partnership firm was a bar to a subsequent action against the remaining partner. This was changed by the Code in 1839. A statute of 1870 providing that on a joint and several bond, note, penal or single bill, no more than one action can be brought where the obligors reside in the same county was held not to apply to the covenants of a lease.

The rule of the common law was changed by Md. act 1839, chap. 14, Code, art. 49, § 10, providing that a judgment rendered against one or more partners or one or more persons jointly liable on any contract less than the whole number jointly bound, shall not extinguish or merge the cause of action as respects the liability of the partners or persons not bound by such judgment, but they shall remain liable to be sued as if their original responsibility had been joint and several.

Under this statute a judgment against one joint debtor is not a bar to a subsequent suit and judgment against the remaining obligor. *Cruzen v. McKaig*, 57 Md. 461.

So, under this act where a judgment by default had been taken severally and at different stages of the case but no final judgment rendered against any of the parties, and their liability all depended upon one joint contract, it was proper to render one final judgment against them. *Loney v. Bailey*, 43 Md. 10.

The court may set aside a default judgment as to one of two joint partners and allow him to confess a judgment for the debt, under Md. act 1839, chap. 14 (Code, art. 29, § 18), suspending the common-law rule by which a cause of action against one of two joint debtors was merged by the judgment against the other, and allowing a recovery of several judgments in such cases. *Thomas v. Mohler*, 25 Md. 36.

In *Cruzen v. McKaig*, 57 Md. 461, it was held that Md. Code, art. 49, § 2, Amended Laws 1870, chap. 329, providing that no person shall institute more than one suit on a joint and several bond, promissory note, penal, or single bill, when the persons executing the same are alive and residents in the same county, did not apply to an action on a covenant in a lease.

But previous to the act of 1839 it was held that a judgment against a party on a note executed by him barred a subsequent action of assumpsit against another party claiming that he was a dormant partner in a firm carried on in the name of the party who executed the note, and that the note was given for goods furnished the firm, and that at the time of the first suit the plaintiff was ignorant that the last-named defendant was a partner in such firm. *Moale v. Hollins*, 11 Gill & J. 11, 33 Am. Dec. 684. It is said in *Thomas v. Mohler*, 25 Md. 36, that Md. act 1839, chap. 14, Code, art. 29, § 18, changed this rule.

Massachusetts.
The common-law doctrine that a judgment against one joint debtor bars a subsequent action against the other applies in this state, except so far as modified by the statute, which provides that where more than one is sued, and process is returned not found as to the other, such judgment is not a bar to a further action. This statute has been applied where a judgment has been taken on a joint debt and the other obligors were not residents, instead of regarding such cases as an exception to the general rule, but the same result is reached. It seems that notwithstanding the statute if the action is brought originally against one joint debtor, and no effort is made to secure service on the others, that such a judgment shall be a bar to a further action. On a joint and several obligation a judgment in an action against one is no bar to a further proceeding in the same action against the others under the statute.

A judgment recovered against one of two partners merges the debt and is a bar to a subsequent action against both promisors. *Ward v. Johnson*, 18 Mass. 148.

And an action and judgment against one of two joint debtors is a bar to any further action against the other. *Kingsley v. Davis*, 104 Mass. 178. And the same was said to be the rule in *Gibbs v. Bryant*, 1 Pick. 118.

In *Well v. Raymond*, 142 Mass. 206, which was an action to ascertain whether an agent or undisclosed principal was liable, the court said: "If the plaintiff sold the merchandise to George J. Raymond, under the name of George J. Raymond & Company, he can sue him therefor; if, in buying the property George J. Raymond acted as the agent of his wife, an undisclosed principal, the plaintiff can also sue her; he cannot sue both jointly, but it is said that he can proceed against each separately, although not to judgment against both, for a judgment obtained against one, although unsatisfied, is a bar to an action against the other;" citing *Kingsley v. Davis*, 104 Mass. 178.

Massachusetts Rev. Stat. chap. 92, § 12, Gen. Stat. chap. 126, § 13, provides that if an action founded on contract is brought against several defendants, and the writ is duly served on one or more of them, but no legal service is made on the other either by attachment of property or otherwise by reason of their absence from the state or for other sufficient cause, the action may nevertheless proceed against those who are duly served with process, without any further proceedings against the others; and Rev. Stat. chap. 92, § 13, Gen. Stat. chap. 126, § 14, provides that if judgment shall be rendered against 43 L. R. A.

one or more of several contractors in the manner provided in the preceding section, and shall remain unsatisfied, an action on the same contract may be afterwards maintained against any of the other joint contractors in like manner as if the contract had been joint and several.

In *Odum v. Denny*, 16 Gray, 114, it was said that this statute rescinded the rule of the common law which had been applied by the court in *Ward v. Johnson*, 13 Mass. 148. The court evidently meant that where the provisions of the statute are followed the common-law rule does not apply.

But *Kingsley v. Davis*, 104 Mass. 178, followed *Ward v. Johnson*, without referring to this statute.

So under this statute a judgment in another state against one joint obligor where the other was a nonresident is not a bar to the prosecution of a suit against another obligor in this state. *Shirley v. Shattuck*, 18 Met. 256; *Odum v. Denny*, 16 Gray, 114.

In this latter case it was said that the case of *Catskill Bank v. Hooper*, 5 Gray, 574, was not in conflict with it, as in that case the plaintiff had sued two partners in New York and obtained a judgment there which bound their joint property in that state under the laws of New York, although one of them was not served with process. The court said that in that case it was held that such judgment, after the commencement of proceedings in insolvency here against the defendant who was not served with process in New York, precluded proof of debt against his separate estate in insolvency, as the suit and judgment in New York was a conclusive election to treat the two defendants as partners.

In *Knapp v. Abell*, 92 Mass. 485, it was said that by the existing laws of this commonwealth, where several defendants are sued jointly on a contract, the action may proceed to judgment against part only served with process, and the others remain liable to a new action on the original contract.

Joint and several obligations.

A judgment and execution against one of two joint and several makers of a note pending exceptions taken by the other is not a bar to a judgment against the first upon the overruling of the exceptions, under Mass. Stat. 1852, chap. 312, § 3, authorizing a separate judgment against one of two joint and several promisors. *Hawkes v. Phillips*, 7 Gray, 284.

In *Ward v. Johnson*, 13 Mass. 148, it was said that in case of a joint and several contract, an unsatisfied judgment against one of the promisors was no bar to a subsequent action against the other.

Michigan.

The common law is in force in Michigan except as modified by statute. The common-law rule was applied to a judgment obtained in another state, although this is generally held to be an exception to the common-law rule. But in another case a different rule was applied because the prior judgment was obtained in New York, holding that under the statute there a judgment against one obligor did not bar a subsequent action against another. On a joint and several obligation a judgment against one obligor is held here as elsewhere to be no bar to an action against a remaining obligor.

It seems that where a suit is on a joint obligation the failure of the plaintiff to maintain his action as to one of the parties, or a discontinuance by him as to one party, prevents judgment against the other. *Winslow v. Herrick*, 9 Mich. 380; *Lee v. Bolles*, 20 Mich. 46; *Mace v. Page*, 33 Mich. 88; *Ballou v. Hill*, 23 Mich. 60;

Reading v. Beardsley, 41 Mich. 123; Anderson v. Robinson, 38 Mich. 407; Andre v. Fitzhugh, 18 Mich. 93; Anderson v. White, 39 Mich. 130; Post v. Shafer, 63 Mich. 85; Searles v. Reed, 63 Mich. 485; Seligman v. Gray, 66 Mich. 341.

And the same was said to be the rule in Maynard v. Penniman, 10 Mich. 153.

This rule was applied where suit was brought against two indorsers jointly and the plea was joint. A judgment discharging one discharged the other. Seligman v. Gray, 66 Mich. 341.

So, in a suit on a joint award on a joint submission, a discontinuance against one ends the suit. Ballou v. Hill, 23 Mich. 60.

And where a discontinuance against a part of the defendants discharged sureties on an attachment bond. Andre v. Fitzhugh, 18 Mich. 93.

And where the surety on the appeal bond of husband and wife was released by judgment on appeal in favor of the wife. Post v. Shafer, 63 Mich. 85.

Howell's Mich. Stat. § 7345 (Comp. Laws 1857, § 4160, Comp. Laws 1871, § 5776), provides that it may be lawful for the holder of a bill of exchange or note to include all or any of the drawers, makers, guarantors, indorsers, and acceptors in one action as though they were joint contractors. How. Mich. Stat. § 7347 (Comp. Laws 1857, § 4126, Comp. Laws 1871, § 5778), provides that in such action judgment may be rendered for the plaintiff against some of the defendants, and in favor of some of the defendants against the plaintiff. How. Mich. Stat. § 7355 (Comp. Laws 1857, § 4170, Comp. Laws 1871, § 5786), provides that plaintiff need not include in the record a judgment against all the parties to such bill or note, but judgment may be entered against any of the parties whenever plaintiff would be entitled to the same if the suit had been commenced against such parties only, and if the trial be put off by any of the parties, or if a default shall have been obtained against part, the plaintiff may proceed to trial against the other parties in the same manner as if suit had been commenced against the other parties only, and the action shall thereby be severed.

In Reading v. Beardsley, 41 Mich. 123, it was held that Mich. Comp. Laws, §§ 5776-8, authorizing the makers, indorsers, acceptors, and guarantors of a note to be sued together and a judgment against any one or more of them, did not contemplate severance in a case of persons purporting to be joint makers and sued as such.

And where a suit was brought against a partnership, and four of the defendants were shown to be members but none of the others, it was fatal to the plaintiff's right to recover. Anderson v. White, 39 Mich. 130.

In this case it was said that Mich. Comp. Laws, § 5778, in connection with the section preceding it, shows "that it has no application to a case like the present, but to cases where the holder of a 'bill of exchange or promissory note, instead of bringing separate suits against the drawers, makers, guarantors of the payment thereof, indorsers and acceptors of such bill or note,' includes all or any of said parties in one action."

In Brooks v. McIntyre, 4 Mich. 316, it was said that "whether the judgment be against one or all the joint debtors, as well as where suit is instituted against part only of those jointly liable, and no plea in abatement is interposed on that account, such judgment is a bar to an action upon the original claim against the defendants not served in the one case, and against the debtors not proceeded against, in the other."

But in Detroit v. Houghton, 42 Mich. 459, where a judgment was rendered for all the de-

fendants in a joint action, because one of the alleged makers on a joint bond had never executed it, it was said that this judgment would be no bar to another action brought against some of them on the same cause of action.

And where two persons indorsed a note before delivery to the payee they were joint original promisors with the drawer. A garnishment by a creditor of the payee and judgment against the drawer alone was void as being against one of three joint promisors, and was no bar to a subsequent suit on the note against the third, as one of two joint debtors cannot be charged as a trustee in a suit where the other debtor is not joined. Wetherwax v. Paine, 2 Mich. 555.

In Holcomb v. Tift, 54 Mich. 647, it was held that a judgment taken before a justice against a party served did not merge the debt on which it was founded, so as to preclude a suit against both, under How. Mich. Stat. §§ 6942-3 (Justice's court), providing for a judgment against all the defendants on a joint obligation where only part are served, but that such judgment shall be evidence of the plaintiff's demand as against the party not served after the liability of such defendant shall have been established by other evidence.

Nonresidence.

A judgment obtained in Ohio against one of the defendants on a partnership note is a merger of the note and extinguishes the joint liability, and is a bar to a suit subsequently brought on the note against both in the state of Michigan. Candee v. Clark, 2 Mich. 255.

In this case it was said that when the plaintiffs elected under the provisions of the statutes of Ohio to proceed to judgment on the note against B alone, they voluntarily and legally released their securities on the note against C, hence the judgment is a merger of the plaintiff's entire claim.

At the time of the commencement of the first suit the defendant subsequently sued was not a resident of Ohio but a resident of Michigan. But the court does not allude to this fact which generally works an exception to the rule. The court said they had no several demand against C on the original note if it had not been merged in the judgment.

But where a suit was brought in New York against two joint debtors one of whom was served with process and did not appear, and judgment was rendered against both, an action subsequently brought in Michigan against two was properly brought upon the original demand instead of upon the judgment, and the prior judgment was not an extinguishment of the demand sued upon. Bonesteel v. Todd, 9 Mich. 371, 80 Am. Dec. 90.

This decision was placed on the ground that the statute of New York had modified the common-law rule, and the court also attempted to distinguish Candee v. Clark, 2 Mich. 255, where the common-law rule was applied to a similar judgment, and said: "In thus holding, the court recognizes the propriety of former decisions, where, as in Candee v. Clark, in our own state, the common-law presumption has been applied to foreign judgments in the absence of any proof of its abrogation."

In this case the court said that "under all the New York joint debtor acts it has been held that the judgment was no bar to a further action. Their Revised Statutes, from which ours were, in this respect, borrowed, referred very plainly to such actions, and provided how far the judgment should be allowed to prevail as evidence. . . . But the original demand was always to be made the real foundation of a recovery against the defendant not served in the former action."

Under How. Mich. Stat. § 7355, a suit brought against the maker and a guarantor where they answered separately could be discontinued as to the guarantor without prejudicing the right to proceed against the maker, as the guarantor was not a joint maker, and the discontinuance did not affect the right of the maker who was a sole promisor, *Phelps v. Church*, 65 Mich. 231.

So, in an action on a joint and several note a judgment entered against one on a cognovit was no bar to a further prosecution of the same action against the other debtor. The court said that under How. Mich. Stat. § 7355, judgment could be rendered against one or more defendants and in favor of one or more defendants, and that in this case the note was joint and several, and under this section the plaintiff had the right to take a judgment against one or the other. *Reals v. Smith*, 91 Mich. 146.

Where an action was brought against the maker and indorser jointly a default by the maker and a plea by the indorser did not sever the joint proceedings, as Mich. Comp. Laws, § 4170, How. Stat. § 7355, made it optional with plaintiff and he had a right to a joint judgment against both if he could establish the several liability of each. *Storey v. Bird*, 8 Mich. 316. **Minnesota.**

Joint and several obligations.

On a joint and several obligation judgment by default may be entered at one time against one party and afterwards another judgment against another defendant, under Minn. Gen. Stat. chap. 66, § 67, subd. 3, providing that although all the defendants have been served with summons, judgment may be taken against any of them severally when the plaintiff would be entitled to judgment against such defendants if the action had been against them alone, and under § 265, providing that in an action against several defendants, the court may in its discretion render judgment against one or more of them leaving the action to proceed against the others whenever a several judgment is proper. *Wolford v. Bowen*, 57 Minn. 267. **Mississippi.**

A judgment against one partner is no bar to an action against another, under Miss. Stat. 1880, § 1134, providing that in any action founded on any joint or joint and several bond, covenant, bill of exchange, promissory note or other contract, or on a contract or liability of copartners, it shall be lawful to sue any one or more of the parties liable on such bond, covenant, bill of exchange, promissory note, or other contract or liability. *Hyman v. Stadler*, 63 Miss. 362.

So, a separate action against one partner in this state is not barred by the fact that a judgment had been recovered against his copartner for the entire debt, under Miss. Code 1880, § 1134, where the judgment was not paid. *Scharff v. Noble*, 67 Miss. 143. **Missouri.**

In an early case the common-law doctrine was applied to a judgment in favor of some defendants on a joint contract, holding that it barred further proceedings against others. But since then the statute made joint contracts joint and several, and this has been held to avoid the effect of the common-law doctrine in all cases.

Wagner (Mo.) Stat. 269, §§ 1, 2, 4, provide that all joint obligations shall be construed to be joint and several.

Under this act a judgment on a note against one of the makers and the administrator of the individual estate of a deceased member of a firm, who was a maker with him, is not a bar to a recovery against the partnership estate of the 43 L. R. A.

firm in another action. *Knox County Sav. Bank v. Cotter*, 70 Mo. 150.

In *Wiley v. Holmes*, 28 Mo. 286, 75 Am. Dec. 126, where a note was made in New York signed by a firm, a judgment recovered in Louisiana against one of the firm on this note was held no bar to a subsequent action against the remaining partner in Missouri. This decision was on the ground that a debtor could not, by moving out of the state, extinguish his liability, and on the further ground that the Missouri statute making all joint contracts joint or several, and allowing a suit against one or more of the joint debtors, has altered the common law in relation to actions on joint demands.

In *Phillips v. Fitzpatrick*, 34 Mo. 276, it was held that a judgment against two of three joint debtors was no bar to a suit against the third. This was evidently under the statute although there was no discussion of the effect of the statute.

So, a judgment on a several bond against one obligor is no bar to an action against the other, where there was no satisfaction or payment. *Armstrong v. Prewitt*, 5 Mo. 476, 32 Am. Dec. 338.

And a judgment against the principal on a note is no bar to an action against the surety, as the obligation of such note was joint and several. *Phoenix Mut. L. Ins. Co. v. Landis*, 50 Mo. App. 116.

But in *Hempstead v. Stone*, 2 Mo. 65, in an action on a joint contract where a judgment was had for some of the defendants and against others, the judgment was reversed on the ground that as some of the defendants had a verdict for them there should have been a judgment for all. The court approved the decision of *Robertson v. Smith*, 18 Johns. 459, 9 Am. Dec. 227, to the effect that a judgment on a joint contract against part merged the contract against the rest.

Nebraska.

It seems that under the Code the plaintiff may take a judgment against one joint obligor although he may fall in that action to recover from a remaining obligor.

In an action on a joint contract where the liability only of the principal was established, a judgment against the principal and in favor of the surety was not erroneous, under Neb. Code, § 429, providing that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants. *Ryan v. State Bank*, 10 Neb. 524.

And in *Long v. Clapp*, 15 Neb. 417, it was said that "under the common-law practice, where the declaration counted upon a joint liability on the part of several defendants, and the evidence only proved a several liability as to one of them, the plaintiff was nonsuited;" but that this was changed by § 429 of the Code.

In *McLeady v. Rogers*, 1 Neb. 124, 93 Am. Dec. 333, it was said that the liability of a surety on an attachment bond is joint and several, and a judgment against one obligor is no bar to a recovery against the other. **New Hampshire.**

A judgment against one party on a joint contract where the other party was out of the state is held to be no bar to another action against the other party. A judgment against one party on a joint and several obligation is no bar to a subsequent action against the remaining obligors.

Where one of two or more joint contractors was without the state so that no service could be made upon him, the judgment rendered against the joint contractors found within the state is no bar to a subsequent suit against the remaining obligors. *Olcott v. Little*, 9 N. H.

259, 32 Am. Dec. 357; *Tibbetts v. Shapleigh*, 60 N. H. 487.

In the first case the decision was on the ground that this was an exception to the general rule. In the second the same result was reached by applying Mass. Gen. Stat. chap. 126, §§ 13-15, providing that a judgment recovered against one joint contractor in such cases is no bar to an action against the remaining joint contractors.

Joint and several obligations.

Where a note was joint and several the rejection of the claim by insolvent commissioners of the maker's estate was no bar to an action against the surety where the cause of rejection was not shown. *Townsend v. Riddle*, 2 N. H. 448.

In this case it was said that where a contract was joint and several a judgment against one promisor followed by the commitment to prison and a discharge of his person, which amounted to a technical satisfaction, did not operate as a satisfaction of the debt itself and bar another action against another promisor, but operated merely as a formal satisfaction in respect to the individual imprisoned.

New York.

Common-law remedy.

At common law a judgment against one joint contractor or partner merged or extinguished the debt and was a bar to a subsequent suit against the remaining obligor. The statutes and codes have attempted to change the common-law rule, but the common law is still in force except where specifically provided against.

So, in the absence of statutory provisions, the following cases have held that a judgment against one joint contractor or partner is a bar to a subsequent suit against a remaining obligor. *Robertson v. Smith*, 18 Johns. 459, 9 Am. Dec. 227; *Peters v. Sanford*, 1 Denio, 225; *Benson v. Paine*, 2 Hilt. 552; *Moran v. Vredenburg*, Hill & D. Supp. 392; *Smith v. Kibbe*, 31 Hun, 390; *Waggoner v. Walrath*, 24 Hun, 443; *Olmstead v. Webster*, 8 N. Y. 413; *Candee v. Smith*, 93 N. Y. 349.

And the same was said to be the rule in *Pierce v. Kearney*, 5 Ill. 82; *Smith v. Kibbe*, 19 N. Y. Week. Dig. 118.

In *Robertson v. Smith*, 18 Johns. 459, 9 Am. Dec. 227, after judgment on a firm note, a subsequent suit was brought against a party discovered to have been a partner. This is the leading case in the United States, followed in England and by the Supreme Court of the United States, denying the authority of *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. ed. 215. But its effect is modified by the present Code provision.

In *Candee v. Smith*, 93 N. Y. 349, one obligor had confessed judgment prior to N. Y. Code Civ. Proc. § 1278.

In *Benson v. Paine*, 2 Hilt. 552, and *Moran v. Vredenburg*, Hill & D. Supp. 392, the prior judgment had been taken on a note given by one partner for a firm debt.

In *Waggoner v. Walrath*, 24 Hun, 443, judgment against one surety where both were sued was held to release the other.

In *Olmstead v. Webster*, 4 N. Y. 413, a judgment taken in a suit against one partner, and then vacated, was held a bar to an action against the others.

So, in a suit against three partners when judgment was taken against two, and the third partner then pleaded that judgment as a bar to a further prosecution against him, the court vacated the judgment, but could not revive the debt against the remaining partner because it was merged. *National Broadway Bank v. Hitch*, 29 Abb. N. C. 403, 43 L. R. A.

But a joint judgment taken by default against all the members of a firm, vacated so as to allow one of them to answer, was not a merger of the debt, as the plaintiff did not elect to extinguish the cause of action, and he opposed the vacation of the judgment. *Heckemann v. Young*, 134 N. Y. 170, 28 Abb. N. C. 356, Reversing 55 Hun, 406.

And a judgment in an action by an indorsee against indorsers did not bar an action by him against the maker. *Russell & E. Mfg. Co. v. Carpenter*, 5 Hun, 162.

As affected by nonresidence.

An exception to the common-law doctrine of merger is applied in case of judgments obtained against one or more joint obligors where the others are nonresidents, and such judgments are not a bar to a subsequent action. *Brown v. Birdsall*, 29 Barb. 549; *Suydam v. Barber*, 18 N. Y. 468, 75 Am. Dec. 254.

In this latter case the prior judgment was had in Missouri where a statute made such contracts joint and several.

But in *McMaster v. Vernon*, 3 Duer, 249, a judgment obtained against one partner in Rhode Island was held to be a bar to a suit in New York against two surviving partners. The residence of the three partners is not shown or discussed. If the other partners were nonresidents of Rhode Island this decision is not in accord with the weight of authority.

Statutory provisions where all are not served with process.

Under an early statute of New York it appears that a judgment could be rendered against one joint obligor at one time, and afterwards an action brought against the remaining obligor, where the defendant in the second suit was not served with process in the first suit.

1 N. Y. Rev. Laws, 515, Sess. 36, chap. 56, § 36; 1 Rev. Laws 1801, p. 353, § 13; 1 Rev. Laws 1813, p. 521, § 13, provides for judgment against all the obligors whether served or not, and suit may then be brought on that judgment against the party not served.

The effect of this statute is to allow judgments to be taken at different times against different obligors, and to prevent a merger by taking the first judgment. The decisions under this statute are as follows:

Where a judgment was taken on a bail bond against two defendants on a service of process on one, an action was allowed against both defendants on this judgment. *Dando v. Doll*, 2 Johns. 87; *Taylor v. Pettibone*, 16 Johns. 66.

The first judgment was a merger of the original indebtedness so that an action could not be maintained on the original promises; but an action of debt could be maintained on the judgment. *Carman v. Townsend*, 6 Wend. 206, Affirming 6 Cow. 696.

So, an action of debt will lie upon the judgment against both. *Bank of Columbia v. Newcomb*, 6 Johns. 98.

But where plaintiff recovered a judgment against A and B on service against A, and afterwards discovered that C, D, and E were dormant partners, and then brought a bill in equity asking for relief against them, it was held that ignorance of the fact that they were partners was no ground for relief in equity, and no recovery could be had against them. *Penny v. Martin*, 4 Johns. Ch. 568.

A similar act (2 N. Y. Rev. Stat. p. 377, § 2) provided that the claim against the remaining obligor was to be established by evidence other than the judgment.

So, under this act the first judgment is not a merger. *Oakley v. Aspinwall*, 4 N. Y. 515.

In *Dean v. Eldridge* (1864) 29 How. Pr. 218, where an action was brought against

two defendants on a judgment rendered for a joint debt on process against one, it was said: "It will not be denied that a cause of action still exists against these defendants, and it must be still a joint indebtedness, one which may be enforced against the defendants jointly, by means of a judgment and execution against them jointly."

And in an action against a debtor not served in the first suit, the plaintiff was bound to show that the liability existed by evidence other than the judgment under a plea of nul tiel record. *Mervin v. Kumbel*, 23 Wend. 293.

New York Code Civ. Proc. § 1933, is similar to this statute.

In *Perkins v. Richmond*, 17 How. Pr. 809, an action upon a note against principals and sureties, it was held that Code, § 136, providing that in actions on a joint contract the plaintiff may proceed against the party served, and enter a judgment against all, did not apply to justices' courts, and that in an action against several defendants on a joint and several contract, if the plaintiff elect to bring his action against the defendants, he must recover against all or fail, except when the defense is personal as to some.

New York Code Civ. Proc., § 1932, is to the same effect as Code Proc. § 136, subd. 1.

New York Code Civ. Proc. § 375 (Amended 1849), provided that where a judgment was recovered against one or more jointly indebted on a contract by a proceeding under § 136, those who were not originally summoned may be summoned to show cause why they may not be bound by the judgment. N. Y. Code Civ. Proc. § 1937, is similar.

Under this section proceedings may be had to bind parties not served in the original action. *Prince v. Cujas*, 7 Robt. 76; *Harper v. Bangs*, 18 How. Pr. 457; *Foster v. Wood*, 30 How. Pr. 284.

So, where the first judgment was entered against one partner alone. *Decker v. Kitchen*, 26 Hun, 173.

Statutes allowing offer and confession of judgment.

Under the Code provisions a judgment may be confessed by one joint debtor without its being a bar to a judgment against the remaining debtor. But it is questioned whether the same rule applies to another statute providing that a defendant may offer to allow a judgment to be taken against him for a certain amount.

New York Code Civ. Proc. § 738, Amended 1877, similar to Code Proc. § 385, provides that the defendant may offer to allow judgment to be taken against him for a specified sum, but if the plaintiff fails to obtain a more favorable judgment he must pay costs from the time of the offer.

Section 1278, N. Y. Code Civ. Proc., provides that "one or more joint debtors may confess a judgment for a joint debt, due or to become due. Where all the joint debtors do not unite in the confession, the judgment must be entered and enforced against those only who confessed it; and it is not a bar to an action against all the joint debtors upon the same demand."

Prior to § 1278 of the Code, a judgment by confession taken for the whole amount against one of the joint makers merged the debt and discharged the other makers. *Candee v. Smith*, 93 N. Y. 352.

Under this section a judgment confessed by some members of a partnership firm was no bar to a further action against the remaining member. *Harbeck v. Pupin*, 123 N. Y. 115, affirming 55 Hun, 335.

In *Tripp v. Saunders*, 59 How. Pr. 379, the court said that a confession of judgment by 43 L. R. A.

one joint debtor was no bar to an action against all the joint debtors on the same demand.

Under N. Y. Code Civ. Proc. § 385, where an action was against four on a joint and several bond, and two offered to let judgment be taken, it was questioned whether plaintiff could sever the action by entering judgment against two of the joint defendants and preserve the action against the other two. The court said that § 274 of the Code provides that in an action against several defendants the court may, in its discretion, render judgment against one or more, leaving the action to proceed against the others whenever a several judgment may be proper, but that this appears to be in the discretion of the court. The court said that if the plaintiff avails himself of the defendant's offer, and enters judgment, it may be questionable whether he would not thereby discontinue the action against the defendants who had not united in the offer. *Griffith v. DeForest*, 16 Abb. Pr. 292.

A judgment entered against two partnership debtors upon an offer of judgment made by them was a bar to an action against another member of the firm for the same debt. It was held that § 1278 of the Code of Civil Procedure did not apply to judgments entered upon offers. *Earnsworth v. Halstead*, 18 N. Y. Civ. Proc. Rep. 227.

So, in *Garrison v. Garrison*, 67 How. Pr. 271, it was held that this section did not apply to offers made by one partner to allow a judgment to be taken.

In *Bannerman v. Quackenbush*, 7 N. Y. Civ. Proc. Rep. 428, referring to Code Civ. Proc. § 738, 1932, it was said: "There seems to be no reported case construing this provision of the Code, excepting *Garrison v. Garrison*, 67 How. Pr. 271, wherein it was decided that there is no statutory authority allowing one joint debtor or partner to make an offer of judgment in behalf of his joint debtor or copartner, and that § 738 only applies to cases where a separate judgment must be taken against him who makes the offer, and that § 1932 of the Code, allowing judgment to be entered in form against both joint debtors when only one is served, does not relate to judgments entered upon offers."

In *Kantrowitz v. Kulla*, 20 Abb. N. C. 321, it was held that a judgment taken under an offer to allow a judgment for a certain amount, made by one of several joint debtors, did not bar the action as to the others.

This case was disapproved in *Heckemann v. Young*, 55 Hun, 406, but this latter case was reversed in 134 N. Y. 170.

North Carolina.
Under the provisions of the Code a judgment against one joint obligor does not bar an action against the remaining obligors. A judgment against one joint and several obligor is no bar to an action against the others.

In *Ruffy v. Claywell*, 93 N. C. 306, it was said that "under the rules of pleading, according to our former system, if the action was upon a joint contract, and the plaintiff took judgment against a part only of those liable, there could be no recovery in a subsequent suit against those omitted," but that under N. C. Rev. Code, chap. 31, § 84, contracts, whether made by co-partners or other joint obligors, were made several by statute, and the plaintiff could sue one or more at his election without impairing his right to proceed against the others afterwards. The court said that this section was omitted in the Code of Civil Procedure, but re-enacted by the General Assembly, 1871-2, chap. 24, § 1, and now constitutes § 187 of the Code.

In *Navassa Guano Co. v. Willard*, 73 N. C. 521, it was said that *Battle's Rev.* 1873, N. C.

Code Civ. Proc. § 87, providing that where the action is against two or more defendants, and the summons is served on one or more of them but not on all of them, the plaintiff may proceed as follows,—“only applies to an action against two or more defendants and the summons is not served on all;” that subd. 4, providing if the name of one or more partners shall for any cause have been omitted in any action in which judgment shall have been passed against the defendants named in the summons, and such omission shall not have been pleaded, the plaintiff, in case the judgment therein shall remain unsatisfied, may by action recover of such partner separately upon proving his joint liability, notwithstanding he may not have been named in the original action, “was intended to prevent a partner who was not served with the summons from defeating any action against him on the ground that judgment had already been taken against his copartner,” and to prevent a merger.

A judgment against one on a joint and several note is no bar to an action against another maker. The court said the creditor may take several judgments and make his money out of either of them, or a part out of one and a part out of the other. *Hix v. Davis*, 68 N. C. 231.

In this case a compromise judgment against the surety in North Carolina, which had been satisfied, but did not pay the whole claim, did not prevent an action against the remaining obligor and a judgment for the balance.

In 1 Hayw. 487, where a writ was issued against two upon a joint and several bond, and one pleaded in abatement that the process was not served upon him in due time, the writ was abated and judgment was rendered against the other who was served. Haywood, J., said the abatement of one is the abatement of the whole writ. The reporter's note said “this decision was certainly an erroneous one.”

Ohio.

In this state the common-law rule applies except as modified by statute, providing that a defendant not served with process may thereafter be made a party to a judgment against the others. An exception is made to the common-law rule in actions against husband and wife. So where the defendant is out of jurisdiction a judgment against one is no bar. A judgment on a joint and several obligation is no bar to a further action against others.

A judgment in favor of all the defendants on a joint contract is a bar to a subsequent action by the same plaintiff for the same cause of action, against one of the defendants in the former action. *Roby v. Rainsberger*, 27 Ohio St. 674.

And a judgment upon the merits for the defendant upon a joint contract brought against one of two joint contractors is a bar to another action upon the same contract against all the contractors. *Reynolds v. Pittsburgh, C. & St. L. R. Co.* 29 Ohio St. 602.

And in *Yoho v. McGovern*, 42 Ohio St. 11, it was said that a judgment upon a joint obligation against all or part merges the debt, and is a bar to a further proceeding upon it.

And in an action against joint contractors on a partnership contract, a judgment in favor of one is a discharge of the other. *Pfau v. Lorain*, 1 Cin. Super. Ct. Rep. 73.

A judgment in another state against one of two partners on a joint obligation is a bar to a subsequent suit against the partners. *Sloo v. Lea*, 18 Ohio, 279.

In this case a judgment by confession had been entered in Illinois against both parties which was afterwards held void as to one of them, and an action was brought against both in Ohio. The court said that while the judg-

ment in Illinois against M. is suffered to remain upon the docket in force no second judgment on the original liability can be recovered here against M. or against both jointly, or against S. separately upon the original cause of action because it is merged in the judgment.

But a judgment against a husband upon a joint note of himself and his wife did not merge the right to charge the wife's separate estate with the payment of the note in a subsequent action. *Avery v. Van Sickle*, 35 Ohio St. 270.

This was on the ground that the makers of the note were not in a legal sense jointly liable; that the wife was not liable at law and hence a joint remedy could not be anticipated when the note was executed. The court said that in this case either the husband alone was liable on the note, or he was liable jointly with the wife's separate estate, against which the remedy was wholly in equity, while his liability was strictly legal; and that a judgment against one of two joint makers of a written instrument constitutes a bar to a subsequent action only when the makers are liable thereon at law.

And a judgment rendered by a justice of the peace against one of the makers of a joint note was no bar to a subsequent action upon the note in the same court against another one of the makers who had not been served with process, and who was a nonresident of that county, to make him a party to the prior judgment, under Ohio Rev. Stat. § 5368, providing that when judgment is rendered on a joint contract, parties to the action who were not summoned may be made parties thereto by action in the same court. *Yoho v. McGovern*, 42 Ohio St. 11.

This was on the ground that nonresidence of one party prevented a merger, and that the justice was not authorized to issue process out of the county, and that the severance by taking a judgment against one was not the fault of the plaintiff.

The court distinguished the case of *Clinton Bank v. Hart*, 19 Ohio, 372, saying that no “joint” liability was ever incurred upon the note there in suit, and so in legal effect the court found, although one of the defendants was in default.

In *Smith v. Exchange Bank*, 26 Ohio St. 141, it was said that the liability of the drawer of a bill of exchange is a several liability and at common law was required to be enforced by a separate action; that the Code by allowing all the parties to the bill to be joined in one action does not require a joint judgment against all.

In this case the court further said: “Ohio Code, § 371, expressly provides that in an action against several defendants the court may in its discretion render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment may be proper. Where a separate action might have been maintained against a party a separate judgment under this provision of the Code is certainly proper. What effect the fact that the drawer is also one of the firm who accepted the bill may have on the right of the plaintiff to take a future judgment against the acceptors, we are not called on now to consider.”

In a joint action against all the makers of a joint and several note in which process was only served upon part, a judgment against one is no bar to a separate action against one not served with process. *Clinton Bank v. Hart*, 5 Ohio St. 83.

In this case it was said that the Ohio statute enabling a creditor to make one not served a party to the judgment against others, did not take away any common-law rights; that in case of a joint contract it is his only remedy, and where a contract is joint and several he has

his election to pursue that remedy or to commence a separate action against any of the several makers who have not been served with process and whose liability has not been merged in the judgment.

But where four persons were sued as joint makers of a joint and several note, judgment was taken against one by default, and for two on issue joined, the fourth was not served with process and in a scire facias to charge the fourth with the judgment it was held that as the judgment was that two who were alleged to be joint makers were not liable, no judgment could have been rendered in that action against the fourth party, and therefore no judgment could be rendered against him on the scire facias. *Clinton Bank v. Hart*, 19 Ohio, 372. **Oregon.**

The recovery of a judgment against the principal is no bar to an action against him and another on another contract of guaranty executed by both of them jointly. *McCullough v. Hellman*, 8 Or. 191. **Pennsylvania.**

Common-law remedy.

A judgment against one partner bars a subsequent suit against the other on the same obligation. *Smith v. Black* (1822) 9 Serg. & R. 142, 11 Am. Dec. 686.

So, an election in a suit on a joint contract to take confession of judgment by one bars a joint judgment or a judgment against the remaining party. *Williams v. McFall* (1816) 2 Serg. & R. 280.

And an election to treat a joint and several bond as joint by a suit, and taking a judgment against one obligor, bars a subsequent suit against the others. *Downey v. Farmers' & M. Bank* (1825) 13 Serg. & R. 288; *Beltzhoover v. Com.* (1832) 1 Watts, 126.

In the latter case the prior one was followed. All the defendants were in court; but the plaintiff accepted a confession of judgment from one which barred further judgment. No reference was made to any statute, and it is probable that the action was had prior to the act of 1830 which changed the rule in such cases.

But a judgment against a debtor is no bar to an action against a surety on a collateral covenant to pay the same debt. *Cambria County Comrs. v. Canan*, 2 Watts, 107.

So, a judgment against a principal is no bar to an action against him and a guarantor on a separate joint contract. *White v. Smith*, 33 Pa. 186, 75 Am. Dec. 589.

Statutory changes.

Pennsylvania act April 6, 1830, Pub. Laws, 277, § 1, provides that "in all suits now pending or hereafter brought in any court of record in this commonwealth, against joint and several obligors, copartners, promisors, or the indorsers of promissory notes, in which the writ or process has not been or may not be served on all the defendants, and judgment may be obtained against those served with process, such writ, process, or judgment shall not be a bar to recovery in another suit against the defendant or defendants not served with process."

In *Miller v. Reed*, 27 Pa. 247, 67 Am. Dec. 450, in reference to the Acts of 1830 and 1848, it was said that "the terms of this legislation, though limited to undertakings that are 'joint and several,' are applicable to contracts that are joint and not several. . . . If, then, neither action and recovery against one joint debtor, nor a confession of judgment by one, nor the death of one after judgment, works a discharge of the other, what difference remains so far as regards the remedy between joint contracts and contracts joint and several?"

A judgment against an obligor is not a bar 43 L. R. A.

to a subsequent suit against the remaining obligor not served in the prior suit:

Where the judgment is upon a partnership contract. *Wann v. Pattengale* (1850) 14 Pa. 313.

Or where the contract is joint. *Moore v. Hepburn* (1847) 5 Pa. 309.

The subsequent proceedings should be by another action. *Myers v. Nell* (1877) 84 Pa. 369.

And there is no bar where the judgment is on a joint and several obligation. *Vanemen v. Herdman* (1834) 3 Watts, 202.

And this section applies where the prior judgment is had in another state on a joint note. *Campbell v. Steele* (1840) 11 Pa. 394.

And the same was held in an action on a partnership note. *Bennett v. Cadwell* (1849) 70 Pa. 253.

This was on the ground that the presumption is that the laws of other states are the same as in Pennsylvania.

Pennsylvania act April 6, 1830, Pub. Laws, 277, § 2, provides that "in all cases of amicable confession of judgment, by one or more of several obligors, copartners, or promisors, or the indorsers of promissory notes, such judgment shall not be a bar to recovery in such suit or suits as may have to be brought against those who refuse to confess judgment."

In *Wallace v. Fairman* (1835) 4 Watts, 378, it was held that a confession of judgment on a note given by one partner for a firm debt does not bar a subsequent action against the firm.

This was on the ground that the former suit was on the single bond of one of the partners, and not on the partnership debt. It was said that Pa. act April 6, 1830, did not apply, as that contemplates a recovery on a joint cause of action against one of several copartners, and is intended to preserve a remedy against the others.

So, a note and confession of judgment by two members of a firm of three was held no bar to a suit against one of them and the third partner. *Potter v. McCoy* (1856) 26 Pa. 458.

This was held on the ground that merger takes place only where the debt and parties are identical.

The court in the above case denied the authority of *Lewis v. Williams* (1840) 6 Whart. 264, which held that confession of judgment on a note given by one partner was a bar to a subsequent suit against another partner on the original obligation; that the act of April 6, 1830, did not apply where one had been sued severally on his single bond.

In *Rhoads v. Frederick* (1839) 8 Watts, 448, it was held that a judgment confessed by one obligor is no bar to a subsequent suit against the remaining obligors on a joint and several contract.

In this case a confession of judgment was made upon the original bill or specialty by one party, and after this an action was brought against the others.

Pennsylvania act August 2, 1842, Pub. Laws, 458, § 6, provides that "in all original actions and proceedings to revive judgment which have been or hereafter may be instituted against two or more defendants, in which judgment has been entered on record, at different periods, against one or more of said defendants, by confession or otherwise, or hereafter may be so entered, the entries so made or to be made shall be considered good and valid judgments against all the defendants, as of the date of the respective entries thereof, and the day of the date of the last entry shall be recited in any subsequent proceedings, by scire facias or otherwise, as the date of judgment against all of them, and judgment rendered accordingly: provided,

that the provisions of this section shall not affect the liens of any such judgment."

Under this statute only one final judgment can be entered in suits against several. *Murtland v. Floyd*, 153 Pa. 99; *American Bank's Appeal*, 153 Pa. 98; *Campbell v. Floyd*, 153 Pa. 94; *Noble v. Laley*, 50 Pa. 281; *Finch v. Lamberton*, 62 Pa. 370; *O'Neal v. O'Neal*, 4 Watts & S. 130.

So, in an action on a joint debt a judgment cannot be entered against a part of the defendants for want of a sufficient affidavit of defense, unless judgment is also entered against those defendants who make no defense. *Murtland v. Floyd*, 153 Pa. 99.

In *Campbell v. Floyd* (1893) 153 Pa. 94, it was said that when in an action against numerous defendants judgment is taken against one in default of appearance, against another in default of an affidavit of defense, against a third in default of a plea, and against the remaining defendants upon the verdict of a jury, the severance of the plaintiff's demand by the entry of the first of such final judgments was fatal at common law. The court said that this statute sanctions such several judgments for the purpose of lien, and the symmetry of the common-law proceedings was restored by blending them into one for all other purposes upon a final determination of the cause.

In *Murtland v. Floyd*, 153 Pa. 99, it was said that there is nothing whatever in the act sanctioning such a severance in the proceedings as the entry of a judgment against one only of two or more defendants equally in default.

In *Finch v. Lamberton* (1869) 62 Pa. 370, it was held that as a general rule, in joint actions, taking a "final" judgment by plaintiff against one defendant bars further proceedings in the same suit against the other. But where the judgment was by default and the prothonotary liquidates the sum without waiting for the trial and assessment for damages against the other, the liquidation being the act of the officer is amendable by striking it out.

In *Noble v. Laley*, 50 Pa. 281, where there was a joint action against three, and two confessed judgment before the trial of the action, it was said that when judgment by default goes against some of the defendants and the issue is tried as to others, there can be but one final judgment in a personal action.

In *O'Neal v. O'Neal* (1842) 4 Watts & S. 130, it was said that it was shown in *Williams v. McFall*, 2 Serg. & R. 260, that there cannot be two final judgments in debt (for the reason that as the contract is entire each of the defendants is entitled to the benefit of his codefendant's plea, and the plaintiff must proceed against all or none; to which may be added that there can be but one final judgment in any personal action).

Pennsylvania act April 11, 1848, Pub. Laws, 536, § 5, provides that "where a judgment shall be hereafter recovered against one or more of several copartners, joint or joint and several obligors, promisors, or contractors, without any plea in abatement, that all the parties to the instrument or contract on which the suit is founded are not made parties thereto, such judgment shall not be a bar to a recovery in any subsequent suit or suits against any person or persons who might have been joined in the action in which such judgment was obtained, whether the same shall be obtained amicably, or by adversary process.

Pennsylvania act April 4, 1877, Pub. Laws, 52, § 1, provides that "where judgment has been or may hereafter be obtained in any court of record of this commonwealth against one or more of several codefendants, in default of ap-

pearance, plea, or affidavit of defense, said judgment shall not be a bar to recovery in the same suit against the other defendants jointly and severally liable as co-obligors, copartners, or otherwise."

That an affidavit of defense by a co-obligor was filed and overruled was not sufficient to take the cause out of the act of 1877, and was not a bar. The court said: "The phrase, however, 'in default of appearance, plea, or affidavit of defense,' means, of course, in default of an appearance, plea, or affidavit sufficient in law." *Bean v. Seyfert* (1877) 12 Phila. 224.

South Carolina.

In this state it is held that a judgment on a joint contract against a joint obligor is not a bar to an action against the other. Following *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. ed. 215.

A judgment on an individual note of an ostensible partner is not a bar to an action on the original debt against all the partners. *Watson v. Owens*, 1 Rich. L. 111.

So, in an action on a joint bond a plea by one defendant of a former recovery on the same bond against his codefendant is no bar, as the bond was not merged in the judgment. *Collins v. Lemasters*, 1 Ball. L. 348, 21 Am. Dec. 469.

So in regard to a partnership debt. *Union Bank v. Hodges*, 11 Rich. L. 480.

In this case it was said that it may be conceded that the plea would have been held good in England, Massachusetts, and perhaps other states; but that in this state the decisions have been uniform that on a joint contract a plea by one defendant of a former recovery against his codefendant without satisfaction is no bar.

A former recovery against a sheriff alone without satisfaction is no bar to a subsequent joint action on his bond against himself and his sureties for the same default. *Treasurers of the State v. Bates*, 2 Ball. L. 362.

In this case the court said it is well settled that if one joint contractor is sued separately and a recovery had, and he is afterwards sued jointly with the others, he alone against whom the recovery was had can plead it in bar, and that the others have no right to make the objection if he does not choose to rely on it. The court further said that as to him it would not be a good plea in bar because a judgment against one joint contractor is a nullity.

A judgment against one of the makers of a joint and several note is not a bar to an action against the other maker who is severally liable unless the judgment be paid. *Day v. Hill*, 2 Speers, L. 628, 42 Am. Dec. 300.

But in *Philson v. Bampfield*, 1 Brev. 202, it was held that an action at law cannot be maintained upon a firm note against the estate of a deceased copartner after a judgment on such note against the surviving partner. The court said that the debt was merged in the judgment, and the estate is to be reached by proceedings in equity if the surviving partner is insolvent.

Tennessee.

By an early statute in 1789 and by Tenn. Code 1871, § 2789 (Act 1789, chap. 57, § 5), all joint obligations are made joint and several, and therefore a judgment against one obligor is not a bar to a subsequent action against the other. The Code makes several provisions governing the prosecution of part of the obligors on a contract, but it seems that the plaintiff cannot drop the prosecution of a suit against one obligor without an entry of discontinuance, and proceed as to the others.

In *SULLY V. CAMPBELL & POWDER*, it was held that an obligor on a joint note, which in that state was made joint and several by statute,

was liable for the unpaid balance, although a judgment had been taken against the obligor and was partly satisfied. This is in accord with the general rule.

Under this act a judgment against one partner is no bar to a suit against another member on the firm debt. *Nichols v. Cheairs*, 4 Sneed, 229.

So, a judgment against one obligor on a joint and several contract is no bar to a suit against another obligor. *Christian v. Hoover*, 6 Yerg. 605.

And in *Hawkins v. Humble*, 5 Coldw. 531, the same was said to be the rule as to joint obligations under the Code.

A judgment in favor of a sheriff not on the merits on a motion against him for default of his deputy is no bar to a proceeding against a deputy. The court said that where several are jointly or jointly and severally liable, a recovery against one does not prevent a suit against the other, and nothing short of satisfaction will constitute a bar to a subsequent suit against one so jointly liable. *Witcher v. Oldham*, 4 Sneed, 220.

In *Greer v. Miller*, 2 Overt. 187, *Tipton v. Harris*, Peck (Tenn.) 414, and *Hutchins v. Sims*, 7 Humph. 236, it was held that where an action was commenced against several joint defendants it could not be dropped as to some and proceeded in as to others; that there must be a dismissal as to others not proceeded against or a judgment by default taken, and then the writ of inquiry must be executed by the same jury which tries the issue as to those who plead.

Judge Cooper in his note to the case in Peck doubts the principle of these cases, and cites Code, §§ 2789-90.

In *Hutchins v. Sims*, 7 Humph. 236, it was said that Tenn. act 1820, chap. 25, § 2, and 1835, chap. 86, provide that in joint actions upon contracts a discharge of one or more jointly sued shall not prevent a judgment against him or them who may be liable, and that where suit may be commenced against more than one the plaintiff may enter a *nolle prosequi* as to any one or more and proceed against the others. In this case the court said that there was no *nolle* entered, and the statutory mode of escape from the principles of the common law were not resorted to.

In *Greer v. Miller*, 2 Overt. 187, the court said that under North Carolina act 1789, in force in Tennessee, all assumpsits and obligations were made joint and several, and the plaintiff had his election to commence his suit against one or both of the parties; but that, having sued both and charged them with a joint contract, he was bound to prosecute his suit afterwards against both, and having voluntarily lost sight of one of the defendants, and left the cause as to him undecided or discontinued, the judgment was properly arrested as to the other.

In *Pollard v. Huston*, 7 Lea. 689, it was said that the plaintiff could dismiss his action whether on a contract as to any one or more of the defendants, and at any stage of the case, without prejudice to his right to proceed against the others, under Tenn. Code, § 2790, providing that in all actions on contracts a dismissal of suit as to one or more of those jointly sued or failure to recover as to one, shall not prevent a recovery against those defendants who may be liable, and § 2964, providing that the plaintiff may take a nonsuit or dismiss his action as to any one or more defendants, and § 4246, providing that the plaintiff may at any time during the pendency of the action dismiss as to any one or more of the defendants and proceed against the others.

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So, under Tenn. Code, §§ 2789-90, *supra*, in an action against a sheriff and the sureties on his official bond, the dismissal of the suit by the plaintiff as to one of the sureties did not affect his right to proceed against the other sureties. *Garrison v. Hollins*, 2 Lea. 684.

A surety on a judgment against two partners was entitled to maintain an action against a third partner to recover the amount paid by him. *Lowry v. Hardwick*, 4 Humph. 188.

In this case the court held that there was no merger, and that Tenn. act of assembly permitting a party to sue any one or more joint obligors or partners, does not make such suit a bar to a suit which may be subsequently brought against the remaining partner or joint obligor.

But a judgment in favor of a principal discharging him is a bar to a subsequent suit against a surety, this being regarded as an exception to the general rule of *res inter alios acta*. *Gill v. Morris*, 11 Heisk. 614, 27 Am. Rep. 744.

Texas.

The statute changes the common-law rule so that a judgment against part on a joint obligation is not a bar to a subsequent action against others. A discontinuance as to part of the defendants is not a bar to a further prosecution of the suit against others.

Sureties on a bond are not released by a judgment taken against the principal where they were not parties to that suit. *Wooters v. Smith*, 56 Tex. 198.

In this case it was said that at common law a judgment against one of several joint contractors merges the contract, but that Tex. Rev. Stat. § 1256, provides that a discontinuance as to parties not served shall not be a bar to a subsequent suit against them. It is held that the sureties do not stand in a more favorable attitude than they would if the suit had been directly upon the bond and they had not been served.

In *Hinchman v. Riggins*, 1 Tex. App. Civ. Cas. (White & W.) § 294, it was said that Tex. Rev. Stat. art. 1207 (act May 13, 1846, June 22, 1846, §§ 4, 45, 46, act January 25, 1840, March 16, 1840), providing that any principal obligor in any contract shall be sued either alone or jointly with any other party thereon, changes the common-law rule, and it is no longer necessary to join as defendants all joint obligors in a suit upon a joint contract. The court further said this is the first case in which this statute has been construed.

A discontinuance as to some defendants not served will not prevent proceedings against the defendants served, under Sayles's Tex. Civ. Stat. art. 1256 (Hart's Tex. Dig. art. 704, act 1846, p. 374, § 45), providing that where some of the defendants are not served the plaintiff may discontinue as to them and proceed against the others, or may continue the suit to the next term and take out new process, and no defendants against whom any suit may be discontinued shall be exonerated, but may at any time be proceeded against as if no suit had been brought. *Burleson v. Henderson*, 4 Tex. 49; *Forbes v. Davis*, 18 Tex. 268; *Wooters v. Smith*, 56 Tex. 198.

But in *Whiting v. Turley* (1842) *Dallam*, Dec. 453, where two were sued upon an assumed joint liability, and judgment was had as to one, the discontinuance after verdict as to the other was a discontinuance of the entire action.

This was prior to the statute changing the rule in such cases.

And where one of several defendants against whom a judgment had been rendered on an obligation that was joint, appealed and reversed

the case, the reversal operated as to both defendants. *Wood v. Smith*, 11 Tex. 367.

Vermont.

A judgment against one of two obligors on a joint and several note extinguishes his liability, but is not a bar to a subsequent suit against the other obligor. *Sawyer v. White*, 19 Vt. 40.

But where an action was brought against one of the makers of a joint and several note, and the defense of payment prevailed, such defense is a discharge for the other maker and a bar to a suit against him, though not a party of record to the former adjudication. *Spencer v. Dearth*, 43 Vt. 98.

Virginia.

In early cases it was held that in a joint action against several parties plaintiff could not take a judgment by default against one and at another time a judgment on the merits as to another, or discontinue as to one and take a judgment as to another, and it was also held that there could be but one judgment in a joint action. To meet these decisions Va. Code, chap. 177, § 19, was passed and still further amended by the present Code, § 3396, which prevents a discontinuance as to any defendants being a bar to a subsequent suit, or a subsequent judgment in the same action. Notwithstanding this, where both defendants are sued in a joint action on a joint contract, the plaintiff cannot dismiss as to one and prosecute the other unless the defense to the first is for personal matters. It seems that, notwithstanding the Code, if a plaintiff brought an action against one joint obligor and took a judgment against him without reference to other joint obligors, or without following the Code provisions, such judgment would be a bar to a subsequent action against another obligor.

The early cases which held that in a joint action against several but one final judgment could be entered, were as follows: *Jenkins v. Hurt*, 2 Rand. (Va.) 446; *Taylor v. Beck*, 3 Rand. (Va.) 316; *Peasley v. Boatwright*, 2 Leigh, 196; *Early v. Clarkson*, 7 Leigh, 83; *Baber v. Cook*, 11 Leigh, 606; *Stephoe v. Read*, 19 Gratt. 1.

The same was also held in *Gibson v. Beveridge*, 90 Va. 696, where it was said that the common-law rule applicable in these cases had been changed by Va. Code 1898, § 3395 (same as Va. Code, chap. 177, § 19), providing that in an action on contract against two or more, the plaintiff may be barred as to one, yet he may have judgment against others. But the court held that this provision did not apply where the plea was joint and the plaintiff dismissed as to one in the absence of any showing that the defense as to the first was merely personal.

A judgment on a joint bond as to one in an action against two merges the debt and bars a subsequent action against both. *Beasley v. Sims*, 81 Va. 644.

And the same was said to be the rule in *Corbin v. Planters' Nat. Bank*, 87 Va. 661.

In *Beasley v. Sims*, 81 Va. 644, the court said that under Va. Code, chap. 167, § 50 (Code 1849, chap. 177, § 49), providing for a judgment against one defendant served with process and a discontinuance or subsequent service of process and judgment against the other defendant at the election of the plaintiff, the proceedings are required to be in that suit. The court further said that (Code 1860, chap. 177) chap. 173, § 19, providing for judgments against one defendant although the plaintiff may be barred as to another, meant that in a joint action against several of the contractors when all have been served with process, and where chap. 167, § 50, is inapplicable, the plaintiff must recover against all or none as at common law, unless 43 L. R. A.

some are discharged on a merely personal defense.

But in some cases under Va. Code, chap. 177, § 19 (Code 1898, § 3395), several judgments were entered in joint actions where the first judgments or discontinuances were said to be on personal defenses. *Moffett v. Bickle*, 21 Gratt. 280; *Bush v. Campbell*, 26 Gratt. 403; *Muse v. Farmers' Bank*, 27 Gratt. 252.

And in *Pitts v. Spotts*, 86 Va. 71, a joint action against partners and a confession of judgment by one was held not to affect a subsequent judgment against the other. But the Code and previous cases were not cited in this case.

A judgment on motion against one of two obligors on their joint bond did not merge the cause of action in the judgment, under Va. Code, § 3212, providing for judgments on motions on a joint obligation, and declaring in effect that there shall be no merger of the original cause of action until there has been a judgment against every person liable. *Cahoon v. McCulloch*, 92 Va. 177.

And a judgment against one on a joint and several contract is not a bar to a subsequent action against another. *Corbin v. Planters' Nat. Bank*, 87 Va. 661.

In this case it was said that the rule announced in *Beasley v. Sims*, 81 Va. 644, was changed by the present Code, § 3396, providing that where in an action against two or more defendants the process is served on part of them, the plaintiff may proceed to judgment as to any so served, and either discontinue as to others, or, as process is served, proceed to judgment as to them, and that such discontinuance as to any defendant shall not operate as a bar to any subsequent action which may be brought against him for the same cause. The court said that this discontinuance meant as to a defendant upon whom process had not been served.

West Virginia.

Under the Code plaintiff may have judgment against one although he fails as to another; but this is held to mean where he is entitled to recover against the remaining obligor on the contract sued on as contra-distinguished from recovering on the contract proved. He cannot split his judgments, but if he takes a default as to one and verdict as to another, he must take but one final judgment in the action.

West Virginia Code, chap. 181, § 19, p. 628, provides that in an action on contract against two or more defendants, although the plaintiff may be barred as to one, he may have judgment against the other of the defendants against whom he would have been entitled to recover had he sued them only. Chapter 125, § 52, p. 607, provides that where in an action against two or more defendants the process is served upon part of them, the plaintiff may proceed to judgment as to any so served and discontinue it as to the others, or, from time to time, as the process is served as to others, proceed to judgment as to them.

Under these sections in a joint action against A and B on a joint obligation where process was served on each of them, and A confessed judgment and a separate judgment was entered as to him, a judgment found against B at a subsequent term and entered against him was erroneous. But the supreme court corrected the error by directing a joint judgment. It was held that the judgment on the cognovit action by A did not merge the cause of action so as to exonerate B. *Snyder v. Snyder*, 9 W. Va. 425.

In this case the court said that this statute did not change the original rule that in a joint action upon a joint or joint and several obligation with process served upon all, there must be a joint judgment.

Under these sections of the Code it was held that where a joint suit was brought on a joint and several obligation, and the declaration showed that the defendants might have been sued separately, and one defendant confessed judgment, a judgment taken against the others at the next term was held to be valid notwithstanding such prior judgment. *Hoffman v. Bircher*, 22 W. Va. 537.

Under these sections the plaintiff may dismiss his action against any of the parties to a suit on a joint contract, and proceed against the remainder. *Carlson v. Ruffner*, 12 W. Va. 207.

In *Choen v. Guthrie*, 15 W. Va. 100, it was said that the most natural construction of W. Va. Code, chap. 131, § 19, p. 628, is that the plaintiff, though barred or defeated in his action as to some of the defendants, may nevertheless have a judgment against those of the defendants against whom he would have been entitled to judgment had he sued them only on the "contract alleged" in the declaration. The court said the other construction is that if defeated by some of the defendants the plaintiff may recover against others against whom he would have been entitled to judgment had he sued them only on the "contract as proven" at the trial.

In *Enos v. Stansbury*, 18 W. Va. 477, the first construction of this statute was said to be correct.

Wisconsin.

The Code provisions attempt to obviate some of the provisions of the common-law rule, but notwithstanding them it was held that a judgment against one of several joint debtors is a bar to a subsequent action against the others. On a joint and several contract where judgment is taken against one defendant, proceedings by *scire facias* will not lie to make another obligor a party to the judgment, but a new action is required. In such a case a prior judgment will not be a merger.

A judgment against one of several joint debtors is a bar to a subsequent action against the others as the debt is merged in the judgment. *Lauer v. Bandow*, 48 Wis. 638.

In this case the court said that a joint debt being indivisible cannot be merged or canceled as to one and exist as to another joint debtor.

In *Bowen v. Hastings*, 47 Wis. 232, it was said that the rule of the common law is recognized by Wis. Rev. Stat. § 2884, providing that where an action is against two or more jointly liable, and the summons is not served on all, the plaintiff may have judgment against all jointly indebted to be enforced against the joint property of all the defendants, or where the defendants are severally liable the plaintiff may have judgment against the defendant served as if he were the only party proceeded against, and where all are served judgment may be taken against any of them severally if he would have been entitled to judgment if the action had been against him alone, and by § 2795, giving a remedy in such cases by a proceeding in the nature of a *scire facias* against the joint debtors not served with process, to require them to show cause why they should not be bound by the judgment. The court said that in a suit on a joint contract if only one is summoned and he should defeat the action, it would bar another action against the remaining obligor.

Under § 2884, the plaintiff in an action on a joint contract may have a judgment against one although he may fail as to the other defendant. *Smith v. Cassell*, 70 Wis. 567.

But in an action on a joint contract against five defendants where but one defendant was 43 L. R. A.

served and another one appeared, the plaintiff could not proceed against the defendant alone upon whom service was made, as a judgment upon such joint contract is an entire thing and cannot be separated into parts. The court said that Wis. Rev. Stat. § 2884, subd. 1, authorizing the plaintiff to proceed against the defendants served, did not mean that plaintiff could proceed against one where two were served, and that an action on a joint contract could not be tried in fractions. *Nichols v. Crittenden*, 74 Wis. 459.

Where service was had upon one of two "joint and several" debtors, and judgment taken against him, it was improper to prosecute proceedings against the other to make him a party to the same judgment, under Wis. Rev. Stat. 761, § 2795, giving a proceeding in the nature of *scire facias* against the "joint" debtor not served, to hold him bound by the judgment in the same manner as if he had been originally summoned. *Dill v. White*, 52 Wis. 456.

In this case the court said that where the obligation is several as well as joint it is divisible, and a judgment upon it against one debtor did not merge the several obligation of another debtor not summoned, and the plaintiff could bring another action upon it against the latter, but not under the statute.

United States.

The first case was *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. ed. 215. This was an action on a note signed in the name of A, alleged to have been made by the firm of A and B doing business under the name of A, and in another count in *assumpsit* alleging goods sold to A and B under the firm name of A. The defendant B pleaded a judgment obtained by plaintiff against A on that note as a bar, and that it was for the same debt. The supreme court held the plea bad and directed judgment on the first count of the declaration.

This decision has been much questioned, and is considered as overruled by subsequent cases in the same court. If the court had rendered this decision on the *assumpsit* count, and simply held that the first judgment was on a personal obligation of one of the joint debtors, similar to *Drake v. Mitchell*, 3 East, 251, it might have been followed.

It is now held in the Federal courts that a judgment against one joint obligor is a bar to a subsequent action against the remaining obligors for the same debt. It was also held in *United States v. Cushman*, 2 Sumn. 426, that a judgment against both obligors on a joint and several debt was no bar to a several action against one of them. But this was overruled in *United States v. Price*, 9 How. 83, 13 L. ed. 56. A judgment against one joint and several obligor is no bar to a subsequent action against another unless such judgment is satisfied.

A judgment against a postmaster on his official bond for moneys not accounted for is a bar to a subsequent action against the postmaster and his assistant for the same money, where they had been in the habit of jointly depositing the postoffice money in the bank in their joint name. *Trafton v. United States*, 3 Story, 654.

In this case *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. ed. 215, was distinguished, and also questioned.

And a judgment on a bond given by a partner in an admiralty seizure case barred a subsequent suit against the remaining partners. *United States v. Ames*, 99 U. S. 35, 25 L. ed. 295.

This case in effect overrules *Sheehy v. Mandeville*, although it does not cite it. But other cases are approved which deny the authority of the case of *Sheehy v. Mandeville*.

A judgment on a copartnership contract against one of the partners is a bar to a subsequent suit against any or all of the obligors. *Woodworth v. Spafords*, 2 McLean, 168.

This case says in regard to Chief Justice Marshall's decision in *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. ed. 215, that "it would be doing injustice to the reputation of that great jurist to assume that he intended to lay it down as a sound principle of law, that separate judgments can be recovered on a contract joint in its terms and character, except where such a course may be authorized by express legislative enactment. Such a doctrine would destroy the well-settled distinction between joint and joint and several contracts, and would, in effect, vest in courts a power to change, by construction, the contracts of parties, and give them an operation not within their contemplation or design."

In *United States v. Cushman*, 2 Sumn. 426, it was held that where a contract was joint and several a judgment against both the obligors was no bar to a several action against each of them. It was said that a several judgment against each was no bar to a joint action against both.

But this case was overruled in *United States v. Price*, 9 How. 83, 13 L. ed. 56, in which it was said that on a joint and several bond the obligee may elect to sue them jointly or severally, but having once made his election and obtained a joint judgment his bond is merged in the judgment. "One judgment against all or each of the obligors is a satisfaction and extinguishment of the bond."

And the same was said to be the rule in *Sessions v. Johnson*, 95 U. S. 347, 24 L. ed. 596.

In *Brooklyn City & N. R. Co. v. National Bank of the Republic*, 102 U. S. 14, 26 L. ed. 61, it was held that the liability of the maker and indorser of a note was not joint but several, and therefore a judgment in an action against the indorser upon the contract of indorsement could not bar a separate judgment against the maker, especially where the maker was not notified by the indorsers of the pendency of the action against them.

In *Sessions v. Johnson*, 95 U. S. 347, 24 L. ed. 596, *Mason v. Eldred*, 6 Wall. 231, 18 L. ed. 783, and *Willings v. Consequa*, Pet. C. C. 301, it was said that a judgment against one of two joint contractors is a bar to an action against the other.

In *Mason v. Eldred*, 6 Wall. 231, 18 L. ed. 783, the court said that the decision in *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. ed. 215, has never received the entire approbation of the profession, and its correctness and authority have been doubted in numerous instances by the highest tribunals of the different states, and have been denied in *Robertson v. Smith*, 18 Johns. 459, 9 Am. Dec. 227; *Ward v. Johnson*, 13 Mass. 148; *Wann v. McNulty*, 7 Ill. 359, 43 Am. Dec. 53; *Smith v. Black*, 9 Serg. & R. 142, 11 Am. Dec. 686; *King v. Hoare*, 13 Mees. & W. 495, 8 Jur. 1127, 2 Dowl. & L. 382, 14 L. J. Exch. N. S. 29; and *Trafton v. United States*, 3 Story, 651.

But in *Mason v. Eldred*, 6 Wall. 231, 18 L. ed. 783, it was held that where only one was served with process, and judgment had passed against all, it was not a bar to a suit against the defendant not served in the former action, under *Milch. Comp. Laws*, vol. 2, chap. 183, p. 1219, providing that in actions against two or more jointly indebted upon any joint contract, if the process against all shall have been duly served on either the judgment shall be against all the defendants as if they had all been served, and shall be conclusive as to those served, but against every other defendant it shall be evi-

dence only of the extent of the plaintiff's demand after the liability of such defendant shall have been established by other evidence. *English and Canadian Cases*.

An action and judgment against one joint contractor is a bar to a further action upon the same contract against the remaining cocontractor, but where the prior judgment is upon a bill of exchange or check given by one of the joint obligors, a judgment thereon is not a bar to a subsequent suit on the original obligation against the other. So, where the original action is joint and several a judgment as to one without satisfaction is not a bar to a subsequent suit against another obligor.

Joint contracts.

A judgment against one cocontractor on a joint simple contract is a bar to an action against the other cocontractor. *King v. Hoare*, 13 Mees. & W. 494, 8 Jur. 1127, 2 Dowl. & L. 382, 14 L. J. Exch. N. S. 29.

This is the leading case in England on this question, denying the authority of *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. ed. 215, and approving *Robertson v. Smith*, 18 Johns. 459, 9 Am. Dec. 227.

The same was held in *Harris v. Dunn*, 18 U. C. Q. B. 352, where P pleaded a former recovery against A, and filed an affidavit showing that A was a resident of the province. This was held a good plea under common-law procedure act 1856, § 73, providing that in an action against a joint contractor the action shall not abate or account of any other joint contractor not being made defendant, unless the party pleading such nonjoinder shall file an affidavit showing that such defendant is living in Upper Canada and state his residence. To meet this plea the plaintiff alleged that B was a nonresident of Upper Canada at the time of the judgment against A. But the court held that this would not justify a second suit, and that the statute was only to enable one joint contractor to be sued.

And a judgment on a joint partnership debt against one member of the firm is a bar to subsequent proceedings against both. *Ex parte Higgins*, 3 DeG. & J. 33, 27 L. J. Bankr. N. S. 27, 4 Jur. N. S. 595.

And a judgment against two persons for borrowed money is a bar to another action by the same plaintiff against a third person who was afterwards discovered to have been a partner and interested in the business for which the money had been borrowed. *Kendall v. Hamilton*, L. R. 4 App. Cas. 504, 48 L. J. C. P. N. S. 705, 41 L. T. N. S. 418, 28 Week. Rep. 97.

In this case the Lord Chancellor said the first judgment was obtained before the judicature act came into operation, and if this judgment became pleadable in bar, he could not see how this defense is taken away from him by the judicature act subsequently coming into operation. Lord Penzance, dissenting, said that the judicature act, 36 & 37 Vict. chap. 66, rule 9, providing that "the court or a judge may, on such terms as appear to be just, order that the name of any party who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, shall be added," altered the rights of joint contractors in respect of procedure, and a joint contractor having lost his right to be sued only in conjunction with his cocontractor can no longer be heard to maintain that his cocontractor must be sued with him, or that, it being impossible so to sue him by reason of his having been sued already, he is himself discharged. He further said the effect of that act was to sweep away the legal right of a joint contractor to have the

other contractor joined, and the creditor became entitled to sue the parties severally.

In *King v. Hoare*, 13 Mees. & W. 494, 8 Jur. 1127, 2 Dowl. & L. 382, 14 L. J. Exch. N. S. 29, it was said that "in the case of *Lechmere v. Fletcher*, 1 Car. & M. 634, 8 Tyrw. 450, Bayley, B., strongly intimates the opinion of the court of exchequer, that the judgment against one was a bar for both of two joint debtors, though the point was not actually ruled as the case did not require it."

In *Sloan v. Cressor*, 22 U. C. Q. B. 127, it was held that a judgment against a bailiff for a tort was a bar to a subsequent action of covenant against the bailiff and his sureties on the bailiff's official bond.

But a judgment recovered by one of several joint debtors cannot be pleaded as a defense to a subsequent action against the other joint debtor in respect to the same cause of action, where the plea does not show that the judgment was recovered on a ground which operated as a discharge for all. *Phillips v. Ward*, 2 Hurlst. & C. 717, 88 L. J. Exch. N. S. 7, 9 Jur. N. S. 1182, 9 L. T. N. S. 345, 12 Week. Rep. 106.

In this case *Bramwell, B.*, said that this plea does not show that the former action was successfully resisted on some ground common to all the joint debtors, but only that the court gave judgment for the defendant which may have been on some ground purely personal, as infancy, bankruptcy or insolvency.

Where prior judgment is had on a separate contract.

A judgment on a bill of exchange given by one of three joint covenantors to a lease, is not a bar to an action of covenant against the three, where it is not shown that such bill of exchange as accepted in, or had produced satisfaction. *Drake v. Mitchell*, 3 East, 251.

This case was distinguished in *Cambeport v. Chapman*, L. R. 19 Q. B. Div. 229 (overruled in *Wegg Prosser v. Evans* [1895] 1 Q. B. 108, 64 L. J. Q. B. N. S. 1), on the ground that there the covenant was a security of a higher nature and a bill of exchange, and also that the bill in that case was a collateral security and was not given for the same liability or debt as was secured by the covenant.

Where one of two joint obligors on a note had given a warrant of attorney to a party as trustee for the obligee to secure the amount of the note, and a further advance, and a judgment was entered thereon, it was held that this did not merge the note or discharge the other obligor. *Bell v. Banks*, 3 Mann. & G. 267, 3 Scott, N. R. 497.

And in *Wegg Prosser v. Evans* [1895] 1 Q. B. 108, 64 L. J. Q. B. N. S. 1, it was held that an unsatisfied judgment against one joint contractor on a check given by him alone for a joint debt is not a bar to an action against the other joint contractor on the original contract. Following *Drake v. Mitchell*, 3 East, 251, Overruling *Cambeport v. Chapman*, L. R. 19 Q. B. Div. 229.

The case of *Cambeport v. Chapman*, L. R. 19 Q. B. Div. 229, held that an unsatisfied judgment against one partner on a bill of exchange given by him alone for a joint debt was a bar to an action against the other partner on the original contract.

Joint and several contractors.

In *Whiteacres v. Hamkinson*, Cro. Car. 75, it was held that on a joint and several bond an execution and ca. sa. against one of the obligors who was released by the sheriff was no bar to a suit against the other.

In *Blumfield's Case*, 5 Coke, 86b, it was held that where two were bound jointly and severally and one was sued and taken in execution and 43 L. R. A.

afterwards the other, and the first escapes, the second cannot have *audita querela* until the plaintiff is satisfied.

And a judgment against one of the makers of a joint and several note on a cognovit and a partial levy is not a discharge of the other. *Ayrey v. Davenport*, 2 Bos. & P. N. R. 474.

And the holder of a bill of exchange may sue a prior indorser notwithstanding he has imperfectly taken in execution the body of a subsequent indorser and afterwards set him at liberty, as each indorser is independent of the rest. *Hayling v. Mullhall*, 2 W. Bl. 1235.

In *Claxton v. Swift*, 1 Lutw. 362, Reversing 3 Mod. 86, 2 Show. 494, it was held that if the indorsee of a bill on default of payment by the acceptor recovers against one drawer but does not take out execution, this recovery is not a bar to a second action on the same bill by the same indorsee against the first indorser, as the liability is joint and several.

In *Brown v. Wootton*, Cro. Jac. 73, Yelv. 67, it was said that upon an obligation against two, every one of them is chargeable and liable to the entire debt, and therefore a recovery against the one is no bar against the other until satisfaction. Speaking of this, *Parke, B.*, says in *King v. Hoare*, 13 Mees. & W. 494, 2 Dowl. & L. 382, 14 L. J. Exch. N. S. 29, 8 Jur. 1127, that by looking at the report in *Yelverton* it seems to refer to the case of a joint and several obligation against two.

In Yelv. 68a, it was said: "With regard to co-obligors, the earliest authorities show that a judgment and writ of execution sued forth is not a bar without satisfaction." That "in 4 Hen. VII. 8, and 45 Edw. III. 4, it was held that taking the body of one co-obligor in execution was no satisfaction, and that the plaintiff might implead the other and commit him also. *Brooke's New Cases*, III. 112. And so is the law at this day. *Bacon, Abr. Obligations*, D. 4. In 2 Show. 394, *Dyke v. Mercer*, it was decided that the seizure and sale by the sheriff on a fieri facias, of the goods of one joint and several obligor, was no bar to an action against the other—that there was no satisfaction, unless the plaintiff had received the money. See also *Cro. Car. 75, Whiteacres v. Hamkinson*."

This evidently was only intended to state the rule in suits on joint and several obligations.

In *King v. Hoare*, 13 Mees. & W. 494, 8 Jur. 1127, 2 Dowl. & L. 382, 14 L. J. Exch. N. S. 29, it was said that where a debt was joint and several, a judgment against one of the obligors was not a bar to an action against the other.

In *Higgins's Case*, 6 Coke, 44b, it was said "and as to the case which has been objected, that where two are bound jointly and severally and the obligee has judgment against one of them that yet he may sue the other, it was well agreed."

In *Dyke v. Mercer*, 2 Show. 394, where two were bound in a bond, and one defendant was sued, and he pleaded that his co-obligor was sued to judgment and thereupon a *fi. fa.* and that the money was levied by the sheriff, judgment was given for the plaintiff, that the plea was naught on the ground that the co-obligor could plead nothing but satisfaction actually made.

The cases cited in the decision indicate that this was a joint and several obligation.

Cases regarding "right to take a judgment against one party" in a joint action are not intended to be included in this note, except so far as they indicate that such a judgment would prevent a further judgment against other parties.

I. T.

Lettie WEEKS, Appt.,
v.
Frank McNULTY et al.
(.....Tenn.....)

1. Excluding answers to pertinent questions is not ground for reversal unless the record affirmatively shows that the answers would have been competent and material.
2. Failure to construct fire escapes on a hotel as required by an ordinance does not make the proprietor liable for the death of a guest by fire, unless that was caused by the lack of the fire escapes.
3. Want of fire escapes is not shown to be the cause of the death of a guest in a hotel by fire, where it is not shown that he was at a window or in any position where a fire escape would have afforded him any benefit, but there is evidence that he had locked himself in his room and tried to break the door to make his escape, and also that he could have safely escaped by leaping from the window to the roof of an adjoining building.
4. Putting in evidence a portion of the cross-examination of a party in a prior case to show his admission will entitle him to have all his evidence read so far as it bears upon or explains the admission.
5. The failure of a party to offer himself as a witness does not justify any prejudicial inferences against him, unless it is shown that there were facts peculiarly within his knowledge which were not known so fully to any other witness.

(November 12, 1898.)

APPEAL by plaintiff from a judgment of the Circuit Court for Knox County in favor of defendants in an action brought to recover damages for death of plaintiff's husband which was alleged to have occurred while he was a guest in defendants' hotel by their negligence in permitting the hotel to burn without taking precautions to extinguish the flame or to get the guests out. *Affirmed.*

The facts are stated in the opinion.

Messrs. Jerome Templeton and Charles T. Cates, Jr., for appellant:

The verdict of the jury is not supported by any material reliable testimony.

Young v. Cowden, 98 Tenn. 581.

The duty to place fire escapes on hotels by the owners thereof, under the first section of the ordinance, was absolute and mandatory.

It was intended for the benefit of the public and individuals using and occupying the building coming within description of the ordinance.

Hayes v. Michigan C. R. Co. 111 U. S. 228, 25 L. ed. 410; *Rose v. King*, 49 Ohio St. 213, 15 L. R. A. 160; *McLaughlin v. Armfield*, 58 Hun, 376; *Willy v. Mulledy*, 78 N. Y. 314, 34 Am. Rep. 536.

For a violation of this ordinance a right of action would lie at the instance of the injured party.

Bott v. Pratt, 33 Minn. 323, 53 Am. Rep. 47; *Osborne v. McMasters*, 40 Minn. 103; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354.

The principal matters of controversy on questions of fact were as to (1) the dangerous condition of the premises; (2) the elevator shaft and the manner of its opening into the second and third floors; (3) the character and habits of John Davis, the watchman in charge of the hotel from 11 o'clock, P. M., to 4 o'clock, A. M.—during which period plaintiff's husband lost his life.

All of these points touched matters coming within the personal knowledge of defendant McNulty, or should have been within his knowledge, and the testimony of plaintiff's witnesses on said points was prejudicial to said defendant and favorable to the contention of plaintiff.

Defendant McNulty failed to go on the stand and deny such statements. Under these circumstances the presumption afforded by law was that the contention of plaintiff was true—otherwise the same would have been denied by defendant.

Dunlap v. Haynes, 4 Heisk. 476.

The liability of hotel keepers is more severe than that of any other bailees, except a common carrier.

11 Am. & Eng. Enc. Law, p. 51; *McDaniels v. Robinson*, 26 Vt. 310, 62 Am. Dec. 574; *Curtis v. Murphy*, 63 Wis. 4, 53 Am. Rep. 242.

It is very nearly absolute.

Myers v. Cottrill, 5 Biss. 465.

Of the goods of a guest he is an insurer, except as to losses by the act of God, or the public enemy.

Manning v. Wells, 9 Humph. 746, 51 Am. Dec. 688; *Hale, Bailment*, 277.

For the guest's horse he is bound to provide safe stabling.

Dickerson v. Rogers, 4 Humph. 179, 40 Am. Dec. 642.

As to the personal safety of the guest he is bound to use ordinary care to put and keep his premises in a reasonably safe condition for persons who become his guests, and to take such precautions for the safety of his guest while in the hotel as would ordinarily be taken by a prudent and careful man under like circumstances. And this ordinary care is proportionate to the danger, and whenever the circumstances require great care, it is but ordinary care under the circumstances.

16 Am. & Eng. Enc. Law, p. 401, and note; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783.

He is liable for exposing his guest to an infectious disease.

Gilbert v. Hoffman, 66 Iowa, 205, 55 Am. Rep. 263. See *Sandys v. Florence*, 47 L. J. C. P. N. S. 593; *Rommel v. Schambacher*, 120 Pa. 579.

A man cannot claim that he is not negligent because others ordinarily or commonly do the same thing.

NOTE.—For duty as to fire escapes, see note to *Rose v. King* (Ohio) 15 L. R. A. 160; also *Panley v. Steam Gauge & Lantern Co.* (N. Y.) 43 L. R. A.

15 L. R. A. 194; *Schmalzried v. White* (Tenn.) 32 L. R. A. 782; and *Huda v. American Glucose Co.* (N. Y.) 40 L. R. A. 411.

Hamilton v. Des Moines Valley R. Co. 36 Iowa, 31; *Koester v. Ottumwa*, 34 Iowa, 41; *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 313.

Messrs. Washburn, Pickle, & Turner, for appellees:

The innkeeper is bound for the exercise of only ordinary care for the protection of his guests, though some of the cases hold a stricter rule as to the property of guests, and make the innkeeper an insurer thereof. This strict liability, however, as to property, does not apply to boarders.

11 Am. & Eng. Enc. Law, p. 32.

The negligence of the innkeeper must be shown to have been the proximate cause of the injury to his guest.

Deming v. Merchants' Cotton-press & S. Co. 90 Tenn. 353, 13 L. R. A. 518; *East Tennessee, V. & G. R. Co. v. Kelly*, 91 Tenn. 699, 17 L. R. A. 691; *Postal Tel. & Cable Co. v. Zoppi*, 93 Tenn. 374.

That a fire occurred and an injury resulted affords no presumption of negligence against the innkeeper.

East Tennessee, V. & G. R. Co. v. Stewart, 13 Lea, 432; *Young v. Bransford*, 12 Lea, 232; *Sommers v. Mississippi & T. R. Co.* 7 Lea, 201; *East Tennessee, V. & G. R. Co. v. Kelly*, 91 Tenn. 699, 17 L. R. A. 691; *Deming v. Merchants' Cotton-press & S. Co.* 90 Tenn. 307, 13 L. R. A. 518; 2 Thomp. Neg. p. 1227; *Cutler v. Bonney*, 30 Mich. 259, 18 Am. Rep. 127.

Even where the innkeeper has been guilty of negligence, the guest's action may be defeated by his own fault or negligence, immediately causing his damage.

It is an open question as to whether failure to provide the hotel with fire escapes is negligence *per se*.

Schmalzried v. White, 97 Tenn. 36, 32 L. R. A. 782.

The failure to comply with an absolute requirement of an ordinance as to putting up fire escapes does not render the delinquent party liable to civil action for damages resulting from such neglect, especially where the ordinance provides a penalty, and does not provide on its face for the civil liability.

For an injury resulting from an act done in violation of a prohibitory statute, a civil action lies.

Queen v. Dayton Coal & I. Co. 95 Tenn. 458, 30 L. R. A. 82.

But for injury resulting from an act done in violation of an ordinance, the same rule does not prevail.

Philadelphia & R. R. Co. v. Erwin, 89 Pa. 71, 33 Am. Rep. 726; *Flynn v. Canton Co.* 40 Md. 312, 17 Am. Rep. 603; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532.

The whole statement containing the admission must be taken together, whether the admission is verbal or written.

Wood, Practice Ev. § 160.

The custom or usage of a particular trade and business, but not of a particular individual, is the true meaning of ordinary care in the conduct of that trade or business.

Kelton v. Taylor, 11 Lea, 264, 47 Am. Rep. 43 L. R. A.

284; *Lancaster Mills v. Merchants' Cotton-press & S. Co.* 89 Tenn. 2; *Standard Oil Co. v. Swan*, 89 Tenn. 434, 10 L. R. A. 366.

Messrs. Mynott, Fowler, & Mynott also for appellees.

McAlister, J., delivered the opinion of the court:

Plaintiff brings this suit to recover damages for the death of her husband, Arthur E. Weeks, which is alleged to have been occasioned by the negligence of the defendants. The grounds of liability alleged in the declaration are: First, that defendants were owners and proprietors of the Hotel Knox, a public inn in the city of Knoxville, and had negligently permitted said hotel to be in an unsafe and dangerous condition; and second, that defendants had not employed a sufficient complement of servants for the protection of the hotel and guests; and, third, that the servants employed were incompetent, whereby said hotel was on April 9, 1897, destroyed by fire, and plaintiff's intestate, Arthur E. Weeks, who was a guest therein, lost his life. The more specific grounds of negligence are stated in the second count of the declaration, viz.: That defendants had failed to provide fire escapes, as ordered by an ordinance of the city of Knoxville, or other reasonable means of escape from said building; that defendants failed to arouse deceased, or give him proper warning of said fire, and that this failure was due to defendant's omission in not employing a responsible watchman. It is further alleged that the fire was caused, and said hotel destroyed by the negligence of defendants in allowing the cellar of the storehouse, which was situated next door to said hotel, to be filled with inflammable material. Defendants pleaded not guilty. The case was tried by a special jury, to whom a large volume of testimony was submitted. The trial resulted in a verdict and judgment for defendants. Plaintiff appealed, and has assigned errors.

The facts necessary to be stated are that the defendant Frank McNulty was the owner and proprietor of a public inn in the city of Knoxville, known as "Hotel Knox." Plaintiff's intestate, Arthur Weeks, was a traveling man, representing the Rochester Stamping Works and the Robinson Cutlery Company, of Rochester, N. Y. On the evening of April 7, 1897, said Weeks reached the city of Knoxville, registered at the Hotel Knox, and was assigned to room 49 on the third floor. About 3 o'clock in the morning following, Hotel Knox was destroyed by fire, and said Weeks perished in the flames. The fire was first discovered by the night watchman of the hotel, who immediately gave the alarm, ascended the stairway leading to the second and third floors, knocked upon the doors, and made every effort to arouse the guests. It is in proof that the guests were all aroused and escaped, excepting deceased and one other. It is in evidence that one of the guests, as he passed out, heard someone in 49 pounding at the door, and noticed that he had kicked out one of the panels. If this evidence is to be credited, it tends to show that deceased heard the alarm, but had un-

fortunately fastened himself in, or, in the excitement, had lost all command of his faculties. It is also shown that parties occupying rooms on the same floor with deceased, immediately contiguous, and across the hall in opposite and diagonal directions, all received the alarm, and succeeded in making their escape. The building was provided with a front and rear stairway, but had no fire escapes. South of the Hotel Knox, and immediately adjoining, was the banking house of the Third National Bank, which being only one story in height, several of the guests leaped upon its roof from the burning hotel building. This mode of escape was accessible to deceased, since his window overlooked the roof, but it is not shown he had knowledge of it.

The general rule of law governing the liability of an innkeeper is that he is not an insurer of the person of his guest against injury, but his obligation is merely to exercise reasonable care, that his guest may not be injured by anything happening through the innkeeper's negligence. 11 Am. & Eng. Enc. Law, p. 32. "There is no natural presumption," said this court, "that a fire, the origin of which is unknown, was the result of the want of care of the owner or occupant of the premises of its origin. The ancient rule of the common law, which presumed negligence in such cases, was pronounced in the reported cases to be harsh and unreasonable, and was by Stat. G Anne, chap. 31, abrogated. The courts of this country, whether regarding the statute of Anne as in force or not, have unanimously held that negligence or misconduct was the gist of the action against one upon whose premises a fire had originated, and that such negligence would not be presumed from mere proof of the loss by fire communicated from the premises of another." *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 659. It must be shown that the negligence of the innkeeper in this case was the proximate cause of the fire and the consequent injuries. *Deming v. Merchants' Cotton-press & S. Co.* 90 Tenn. 353, 13 L. R. A. 518; *East Tennessee, V. & G. R. Co. v. Kelly*, 91 Tenn. 699, 17 L. R. A. 691; *Postal Teleg-Cable Co. v. Zopfi*, 93 Tenn. 374. We understand these principles were substantially charged by the circuit judge, and the issues of fact have been resolved by the jury in favor of the defendants. We find material evidence in the record to sustain their findings, and, under the rule, the verdict cannot be disturbed on this assignment.

The third assignment is that the court erred in excluding testimony showing that defendant McNulty had stored in the rear of the grocery store, on the ground floor and near the elevator shaft, oils and other combustible materials. Counsel is in error in his statement of the action of the court. The grocery store, it appears, adjoins the hotel, and is situated just north of it. It was owned by McNulty, the proprietor of Hotel Knox. The object of this inquiry was to show that defendants had been guilty of negligence in storing oils and other inflammable substances on the ground floor of the grocery store near the elevator shaft. This

testimony was excepted to by defendants on the ground that no such negligence was alleged in the declaration. The negligence alleged was that defendants had permitted the hotel to be in an unsafe and dangerous condition, and that they had filled the cellar with inflammable materials, but there was no allegation of negligence in storing oils and other combustible material in the grocery store on the floor above the basement. Moreover, it seems defendants were permitted to prove that coal oil was kept in the grocery store, but when the question was asked how near the coal oil was kept to the elevator shaft, an objection was interposed by defendants' counsel, which was sustained by the court. If it be conceded that the action of the court in sustaining the objection was erroneous, it is not shown in the bill of exceptions what the witness would have answered. It has been frequently held by this court that the refusal of the trial court to permit answers to pertinent questions affords no cause for reversal unless the record shows affirmatively that the answers would have been competent and material evidence. *Western U. Teleg. Co. v. Barnes*, 95 Tenn. 271; *Holmark v. Molin*, 5 Coldw. 484; *State v. Turner*, 6 Baxt. 203.

The fourth assignment is that the court erred in excluding the ordinance of the city of Knoxville requiring the owners and keepers of hotels to erect fire escapes thereon. The objection offered to this testimony was that the ordinance in question contemplated that notice to erect fire escapes must be given to the owner of the property by the board of public works, and that no such notice was given to the owner and proprietor of Hotel Knox. The declaration, as already observed, alleged that defendants had failed to provide fire escapes for Hotel Knox, "as ordered by an ordinance of the city of Knoxville." The insistence of counsel for defendants is that this ordinance contains no absolute requirement for the construction of fire escapes, but only provides that the same may be required by the board of public works if in their judgment they are deemed necessary. It is further insisted that, under the ordinance, the supervision, control, and direction of everything pertaining to fire escapes, including the number, locality, strength, capacity, and mode of structure, are committed to the board of public works, and that no plans or directions were ever furnished defendants by said board. It is insisted, however, that failure to comply with even an absolute requirement of a municipal ordinance in the erection of fire escapes will not render the delinquent party liable to a civil action for damages resulting from such neglect, especially where the ordinance provides a penalty, and does not provide on its face for the civil liability. It is conceded that a civil action will lie for an act done in violation of a prohibitory state law. *Queen v. Dayton Coal & I. Co.* 95 Tenn. 458, 30 L. R. A. 82. But it is insisted that a different rule prevails, when the act done is in violation of a city ordinance. This precise question was left open and undecided by this court in *Schmalzried v.*

White, 97 Tenn. 45, 32 L. R. A. 782. It was held in *Osborne v. McMasters*, 40 Minn. 103, where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty, he is liable to those for whose benefit or protection it was imposed, for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately produced by such neglect. In *Bott v. Pratt*, 33 Minn. 323, 53 Am. Rep. 47, it was held that where a city ordinance, in pursuance of the charter, makes it unlawful to leave a team standing unfastened or unguarded in a street, anyone injured by a violation thereof may maintain an action against the wrongdoer. In *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354, it appeared that defendant had suspended a sign over a street in Boston, in violation of a public ordinance of the city. During an extraordinary gale the sign was blown down, and a bolt, part of the fastenings, was hurled against plaintiff's window, causing damage, for which action was brought. Held, that defendant was liable, notwithstanding due care was exercised in constructing and fastening the sign. The reason was that the defendant had placed and kept the sign there illegally, and this illegal act contributed to plaintiff's injury. In *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, the action was to recover damages for personal injuries alleged to have been sustained by the plaintiff, a boy eight or nine years old, who lost his arm by being run over by one of the defendant's cars. The particular negligence charged in the declaration was the omission of the railroad company to build a fence on the west line of its right of way, as required by an ordinance of the city of Chicago. The court held that an ordinance passed in pursuance of legislative authority has the force of law within the limits of the city; and although, in case of injury to persons by reason of the failure of the company to erect such fence, such default is not conclusive of liability irrespective of contributory negligence by plaintiff, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. "The duty," says Mr. Justice Matthews, "is due, not to the city as a municipal body, but to the public, considered as composed of individual persons, and each person specially injured by the breach of the obligation is entitled to his individual compensation and to an action for its recovery. 'The nature of the duty,' said Justice Cooley, in *Taylor v. Lake Shore & M. S. R. Co.* 45 Mich. 74, 40 Am. Rep. 457, 'and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit.' " We are aware there is a line of cases which holds that when the duties enjoined by ordinance are due to the municipality or to the public at large, and not as composed of individuals, the rule is different, and an action will not lie for a

breach of the ordinance. In many cases of the latter class it was held that the owners of land abutting on streets were liable to the city alone for the breach of ordinances requiring such owners to keep sidewalks clear of snow and ice and in good repair, and that they were not liable in damages to persons injured by their neglect to perform the duties enjoined by such ordinances. These cases, it is said, proceed upon the ground that it is the sole duty of the city to keep the streets in good repair and clear of snow and ice. See *Plynn v. Canton Co.* 40 Md. 312, 17 Am. Rep. 603; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532; *Philadelphia & R. R. Co. v. Ervin*, 89 Pa. 71, 33 Am. Rep. 726. An ordinance which a municipal corporation is authorized to make is as binding on all persons within the corporate limits as any statute or other law of the state, and all persons interested are bound to take notice of its existence. *Bott v. Pratt*, 33 Minn. 328, 53 Am. Rep. 47; *Heland v. Lowell*, 3 Allen, 407, 81 Am. Dec. 670; *Vandine's Case*, 6 Pick. 187, 17 Am. Dec. 351; *Gilmore v. Holt*, 4 Pick. 258; *Johnson v. Simonton*, 43 Cal. 242-249. The duty to erect fire escapes required by this ordinance is not due simply to the municipality or public at large, but was a regulation designed for the peculiar benefit and protection of individuals. It is well settled that, when a statute commands or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his benefit, or for a wrong done him contrary to its terms. *Queen v. Dayton Coal & I. Co.* 95 Tenn. 463, 30 L. R. A. 82; *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 15 L. R. A. 194; *Willy v. Mulledy*, 78 N. Y. 314, 34 Am. Rep. 536. We do not, however, decide the effect of the breach of an ordinance in fixing civil liability, nor do we adjudicate the proper construction of the ordinance offered in evidence, since neither question is necessarily involved in this case, for the following reason, namely: There is no proof in the record even tending to show that the deceased lost his life in consequence of the failure to construct fire escapes as provided by the city ordinance. The principle is recognized in all the cases that a liability cannot be predicated alone upon the breach of an ordinance, but it must affirmatively appear that the injury sustained resulted proximately from said breach. In *Queen v. Dayton Coal & I. Co.* 95 Tenn. 463, 30 L. R. A. 82, we said: "So we think the employment of the minor in violation of the provision of the statute in question was an act of negligence on the part of the defendant, and a causal connection between the employment and the injuries sustained by the boy being shown, there is liability. . . . The breach of the statute is actionable negligence whenever it is shown that the injuries were sustained in consequence of the employment." In other words, it is not enough that negligence exists, or that the ordinance was violated, unless it proximately caused the injury. *Deming v. Merchants' Cotton-press*

& S. Co. 90 Tenn. 353, 13 L. R. A. 518; *East Tennessee, V. & G. R. Co. v. Kelly*, 91 Tenn. 699, 17 L. R. A. 601; *Postal Teleg. Cable Co. v. Zopf*, 93 Tenn. 374.

After a very attentive reading of the record in this cause, we have failed to discover any causal connection between the death of plaintiff's intestate and the failure of defendants in error to erect fire escapes, as required by the ordinance. It is not shown that deceased was at a window, or in any position where a fire escape would have afforded him any benefit whatever. There is evidence tending to show that deceased had locked himself in his room, and was heard beating on his door, trying to make his escape. It is shown that one of the windows of his room overlooked the Third National Bank Building, and that deceased could, and with entire safety to himself, have escaped by leaping to the roof of that building, as many other similarly situated successfully did escape. As already stated, it is not shown that deceased knew of this avenue of escape, and we cannot perceive how he would have been benefited by fire escapes under the circumstances surrounding him. We are therefore of opinion that if the contention of counsel for plaintiff in error in respect of the proper construction of this ordinance were correct, and that its breach would constitute actionable negligence, these questions are mere abstractions in this case, since no causal connection between the violation of the ordinance and the injuries sustained by the plaintiff is shown.

The fifth assignment is that the court erred in permitting defendants to read as evidence the stenographer's report of the examination in chief of defendant John R. Northington, given on the trial of the case of H. L. Crowder against these defendants in the circuit court of Knox county. It appears that the case of Crowder against these defendants had been tried only a few days prior to this case, and on that trial John R. Northington was examined as witness. The questions at issue in the *Crowder Case* were identical with those involved in the present case. The plaintiff's counsel in the present trial read a large portion of Northington's cross-examination given on the former trial, for the purpose of showing admissions by Northington against his interest. Counsel for defendants then insisted that the statement of Northington could not be well understood unless the whole of it was read, and thereupon offered to read the remainder of his evidence. The court ruled that defendant's counsel had the right to introduce the whole of the statement, where any part of it is offered by the other side, and thereupon defendants read the whole of Northington's examination in chief, and plaintiff read the whole cross-examination, including the portion her counsel had previously read. We think, after reading the testimony of Northington, that the cross-examination read by plaintiff's counsel could not be fully understood without reading the examination in chief. Says Mr. Wood in his work on Practice Evidence (§ 160), viz.: "An important rule relating to the admissions of a party is. 43 L. R. A.

that the whole statement containing the admission must be taken together, whether the admission is verbal or written; for although some part of it may contain matter favorable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be true, yet, unless the whole is received and considered, the true meaning and import of the part which is good evidence against him cannot be ascertained." Of course, it is not admissible, under this rule, to read matters wholly disconnected and apart from the matter which constitutes the admission, but the whole admission, and anything bearing upon it and explanatory of it, is competent and relevant. Moreover, it is a conclusive answer to this assignment that plaintiff in error did not stand on the exception made, but read the whole of the cross-examination.

The seventh assignment is that the court erred in charging the jury that no prejudicial inferences could be drawn against defendants in this case from the mere fact that they did not offer themselves as witnesses and testify in this case. The general rule undoubtedly is that the failure of a party to be examined as to matters necessarily within his personal knowledge affords a presumption against him, where the proof is not clear, and the case he seeks to make could be proved by him if true. *Dunlap v. Haynes*, 4 Heisk. 476. It is shown by the witness Hacker that defendant McNulty was examined at the coroner's inquest, and stated that he did not get to the hotel until after the fire, and hence knew nothing about the matter. It is not shown there were any facts connected with the case peculiarly within his knowledge, and which were not known so fully to any other witness. The condition of the premises, including the elevator shaft, as well as the character and habits of John Davis, the colored night watchman, were fully proved by other witnesses. In respect of M. J. Ross's testimony, this witness was introduced by plaintiff, and does not state anything calling for a denial from defendants.

Numerous assignments are made, all of which have been carefully considered, but we find in them no reversible error.

Affirmed.

E. M. WIGHT *et al.*, *Appts.*,

v.

James GOTTSCHALK.

(.....Tenn.....)

1. An eviction, either actual or constructive, is necessary before a cause of action arises on a covenant of warranty.
2. There was no liability on a covenant of warranty which was provable as a "contingent debt" or "contingent liability"

NOTE.—The decisions on the effect of a discharge in bankruptcy seem to be too fully reviewed in the above case to need annotation.

As to contingent liabilities, see also *Hospes v. Northwestern Mfg. & Car Co.* (Minn.) 15 L. R. A. 470; and *Gold v. Clyne* (N. Y.) 17 L. R. A. 767.

under the bankruptcy act of 1867 (U. S. Rev. Stat. § 5068), until there was a hostile assertion of the paramount title.

3. A discharge in bankruptcy, under the act of 1867, did not relieve the bankrupt from liability for breach of a covenant of warranty in a prior deed which did not ripen into an actual demand until after the discharge.

(July 10, 1897.)

A PPEAL by complainants from a decree of the Court of Chancery Appeals reversing a decree of the Chancery Court for Hamilton County in favor of defendant in a suit to recover damages for breach of covenant of warranty in a deed of real estate in defense of which defendant pleaded a discharge in bankruptcy. *Affirmed.*

The facts are stated in the opinion.

Messrs. Thomas & Thomas and Dickey & Peoples for appellants.

Messrs. Brown & Spurlock for appellee.

Neill, J., delivered the opinion of the court:

This is a bill in equity for breach of a covenant of warranty in a deed to real estate. The defendant pleaded a discharge in bankruptcy, and the chancellor dismissed the suit, and complainants have appealed. The parties have agreed upon the facts, and the case presents but one question, and that is, Did defendant's discharge in bankruptcy release him from liability under his covenant of warranty? Complainants deny and defendant affirms that the discharge is a good defense. If the discharge by the bankrupt court is a release, in view of this record, then the chancellor was correct; if not, then complainants are entitled to a decree.

The facts necessary to mention are that, between 1860 and 1864, one Hoyle owned the real estate in question. In 1864 he died intestate, leaving a widow and seven brothers and sisters. These brothers and sisters were his heirs at law, and each of them owned, as such heir, a one-seventh of the realty. The widow qualified as administratrix, and filed a bill to sell the real estate to pay debts. The heirs were made defendants. One of the sisters and heirs was Mary C. Reynolds, a married woman, and Michael C. Reynolds was her husband. They had at one time lived in McMinn county, Tennessee, but had before the widow filed her bill, removed to the state of Georgia, where they have ever since resided. Process issued to McMinn county for Mary C. Reynolds and her husband; and in June, 1865, the sheriff of that county returned it, as to Mary C. Reynolds and her husband, that neither was to be found in his county. Notwithstanding this return, a judgment *pro confesso* was taken in the same year against her and her husband, reciting that both had been served with process and had failed to make defense. Subsequent proceedings resulted in the sale of the real estate, and one Foley Vaughn purchased it. Thereafter, in 1870, Vaughn sold it to the defendant in this case. James Gottschalk, and on February 2, 1871, defendant, Gottschalk, sold and conveyed it, 43 L. R. A.

with covenant of warranty of title, to one Alvin Dodge; and the present complainants now own and hold parts of the same realty under regular conveyances down from and through Gottschalk and Dodge. On August 19, 1878, defendant, Gottschalk, filed his petition in bankruptcy, and on January 14, 1881, was granted his discharge under the act of 1867. The decree of the bankruptcy court is as follows: "It is therefore ordered by the court that said James Gottschalk be, and he hereby is, forever discharged of and from all debts and claims which by said act are made provable against his estate, and which existed on the 19th day of August, 1878, on which day the petition for adjudication was filed by himself, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy." Some ten years after Vaughn had purchased the land at the administration sale, Mary C. Reynolds first learned of her interest in her brother's estate, and she began an investigation, which led to a bill being filed in the name of herself and husband. This bill was brought in July, 1882. But it was subsequently voluntarily dismissed by her and her husband; and in 1885 she, by next friend, brought a second bill against Foley Vaughn and the present complainants and others, to recover her one-seventh interest in the land. Such proceedings were had in that case as that she was given a decree on November 21, 1890, the court adjudging that neither she nor her husband was before the court in the *Hoyle Estate Case*; that no statute of limitations barred her; that the suit was properly brought by next friend, and that, for the want of any service of process, the court had no jurisdiction to divest her of title; that the decrees were void, and the purchaser, Vaughn, took no title as to her one seventh; and she was given a recovery accordingly. On appeal to the supreme court, this decree was affirmed in November, 1891. In 1892, Mary C. Reynolds brought suits in the chancery court against the present complainants to sell the real estate for partition. Thereupon the complainants purchased from her and paid her for the one-seventh interest, and obtained it for less than the value thereof, and less than it would have cost them at a partition sale. Complainant Wight paid \$35 court costs and \$125 cash to Mrs. Reynolds. Complainant Whiteside paid the same. Complainant Evans paid court costs, \$35, and \$50 cash to Mrs. Reynolds.

The case turns upon the construction of the bankrupt act of 1867, as carried into the Revised Statutes of the United States at § 5068. That section reads: "In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and

he shall be allowed to prove for the amount so ascertained." The question is whether the claim under the covenant of warranty, under the circumstances above set out, constituted a provable debt, as a "contingent debt" or "contingent liability." In order to a proper understanding of the question, we must first consider the nature of the covenant of warranty in this state, in so far as it furnishes a ground of action for a money demand. It was early held that an action for a breach of the covenant of warranty could not be maintained without alleging and proving a lawful eviction. *Allison v. Allison*, 1 Yerg. 16. To same effect, see *Ferriss v. Harshea*, Mart. & Y. 54, 17 Am. Dec. 782; *Stuart v. Nelson*, 4 Hayw. (Tenn.) 200; *Crutcher v. Stump*, 5 Hayw. (Tenn.) 100; *Young v. Butler*, 1 Head, 648. In *Ferriss v. Harshea*, Mart. & Y. 54, 17 Am. Dec. 782, it was held that even a judgment in ejectment by the party having the better title against the warrantee, and suing out a writ of possession, without its being executed, was not sufficient evidence of an eviction; that, to constitute an eviction, the warrantee must be actually dispossessed by him having the better title. In *Senter v. Hill*, 5 Sneed, 505, it is said to be well settled in this state that where the purchaser of land has taken a deed with a covenant of warranty alone, and is put in possession, and not evicted, a court of chancery will not give an injunction or grant relief against the payment of the consideration on the ground of defective title; that, if there is no fraud and no eviction, the purchaser must rest on the covenants in his deed. Again, it is said in the same volume, at page 124, in the case of *Kincaid v. Brittain*, that the covenant of warranty is regarded as an assurance to the purchaser of a permanent undisturbed possession of the premises conveyed, and therefore is broken only by his eviction, actual or constructive, until which time he can have no remedy, but must await, at whatever hazard of ultimate loss, the event of his involuntary disseisin by the paramount title, before he can be heard to allege a breach of the covenant. It is said, however, in the case of *Kenney v. Norton*, 10 Heisk. 384, that the discharge of an encumbrance, subsisting at the time of the conveyance and capable of being enforced, operates as an eviction *pro tanto*, and a breach of a general warranty of title, and that an action may be brought by the original or any subsequent vendee who discharges such an encumbrance. And in the case of *Callie v. Cogbill*, 9 Lea, 137, it was said that, although the covenant of warranty is not broken without eviction by paramount title, yet that eviction by judgment of law is not necessary, but that the warrantee may voluntarily yield possession to him who had a better title, and claim for a breach of the covenant; but that in such case he acts at his peril, and in a suit against the warrantor the burden of proof is upon the plaintiff to show the paramount title. It appeared in that case that the possession was yielded in obedience to a demand made by the person having the superior title. It was said also 43 L. R. A.

in that case, *arguendo*, that the court had held in *Austin v. McKinney*, 5 Lea, 499, that the vendee might purchase in a better outstanding title, and that under this covenant he could be reimbursed the sum paid for it. That authority, however, does not sustain the proposition, nor does the case of *Searcy v. Kirkpatrick*, Cooke, 211, there referred to. Both of these cases arose under covenants to convey. There is no case in Tennessee that holds that a vendee may voluntarily search out the holder of the paramount title and surrender possession without demand. Likewise there is no case holding the contrary.

In this state of the authorities here we turn to others. In Rawle, Covenants, at page 147, quoting from *Drew v. Towle*, 30 N. H. 537, 64 Am. Dec. 309, it is said: "The defendant had an undoubted right, upon being satisfied of the invalidity of his title, to abandon the possession of the premises, and thereby to avoid the necessity of litigation and its attendant perplexities and expenses. He owed the plaintiff no duty to remain in possession and sustain the burden of the defense, when the title was invalid. . . . The right of the defendant was, at any period, to give up the possession to the rightful owner upon claim made. He was under no obligation, either of duty or contract to withhold it. He was not bound to seek redress through a litigation that might turn out to be fruitless with the party having the title." He adds: "And the law as thus stated has been recognized and applied in many cases,"—citing a large number of authorities. He continues: "In order, however, that such ouster *in pais* should amount to an eviction, it is necessary that the paramount title shall have been hostilely asserted; for although there is a class of cases, to be presently considered, which recognize the right of the purchaser to buy in the paramount title, and in an action on the covenant recover the amount thus paid, yet it will be found that they refuse to sanction such a recovery unless there has been a prosecution or distinct assertion of such title. Where such has been the case, its purchase is considered as equivalent to an eviction, as the idle form of abandoning the premises under one title in order to re-enter under another is deemed unnecessary. But if, in the one case, it be considered as indispensable that there shall have been a previous assertion of the paramount title, it would seem that it would be equally indispensable in the other,"—citing a large number of authorities. He adds further: "The result of the authorities would therefore seem to be that where the holder of the adverse title has the right summarily to obtain possession under it, and adversely asserts or prosecutes that right, the covenantee may anticipate its actual exercise, and voluntarily surrender the possession, by which ouster *in pais* a sufficient eviction will be caused to support an action on the covenant, in which, however, he will be obliged to prove that the results which he thus anticipated were inevitable." In the pages immediately following, the au-

thor discusses cases of constructive eviction, but none of these in any way applies to the facts in the present case.

Other incidents of the covenant of warranty in this state, as elsewhere, are as follows: It runs with the land (*Williams v. Burg*, 9 Lea, 455); the measure of damages on breach of the covenant is, in general, the purchase money paid, with interest (*East Tennessee Nat. Bank v. First Nat. Bank*, 7 Lea, 420); but, under various circumstances, it may be cut down to a sum below that (*Mette v. Dow*, 9 Lea, 93, 96-100). In that case it is said it may be cut down where the vendee or covenantee has no meane profits to pay to the holder of the paramount title. Mr. Justice Cooper, delivering the opinion of the court, added: "If, now, the measure of damages may be cut down by a deduction of the interest when necessary to attain the ends of justice, no reason occurs why a deduction of the principal may not also be made in a proper case. The covenant is a peculiar one, and not like an ordinary covenant for so much money. It is rather in the nature of a bond, with a fixed sum as a penalty, the recovery on which will be satisfied by the payment of the actual damages. Each vendor, subject to this rule, may be treated as the principal obligor to his immediate vendee, and as the surety of any subsequent vendee to hold him harmless by reason of the failure of title, and the ultimate vendee, when evicted, is entitled to be subrogated to the rights of his immediate vendor against a remote vendor, to the extent necessary to indemnify him. Such a vendee, to use the language of the supreme court of North Carolina, sues a remote vendor on the covenant to redress his (the plaintiff's) own injury, not the injuries of the immediate vendee of such remote vendor. Accordingly, that court held, in a case like the one before us, that the measure of damages was the consideration paid by the plaintiff to his immediate vendor, with interest, and not the consideration paid by such vendor to the defendant. In other words, the damages recovered were limited to the actual injury sustained." So, in that case, where it appeared that A. had sold the undivided half of the lot to B., his cotenant, for \$4,500, making him a deed with the covenant of general warranty, and some years afterwards B. sold to C. the entire lot for \$3,000, making a deed of like covenant, and subsequently C. was evicted by paramount title, which, being a trust assignment to secure a debt, did not require an account for meane profits, and C. sued A. on his covenant of warranty, it was held that he could only recover one half of the consideration paid by him to his immediate vendor, with interest from the date of eviction.

It is also held in this state that the covenant is divisible. So, in *Whitzman v. Hirsch*, 87 Tenn. 513, where A. conveyed to B. by warranty deed a tract of land for \$2,700, and B. divided it into twenty-six lots of equal value, and conveyed these lots by warranty deeds, two to C. for \$500, and subsequently ten others to different persons for \$2,400, and the remainder to his assignee in bank-

ruptcy, and then the entire tract was recovered by title paramount, and C. sued A., his remote warrantor, for breach of covenant, it was held that C. could recover of A. only two twenty-sixths of the price received by A. for the entire tract, with interest from the date of eviction, and that the measure of C.'s damages in such case was not affected by the fact that the other vendees failed to sue A., or suffered their actions to become barred; and in the case before us we have an instance in which the cause of action is split among three claimants.

From the foregoing view of the leading points affecting covenants of warranty for title, it is perceived that an eviction, either actual or constructive, is necessary before a cause of action arises; that that cause of action, when it does arise, may be split among several, and that it may exist as to some vendees interested in the warranty, and may not exist at all as to others; and, finally, that the amount to be recovered is not in any manner fixed, except that it cannot go above the consideration expressed in the deed containing the warranty, but that within that limit it may vary greatly. It is further to be observed that, under the facts as found, there was no eviction, either actual or constructive, apparent in this case, until the present complainants were evicted, which was long after the bankruptcy proceedings. It is further to be observed that it does not appear in this case who owned the property at the time the defendant's petition in bankruptcy was filed,—whether it was then still owned by the defendant's immediate vendee, Dodge, or whether he had sold it out in the parcels in which it is now presented in the present case.

Addressing ourselves now to the immediate question whether the claim under this warranty was a provable debt, we have the following to say as the result of our reflections, after full examination of the authorities, aided by very excellent briefs furnished us upon both sides:

We have been referred to only two cases where a warranty of title was drawn in question in connection with a discharge in bankruptcy. The earliest of these cases was *Bush v. Person*, 18 How. 82, 15 L. ed. 273, arising under the bankruptcy act of 1841. It seems to have been assumed in that case, in a general way, that the discharge would be operative upon a covenant of warranty, but that was not the point in judgment. The substance of the case is correctly stated in the syllabus as follows: "Where a person mortgaged land, which was at the time subject to a judgment lien, the deed containing what was equivalent to a covenant of warranty, then took the benefit of the bankrupt act of 1841, and then purchased the property which was sold under the judgment lien, he is estopped by his covenant from setting up his after-acquired title to defeat the mortgage. The bankrupt act does not annul a covenant in such a case." The court held, in substance, that, even if the bankrupt were discharged from his personal obligation on the covenant, it would yet remain alive for the purpose of an estoppel. The next case

is *Riggin v. Magwire*, 15 Wall. 549, 21 L. ed. 232. This case also arose under the bankruptcy act of 1841. The case was this: On the 2d of December, 1839, Riggin conveyed a certain tract of land near St. Louis to one Ellis, in fee, by a deed with words construed to be equivalent to a covenant of warranty. The fact was that prior to the execution of this deed the property had belonged to one Martin Thomas, whose wife had never relinquished her right to dower in it. But Thomas was then living, and did not die until 1848, several years after the alleged discharge of Riggin as a bankrupt. The property afterwards, by regular devolution of title, came into possession of Magwire, who sold it in lots to various persons. In 1868 these persons were sued by Mrs. Thomas, widow of Martin Thomas, for the value of her dower, and were obliged to pay it, and the plaintiff was obliged to refund them the amount. He thereupon brought suit against Riggin on the covenant. The question was whether Riggin was discharged from this demand by his decree of discharge in bankruptcy in 1843. Whether he was or not depended on the question whether the claim could have been proved in that proceeding. The fifth section of the bankruptcy act of 1841 allowed, among other classes of claims that might be proven, those of "persons having uncertain or contingent demands against such bankrupt." Considering this question, Mr. Justice Bradley said: "The better opinion is that as long as it remained wholly uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable, under the act of 1841. . . . In 1843, Martin Thomas was still living, and there was no certainty that his wife would ever survive him. It was uncertain whether there would ever be any claim or demand. On what principle, then, could the covenant have been liquidated or reduced to present or probable value?" We are also referred to the case of *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761. This case also arose under the act of 1841. The syllabus is as follows: "Upon a conveyance of land, it is in contingency whether a paramount title will ever be established or set up, and the covenant of warranty against the lawful claims of all persons is not broken until eviction by paramount title. Until such eviction, therefore, no right of action arises upon such a covenant. In the proceedings of a court of bankruptcy, upon the covenantor's application for a discharge, the claim of the covenantee upon such a covenant was not provable, unless a rightful eviction had previously occurred. To a claim founded upon such a covenant, and proved by an eviction which occurred subsequently to the proceedings in bankruptcy, the discharge in bankruptcy is no defense." Says the court in the body of the opinion, speaking of paramount claims: "If any such existed, their enforcement was dependent on the will of those having such claims. The

plaintiff could not have presented any present claim or existing demand. The possibility that one might arise is not enough."

From these authorities it would seem that, under the bankruptcy act of 1841, such a claim as we have in hand could not be proved. It is said, however, that the case of *Riggin v. Magwire*, 15 Wall. 549, 21 L. ed. 232, is very much weakened by the later case of *Wolf v. Stia*, 99 U. S. 1, 25 L. ed. 309. That case was as follows: Certain goods were attached in chancery, and Wolf executed a replevin bond, conditioned that he would pay the ascertained value of the goods as expressed in the bond, should he be cast in the suit, and the goods be decreed to be subject to the attachment, and liable thereunder to the satisfaction of the debt sued for. After the execution of the bond, but before the rendition of the decree determining the right of property in the goods, he filed his petition in bankruptcy, and in due course was discharged. It was held that this was a contingent liability, under the act of 1867, and that he was released. Chief Justice Waite, delivering the opinion of the court, said upon this subject: "The debt thus created was provable under the bankrupt act. It was payable upon the happening of an event which might never occur, and was therefore contingent. The bond was in full force when the petition in bankruptcy was filed. The sum to be paid was certain in amount. Whether the event would ever occur which would require the payment was uncertain, but if it did occur, the amount to be paid was fixed. This clearly is such a case as was provided for in § 5068, Rev. Stat., which is that, 'in all cases of contingent debts and contingent liabilities contracted by the bankrupt, . . . the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend.' There is nothing in the case of *Riggin v. Magwire*, 15 Wall. 549, 21 L. ed. 232, in conflict with this. That case arose under the bankruptcy law of 1841, which was somewhat, though perhaps not materially, different from that of 1867 in this particular, and not only the happening of the event on which payment was to be made, but the amount to be paid, was uncertain and contingent. The amount to be paid depended materially upon the time when the event happened. Everything was uncertain. The obligation in this case is to pay \$10,000 and interest, if upon the trial of the suit in the progress of which the bond was executed, it should be adjudged that the goods attached were subject to the attachment, and liable thereunder for the satisfaction of the debt sued for." We do not regard this case as in any sense weakening the authority of *Riggin v. Magwire*. It is true that it was distinguished from the case then before the court, but at the same time it was practically conceded that it was applicable as an authority for a similar case arising under the act of 1867, inasmuch as it is stated that the two acts are not materially different in the aspect in which we are

course of settlement in the trial of the suit now considering them. Pursuing the analogy furnished by the state of facts in judgment in the case of *Wolf v. Stia*, 99 U. S. 1, 25 L. ed. 309, we reach the case of *Hill v. Harding*, 130 U. S. 699-704, 32 L. ed. 1083, 1084. In that case a similar bond was in question, and the court held, through Mr. Justice Gray, who delivered the opinion, that, if the bond was executed before the commencement of proceedings in bankruptcy, the discharge of the bankrupt would protect him from liability to the obligee, but it is added (a significant indication of the trend of the court upon this subject): "If the sureties [the bankrupt being the principal in the bond] should ultimately pay the amount of any such judgment, and thereby acquire a claim to be reimbursed by their principal the amount so paid (which is a point not now in issue), it would be because his liability to them upon such a claim did not exist at the time of the commencement of the proceedings in bankruptcy, and therefore could not be proved in bankruptcy, nor barred by the discharge, and consequently would not be affected by any provision of the bankrupt act." In line with the thought contained in the quotation just made is the case of *Wyckoff v. Gardner*, 4 Cent. Rep. 131, decided by the supreme court of New Jersey. The case was this: John Gardner was elected sheriff in 1875. He gave bond, with William Gardner, John Wyckoff, Samuel Frame, Joseph Vliet, and Joseph B. Cornish as his sureties thereon. By reason of negligence, the sheriff, in his official capacity, became liable for nearly \$2,000. His bond was prosecuted, and February 19, 1884, judgment was rendered thereon against John Gardner, John Wyckoff (the complainant), and Samuel Frame. Prior to this action William Gardner and Joseph Vliet had died, and Joseph B. Cornish had been discharged in bankruptcy. The bill, among other things, was filed for contribution against Cornish, and he was held liable, notwithstanding his discharge in bankruptcy, because the liability did not accrue until after the discharge. The court followed the cases of *Riggin v. Maguire*, 15 Wall. 549, 21 L. ed. 232, and *Glenn v. Howard*, 65 Md. 40. The latter case was where the subscription price of the stock of an incorporated company was only to be paid in such instalments, and at such times, as it might be called for, and at the time of the bankruptcy of a stockholder and his discharge no call for the payment of his subscription had been made. It was held that a call subsequently made, for an unpaid instalment, was not a provable claim against the bankrupt's estate in the bankruptcy proceedings, and that, therefore, the bankrupt's discharge was no bar to an action for such unpaid instalment. See this same case reported in 65 Md. 40. See also, to the same effect, *Sayre v. Glenn*, 87 Ala. 631, and *White v. Blake*, 79 Me. 114. This was a suit by a sheriff against his deputy on the latter's bond, for money which the former had to pay on account of the lat-

ter's omission. The bond and the deputy's omission both existed before the deputy's bankruptcy, but the sheriff had not been sued, and the suit was not terminated until after the discharge. It was held that the prior bankruptcy was no defense. So, in our own case of *Goss v. Gibson*, 8 Humph. 197. This case arose under the act of 1841. It was there held that the discharge in bankruptcy of a surety upon an official bond would not protect him from the claim of another surety on the same bond to contribution, the judgment for the official default having been recovered against the latter, and he having paid the money after the discharge. This case was approved by Judge Cooper in 1875, in the case of *Eberhardt v. Wood*, 2 Tenn. Ch. 488, 496. This case was subsequently appealed to the supreme court, and at the December term, 1880, Judge Cooper's decision was affirmed, and his opinion adopted as the opinion of the court. *Eberhardt v. Wood*, 6 Lea, 467, 471. That case of *Eberhardt v. Wood*, 2 Tenn. Ch. 488, in the actual matter there under consideration, and in distinguishing that case from *Goss v. Gibson*, 8 Humph. 197, seems to mark the true distinction controlling this class of cases. In that case the exact point ruled was that the claim of one surety against a co-surety on an administration bond for the contribution is provable, and covered by the discharge of the co-surety in bankruptcy, if the liability of the principal had become fixed by judicial proceedings before the petition in bankruptcy, although the amount of the liability was not ascertained nor paid by the surety until several years afterwards. Distinguishing that case from *Goss v. Gibson*, 8 Humph. 197, Judge Cooper says (p. 496): "There, although there was a breach of the official bond before the proceedings in bankruptcy, yet it does not appear that the fact was known until afterwards. A bond conditioned for the faithful performance of the duty of a public officer is not, prior to its breach, a debt against the surety and provable as such. *Loring v. Kendall*, 1 Gray, 305; *Turner v. Esselman*, 15 Ala. 690. Nor afterwards, it may safely be said, if the breach was unknown, or not adjudged, or in the course of being adjudged. *Ellis v. Ham*, 28 Me. 385. For, until suit brought, or demand made, or, at any rate, until evidence of breach *non constat* that there will be any debt against the surety. But if, as in the case before us, the breach is judicially declared, the debt is clear, and the amount susceptible of being ascertained. *Woodard v. Herbert*, 24 Me. 358." See also *Kerr v. Clark*, 11 Humph. 77. The case of *Choate v. Quinichett*, 12 Heisk. 427, was decided upon substantially the same principle recognized in the quotation we have just made from *Eberhardt v. Wood*. The same principle seems also to be recognized in *Wolf v. Stia*, 99 U. S. 1, 25 L. ed. 309. In that case Chief Justice Waite referred pointedly to the fact that the bond was in full force when the petition in bankruptcy was filed; that it was for a definite amount; and that the matters arising on the bond were then in

in the progress of which the bond was executed. The case of *Carey v. Mayer*, 51 U. S. App. 184, 79 Fed. Rep. 926, 25 C. C. A. 239, was determined upon the same principle. It was there held that the obligation of a subscriber to the stock of the corporation to respond to calls becomes, upon the declared insolvency of the corporation, by the execution of a deed of trust for the benefit of creditors, a liability with a contingency, though not fixed in amount, and not payable until the call has been made; and that when such subscriber has, subsequent to the execution of such a deed of trust, filed his petition in bankruptcy under the act of 1867, and been discharged, his discharge is a good defense to an action to recover the amount of his subscription, though the call on which the action was based was not made until after the discharge was granted. In delivering the opinion of the court in that case, Judge Shipman said: "The decision of this case is placed upon the ground that the deed of the corporation of all its assets to trustees for the benefit of creditors, being a declaration by the corporation of its insolvency, and also the commencement of the winding up, preceded the filing of the defendant's petition in bankruptcy, and that, by reason of these facts, the defendant's obligation as a stockholder became a liability with a contingency, viz., the ascertainment by a court of chancery of the amount to be paid, that this amount could have been made certain, and that it was the duty of the trustees to endeavor to make it certain before the order for a final dividend."

Applying these principles to the case before us, it follows very clearly, as we think, that the claim now sued for was not provable in the defendant's bankruptcy proceeding. Not only did his vendor appear to have title upon the face of the decrees in the case in which he bought the property, and the defect was not discovered until years after he was discharged in bankruptcy, and then by

an examination of the process purporting to bring the parties into court, but in addition to this, even if the defect had been known, there was no eviction until long after the discharge. As we have already shown in the discussion of the principles controlling the covenant of warranty, the covenantee was powerless to take any steps to relieve himself from the position in which he stood or to get any redress upon the warranty, even if he had been thoroughly acquainted with the defect in his title, until there had been a hostile assertion of interest in the property on the part of the owner of the paramount title. The claim was in this condition: The owner of the paramount title might never assert his paramount ownership. Until he did so, the covenantee had suffered no injury and had no cause of action. No one could tell whether the paramount owner ever would assert his right. There was no liability on the covenantor until such hostile assertion. That hostile assertion was not made until many years after the defendant's discharge. The complainants yielded to this superior claim, as it was their duty to do, and then it was their cause of action arose. Then, for the first time, there was, in a technical sense, a liability upon the covenantor. Our conclusion is that the claim was not provable in the bankruptcy proceedings, and that the defendant is not protected by the discharge. The result is the complainants are entitled to recover the amounts claimed by them in the bill, with interest, and the costs of this court and the court below.

Reverse the chancellor's decree, and enter decree here in accordance with the foregoing directions.

Barton, J., concurs.

This decision was affirmed by the Supreme Court in an oral opinion.

UNITED STATES CIRCUIT COURT OF APPEALS. FIRST CIRCUIT.

Frank COLUMB, *Plff. in Err.*,
v.

WEBSTER MANUFACTURING COMPANY.

(50 U. S. App. 264, 84 Fed. Rep. 592, 28 C. C. A. 225.)

Judgment upon the merits in an action for negligence is a bar to another action for the same injury grounded on the defendant's fault or negligence in respect to the

same occurrence, although other elements of negligence are alleged.

(January 3, 1898.)

ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

NOTE.—the effect of a judgment on the question of negligence as *res judicata* when a later action is brought for negligence in different particulars connected with the same transaction was referred to in an article in "Case and Comment" for December, 1895, and reference to a statement by a judge that the specific point had never been decided. The article, however, referred to *McCain v. Louisville & N. R. Co.* 15 43 L. R. A.

Ky. L. Rep. 80, which was marked "Not to be reported," as a decision to the effect that the second action in such case was barred by the judgment in the first case. That decision has since been officially reported in 97 Ky. 804. The question is more fully considered in the above case of *COLUMB v. WEBSTER MFG. CO.*, which reaches the same conclusion.

The facts are stated in the opinion.

Before *Cott*, Circuit Judge, and *Webb and Aldrich*, District Judges.

Mr. John L. Hunt, for plaintiff in error:

The precise point involved in the cause as to what is barred by a judgment on the merits in a case of negligence has been considered by the supreme court of New Hampshire in the case of *Littleton v. Richardson*, 34 N. H. 180, 66 Am. Dec. 759.

The evidence must be confined to the pleadings upon which the issue is tried, and the precise point litigated within the pleadings alone is determined in an action.

Johnson Steel Street Rail Co. v. Wharton, 152 U. S. 260, 33 L. ed. 434; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Gaines v. Hennen*, 24 How. 573, 16 L. ed. 776.

Messrs. H. Eugene Bolles and Richard M. Saltonstall, for defendant in error:

There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; *Wilson v. Deen*, 121 U. S. 525, 30 L. ed. 980; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 390, 35 L. ed. 1055; *Johnson Steel Street Rail Co. v. Wharton*, 152 U. S. 252, 38 L. ed. 429; *Dowell v. Applegate*, 152 U. S. 327, 38 L. ed. 463; *Southern Minnesota R. Extension Co. v. St. Paul & S. C. R. Co.* 12 U. S. App. 320, 55 Fed. Rep. 690, 5 C. C. A. 249; *Lake County Comrs. v. Platt*, 75 Fed. Rep. 567.

The two suits are for the same cause of action, and the fact that the plaintiff in this suit states a different ground of recovery for his injuries sustained in the same accident does not make two distinct causes of action.

Goodrich v. Yale, 8 Allen, 454; *Bassett v. Connecticut River R. Co.* 150 Mass. 178; *Beauregard v. Webb Granite & Constr. Co.* 160 Mass. 201; *Goodrich v. Chicago*, 5 Wall. 566, 18 L. ed. 511; *Green v. Bogue*, 158 U. S. 478-503, 39 L. ed. 1061-1070; *Patterson v. Wold*, 33 Fed. Rep. 791; *Agnew v. McElroy*, 10 Smedes & M. 552, 48 Am. Dec. 772; *Girardin v. Dean*, 40 Tex. 243; *Bagot v. Williams*, 3 Barn. & C. 235.

In New Hampshire it has been held that an employer is bound to use due care in selecting competent servants and agents and in providing safe and suitable appliances. For a breach of these duties he is liable to an employee.

Fifield v. Northern R. Co. 42 N. H. 225; *Nash v. Nashua Iron & S. Co.* 62 N. H. 406.

Though the declaration did not allege in terms a breach of those duties, yet under the New Hampshire statutes and the practice of 43 L. R. A.

its courts the declaration could have been amended, even during the progress of the suit, so as to state these facts.

N. H. Pub. Stat. chap. 222, §§ 7, 8; *Gagnon v. Connor*, 64 N. H. 276; *Moree v. Whitchee*, 64 N. H. 591; *Peaslee v. Dudley*, 63 N. H. 220; *Welcome v. Labontee*, 63 N. H. 124; *Fogg v. Hoskins*, 58 N. H. 367.

The plaintiff has had his day in court; he cannot split up his claim.

Dutton v. Shaw, 35 Mich. 431.

Nemo debet bis vexari pro una et eadem causa, and *Interest reipublicæ ut sit finis litium*.

Stockton v. Ford, 18 How. 418, 15 L. ed. 595; *Beloit v. Morgan*, 7 Wall. 619, 19 L. ed. 205; *Stark v. Starr*, 94 U. S. 477, 24 L. ed. 276; *Dowell v. Applegate*, 152 U. S. 327, 38 L. ed. 463; *Southern Minnesota R. Extension Co. v. St. Paul & S. C. R. Co.* 12 U. S. App. 320, 55 Fed. Rep. 690, 5 C. C. A. 249; *David Bradley Mfg. Co. v. Eagle Mfg. Co.* 18 U. S. App. 349, 57 Fed. Rep. 980, 6 C. C. A. 661; *Patterson v. Wold*, 33 Fed. Rep. 791; *Trask v. Hartford & N. H. R. Co.* 2 Allen, 231; *Knowlton v. New York & N. E. R. Co.* 147 Mass. 606, 1 L. R. A. 625; *Bassett v. Connecticut River R. Co.* 150 Mass. 178; *Sullivan v. Baizer*, 150 Mass. 261; *Rogers v. Higgins*, 57 Ill. 244; *Bell v. McColloch*, 31 Ohio St. 397; *Hall v. Forman*, 82 Ky. 505; *State v. Brown*, 64 Md. 199; *Woolverton v. Baker*, 98 Cal. 628; *Agnew v. McElroy*, 10 Smedes & M. 552, 48 Am. Dec. 772; *McCain v. Louisville & N. R. Co.* 97 Ky. 804; 1 Van Fleet, Former Adjudication, p. 322.

Extrinsic evidence may be offered to prove:—

Identity of parties.

1 Van Fleet, Former Adjudication, p. 351; *Langdon v. Evans*, 3 Mackey, 1.

Identity of subject-matter or facts in issue.

Merchant's International S. B. Line v. Lyon, 4 McCrary, 145; *White v. Chase*, 128 Mass. 158; *Foye v. Patch*, 132 Mass. 106; *Briggs v. Wells*, 12 Barb. 567; *Walker v. Chase*, 53 Me. 258.

Identity of the cause of action.

Driscoll v. Damp, 16 Wis. 106.

Whether or not the former suit was adjudicated upon its merits.

Jepson v. International Fraternal Alliance, 17 R. I. 471; *Black*, Judgm. § 628.

Aldrich, District Judge, delivered the opinion of the court:

This is an action to recover for damages which Frank Columb, the plaintiff, claims he sustained by reason of the defendant's negligence in New Hampshire. The plaintiff brought a prior suit in the New Hampshire state courts against the Webster Manufacturing Company, this defendant, and for the same injury, where he had his trial upon the merits, and upon a cause of action involving the defendant's alleged negligence as a ground of recovery, and where there was a verdict of the jury and judgment for the defendant and the defendant in the circuit court interposed such judgment as a bar to the further prosecution of the plaintiff's action therein.

We think the New Hampshire judgment is a bar to the plaintiff's second action, and it seems quite unnecessary to add anything to the reasoning of the court below. It may be observed, however, that the cause of action (that of the defendant's negligence in respect to the same affair) was identical in both proceedings, although the plaintiff, in this, his second proceeding, varies somewhat his description of the defendant's negligence. It remains, nevertheless, that this action was brought for the same injury, and that the action is grounded on the defendant's fault or negligence in respect to the same occurrence. In the New Hampshire case the plaintiff alleged the defendant's want of care in respect to its duty to furnish a suitable and safe place for the performance of the service which he was expected to render, and that, by reason of the careless and negligent construction of the bridge or trestle, and "by the sudden giving away of said trestle or railroad," he was "thrown into the river below," and injured; while in the proceeding here he alleges that "an unsupported section or part of said bridge, on which plaintiff was so assisting as aforesaid, fell, and, owing to the neglect of the defendant to provide suitable and safe safeguards, instrumentalities, and protection for and in the performance of said work, and owing to the neglect of defendant to provide safe, suitable, and competent servants and agents to assist the plaintiff in the performance of said work, the plaintiff was precipitated into the said river," and was injured. The cause of action in the two proceedings is obviously the same. In the proceeding here the plaintiff alleges other elements of negligence, which he in effect says co-operated with the elements of negligence alleged in the first proceeding to bring about the same result; in other words, he alleges here additional acts of negligence, operating upon the same occurrence, and tending to the same result.

It is not necessary to prolong the discussion of this question further than to say that the scope or extent of the estoppel, operating upon the second action, like that involved in *Roberts v. Northern P. R. Co.* 158 U. S. 1, 27-29, 39 L. ed 873, 882, 883, depends upon the question whether the demand or claim or cause of action is the same in the two proceedings. All authorities seem to agree that, if the cause of action is the same, a trial and judgment upon the merits operate as a bar to subsequent litigation between the same parties; and another line of authorities holds that, where the suit is between the same parties, and the claim or demand or cause of action is different, the judgment in the former action operates as an estoppel only as to the particular points controverted, or to those matters which were strictly in issue. *Forsythe v. Hammond*, 166 U. S. 506, 518, 41 L. ed. 1095, 1100. As to the first class of cases, as said by Mr. Justice Shiras in the *Northern Pacific Railroad Case* just cited (page 28, 158 U. S. and page 883, 39 L. ed.), in quoting approvingly from an earlier decision of the Supreme Court, "a judgment estops, not only as to every ground of recovery or defense actually presented in

the action, but also as to every ground which might have been presented." *Southern P. R. Co. v. United States*, 168 U. S. 1, 50, 42 L. ed. 355, 377.

The Supreme Court decisions are quite decisive, and controlling upon the question before us. In the case of *Beloit v. Morgan*, 7 Wall. 619, 19 L. ed. 205, it is said, with reference to a former trial before a court having jurisdiction over the parties and the subject, that "under such circumstances, a judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between same parties touching the same subject-matter, though the *res* itself may be different."

Again, in referring to the point taken by counsel that the estoppel only operates upon the precise question in issue, it is said: "But the principle reaches further. It extends, not only to the questions of fact and of law which were decided in a former suit, but also to the grounds of recovery or defense which might have been, but were not presented." Again, in the same case it is said: "A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction."

This principle was reaffirmed, and the doctrine emphasized, by the Supreme Court in *Stark v. Starr*, 94 U. S. 477, 485, 24 L. ed. 276, 278, where it is said by Mr. Justice Field: "It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand, and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible."

We have said, in this circuit, of supposed grounds of recovery not presented in the original cause, that, if we were to assume they were sufficient to put in issue the propositions argued, they would not be effectual to give complainants the relief desired; and this was for the reason, as there observed, that in the principal cause the court had jurisdiction of the parties and the subject-matter of the controversy, and judgment therein must, therefore, be taken as conclusive. *Jones v. Merchants' Nat. Bank*, 33 U. S. App. 703, 713, 76 Fed. Rep. 683, 35 L. R. A. 698, and 22 C. C. A. 483.

The additional allegations of negligent acts, in the cases at bar, are (as said of the new evidence in *Southern P. R. Co. v. United States*, 168 U. S. 1, 85, 42 L. ed. 355 382), "simply cumulative," and they merely present elements of negligence which were, in contemplation of law, at least for the fair and reasonable purposes of the *res judicata* rule, involved in the affair originally complained of, and in the single and indivisible cause of action originally set out,—that of the negligence and fault of the defendant which occasioned the injury to the plaintiff. *Beauregard v. Webb Granite & Constr. Co.*

180 Mass. 201, 203; *Patterson v. Wold*, 33 Fed. Rep. 791, 703. The reasons for the *res judicata* rule have been stated again and again, and they include, among other considerations, the idea that the interests of the public and of litigants alike require that a legal controversy should end with one investigation before a tribunal with ample jurisdiction to do justice, and with ample opportunity for the parties to present their case with such measure of statement and proofs as they see fit. A rule which would allow the plaintiff to split his case, and measure out a part of his grievance and of his proofs, and, in the event of failure, to try again upon a greater measure, would necessarily allow the defendant to stand on a part rather than all of his defense to a given cause of action, and, if this should prove insufficient, a second trial upon a more full statement and a greater measure of proofs would be open to him. Under such a rule, litigation would at once become burdensome and oppressive, interminable and never-ceasing,—a condition which the modern law seeks to avoid, and a situation which the courts of the present age are not disposed to aid in creating.

Is there any safe or reasonable ground upon which a cause of action based upon the supposed negligence of an employer can be treated as divisible? Is there any reason for a rule which would permit a plaintiff, by varying his description of negligence, to have a second trial, if he fails to succeed upon his first description and proofs, but deny him a second trial if he does succeed? No reason has been urged in support of such a rule of law, and it is difficult to see that any could be suggested. Then let us look at the question with reversed light. Suppose the plaintiff had recovered in his New Hampshire case, upon such description of the negligence as he employed there; could he, by varying his description, and alleging additional negligence contributing to the same accident, have another recovery of damages for the same injury? If the affirmative is asserted, how are the damages to be divided? How much for the negligence as first described, and how much for the negligence set out in the second description? It is not believed that anyone would seriously insist upon the right of a second recovery. If it is conceded, then, that under such circumstances a second recovery could not be had, for the reason that the full right of recovery was involved in the description of the defendant's negligence which the plaintiff employed, and in the trial, and therefore merged in the judgment favorable to the plaintiff, upon what logic can it be urged that the full right of recovery is not merged in a judgment unfavorable to the plaintiff, which is based upon the same allegations, the same trial, and the same proofs? A rule which would make the question whether a judgment is conclusive upon the plaintiff depend upon the question whether the judgment is for or against him, and make the result of

the trial a conclusive estoppel upon both parties if favorable to the plaintiff, and otherwise not, would be a one-sided rule, discriminating in favor of the plaintiff, and a rule which would at once destroy the fundamental idea of estoppel by judgment.

It is true that the plaintiff, in his second attempt to describe the cause of action, states a stronger case than in his first, for the reason that he includes other elements of negligence; but this does not entitle him to a second trial. A person suffering from a supposed grievance of the character in question must not be permitted to resort to several trials and to different courts, experimenting as to relief, first with a part of his cause of action, then with a little more, and then again with a still stronger description of the co-operating elements which are supposed to have caused the injury. If sound principles permit a second trial, because the second pleader presents a stronger description of the negligent acts contributing to the injury than the first, why not a third, and fourth, and so on without limit, as long as a pleader can be found with sufficient skill and ingenuity to draw a declaration broader than the one next preceding? It follows, from this reasoning, that, the plaintiff having elected the New Hampshire court as the tribunal to settle his rights, and his cause of action being grounded upon the supposed negligence of the defendant, he should have put in evidence all the supposed negligent acts which contributed to the injury, and if, upon the trial, it had turned out that the scope of the evidence was broader than that of the declaration, it is understood that the New Hampshire amendment practice would have permitted the declaration to be recast, to the end that the whole case might go to the jury. If he did not do this, it was his own fault or misfortune, but is not such a misfortune as entitles him to a second trial.

No question is made on argument that the plaintiff, Frank Columb, is not the same person as "Frank Colon," the plaintiff in the New Hampshire case, and it is conceded that the variance between the names is the result of clerical error. This being so, it abundantly appears from the record that the parties and the subject-matter of the cause of action here are the same as in the case presented in the New Hampshire state court, and upon which the plaintiff had a trial upon the merits. The plea in bar interposed in the circuit court, therefore, did not require the aid of matter *dehors* the record. The circuit court expressly excluded the *aliunde* evidence, and determined the question— and rightly, we think—upon the record itself. This being so, it is not necessary that we consider the other questions raised by the assignment of errors.

Judgment of the Circuit Court affirmed. with costs in this court to the defendant in error.

Rehearing denied.

CALIFORNIA SUPREME COURT.

Charles A. GLOCK, *Respt.*,

v.

HOWARD & WILSON COLONY COMPANY, *Appt.*

(.....Cal.....)

1. The right of a vendor to retain moneys paid by a vendee who makes default on a contract of which time is the essence is not lost because the parties have declared that such moneys may be retained as stipulated damages, and this provision is void.
2. Relief to a vendee who has made default on a contract of which time is the essence can be granted only after a showing of fraud, mistake, surprise, or other ground of purely equitable cognizance, excusing the breach.
3. No legal or equitable right to the recovery of moneys paid by a vendee who makes default on a contract of which time is the essence can be acquired by subsequently tendering the amount due, without excusing his default.

(December 18, 1898.)

A PPEAL by defendant from a judgment of the Superior Court for Madera County in favor of plaintiff in an action brought to recover money which the plaintiff had paid to defendant as part of the purchase price of land which defendant refused to convey. *Reversed.*

The facts are stated in the opinion.

Mr. Raleigh E. Rhodes for appellant.

Mr. Robert L. Hargrove, for respondent:

Appellant never demanded payment of instalments or brought suit to recover the same, therefore appellant waived any right it had under the "independent" features of the agreement; and, so far as the case at bar is concerned, the "independent" features of the agreement are naught.

The respondent on August 9, 1895, offered to pay appellant all that respondent had agreed to pay under the agreement.

The last payment to be paid under the agreement was on February 21, 1895, therefore at the time respondent made the tender and demand the covenants were "mutual" and "dependent" with both the "vendor" and "vendee."

The vendor at that time could not have sued for the purchase price without offering to convey, and, *vice versa*, the vendee could not sue for a return of the deposit without offering to pay the amount agreed to be paid by him under the agreement.

Hill v. Grigsby, 35 Cal. 656.

The tender was valid.

Peckham v. Stewart, 97 Cal. 147.

Appellant cannot keep both the land and the money. Under the plain provisions of the Code, respondent would have had

the absolute right to have asked, and the court the absolute right to have granted, in addition to the \$382.50 and interest, damages for expenses properly incurred in examining the title and preparing the necessary papers, together with the difference between the agreed price for the land, and the value of the same at the time of the breach.

Haynes v. White, 55 Cal. 41; *Yates v. James*, 89 Cal. 474; *Breckinridge v. Crocker*, 78 Cal. 535; *Turner v. Reynolds*, 81 Cal. 214.

Respondent had the right to bring either an action for specific performance of the agreement, or an action for the price paid on the agreement, *viz.*, \$382.50 and interest, under the provisions of § 3306, Civil Code.

Raynes v. White, 55 Cal. 41; *Yates v. James*, 89 Cal. 474; *Breckinridge v. Crocker*, 78 Cal. 535.

The only grounds under which appellant could recoup damages would be by alleging in its answer and proving the fact that the contract had been rescinded and abandoned on account of respondent's failure to pay the instalments as they fell due.

Dennis v. Strassburger, 89 Cal. 588; *Englander v. Rogers*, 41 Cal. 420; *Easton v. Montgomery*, 90 Cal. 318; *Anderson v. Strassburger*, 92 Cal. 41; *Hill v. Grigsby*, 35 Cal. 661; *Barron v. Frink*, 30 Cal. 488.

Time stated in the contract was for the benefit of the vendor, and it could, if it had been advised, have demanded payment of the instalments at the stated times or waited and demanded full payment and tendered a deed on February 21, 1895, or at any time afterwards, and thereby placed respondent in default, but appellant did not do it.

Bradford v. Parkhurst, 96 Cal. 105.

On rehearing.

Drew v. Pedlar, 87 Cal. 443, has been cited as authority in the following cases:

White v. Buell, 90 Cal. 179; *Townsend v. Tufts*, 95 Cal. 259; *Merrill v. Merrill*, 95 Cal. 338; *Phelps v. Brown*, 95 Cal. 575; *Bradford v. Parkhurst*, 96 Cal. 105; *Joyce v. Shafer*, 97 Cal. 337; *Shively v. Semi-Tropic Land & W. Co.* 99 Cal. 261; *Fountain v. Semi-Tropic Land & W. Co.* 99 Cal. 683; *Easton v. Cressey*, 100 Cal. 78; *Merrill v. Merrill*, 103 Cal. 203.

The rule *stare decisis* should apply.

Pioche v. Paul, 22 Cal. 106; *Hahn v. Courtis*, 31 Cal. 402; *Smith v. McDonald*, 42 Cal. 484.

In a contract for the sale of land for a term, with a provision for the payment of instalments during that term, carrying interest on all deferred instalments, the covenants for the payment of the instalments, except the last one, are independent, and the vendor can sue to recover each instalment as it matures, or may waive that right and let it draw interest or abandon and rescind the contract for reasons known to himself; therefore there could be no default on the part of the respondent to pay the several instalments as they matured.

McCroskey v. Ladd, 96 Cal. 456; *Hill v. Grigsby*, 35 Cal. 662.

NOTE.—On the question when time is of the essence of the contract, there is a considerable collection of decisions in a note to *Frink v. Thomas* (Or.) 12 L. R. A. on page 241. 43 L. R. A.

As appellants did not take any action towards recovering the prior instalments, as they matured, appellant either waived payment and consented to accept interest, or it abandoned and rescinded the contract.

McCroskey v. Ladd, 96 Cal. 456.

Appellant having failed to demand or bring action to recover the instalments as they matured, suffered the independent covenants of the contract to become merged into mutual, concurrent, and dependent covenants, and before appellant, after the date of the last payment, could put respondent in default, it became its duty at any time thereafter it wished to put respondent in default to tender a deed and demand payment of the respondent; and likewise before respondent could put appellant in default, he was compelled to tender the amount due and demand a deed.

Hill v. Grigsby, 35 Cal. 662; *Barron v. Frink*, 30 Cal. 489; *Benson v. Shotwell*, 87 Cal. 59; *Peasley v. Hart*, 65 Cal. 524; *Brennan v. Ford*, 46 Cal. 10; *Kelly v. Mack*, 45 Cal. 303; *Rourke v. McLaughlin*, 38 Cal. 199; *Southern P. R. Co. v. Allen*, 112 Cal. 455; *Peckham v. Stewart*, 97 Cal. 147; *Easton v. Montgomery*, 90 Cal. 308.

When respondent tendered the money due, and tendered and demanded the deed of appellant, there were only two things for appellant to do: (1) Either to accept the money and execute the conveyance, or (2) to suffer default, and treat the contract as rescinded.

If appellant refused to accept the money and execute the deed, then appellant elected to rescind the agreement.

Newton v. Hull, 90 Cal. 494.

If appellant rescinded the contract, then it is bound to restore to respondent the price paid, to wit, \$382.50, with interest.

Appellant cannot claim damages nor enforce its contract until it tenders a deed and demands payment.

Berry v. Fairmont Town Co. 4 Kan. App. 432; *Steele v. Branch*, 40 Cal. 13.

Obligations of parties are mutual and dependent where one is to convey, and the other at the same time is to pay the purchase price, and neither can put the other in default, except by tendering performance on his part.

Dennis v. Strassburger, 89 Cal. 583; *Merrill v. Merrill*, 95 Cal. 337; *Peckham v. Stewart*, 97 Cal. 150; *Bohall v. Diller*, 41 Cal. 535; *Englander v. Rogers*, 41 Cal. 420; *Clary v. Folger*, 84 Cal. 319; *Salmon v. Hoffman*, 2 Cal. 138, 56 Am. Dec. 322; *Hicks v. Lovell*, 64 Cal. 19, 49 Am. Rep. 679; *Bohall v. Diller*, 41 Cal. 532; *Rourke v. McLaughlin*, 38 Cal. 199; *Kelly v. Mack*, 45 Cal. 303; *Brennan v. Ford*, 46 Cal. 16; *Peasley v. Hart*, 65 Cal. 524; *Benson v. Shotwell*, 87 Cal. 59; *Chatfield v. Williams*, 85 Cal. 521.

The vendor may at any time after the date of the contract convey the land to another, without committing a breach of the contract.

Joyce v. Shafer, 97 Cal. 335; *Shively v. Semi-Tropic Land & W. Co.* 99 Cal. 259.

The contract remains still in force, and the vendee still remains liable to the vendor 43 L. R. A.

for the payment of the purchase price, notwithstanding the vendee has parted with his title, and is totally insolvent.

What security has the vendee upon the happening of such an event?

There is no such thing as a condition precedent, that the vendee is compelled to actually pay and deliver the whole purchase money to the vendor before the vendor can be called upon to execute the deed when the object of the contract is that a vendee should pay a certain sum for a parcel of land in consideration of the vendor executing to the vendee a good and sufficient conveyance.

Hill v. Grigsby, 35 Cal. 661; *Englander v. Rogers*, 41 Cal. 421; *Barron v. Frink*, 30 Cal. 489; *Southern P. R. Co. v. Allen*, 112 Cal. 465; *Dennis v. Strassburger*, 89 Cal. 583; *Easton v. Montgomery*, 90 Cal. 318; *Newton v. Hull*, 90 Cal. 494; *Merrill v. Merrill*, 95 Cal. 337; *Townsend v. Tufts*, 95 Cal. 257.

The provisions in the contract that all moneys paid thereon are to be considered as forfeited, etc., are void under the provisions of §§ 1670, 1671, Civil Code.

Easton v. Cressey, 100 Cal. 78; *Drew v. Pedlar*, 87 Cal. 450; *Eva v. McMahon*, 77 Cal. 472.

Henshaw, J., delivered the opinion of the court:

This action was brought to recover from the corporation defendant moneys paid by plaintiff on a contract for the purchase and sale of a tract of land situated in the then county of Fresno, now in the county of Madera. Plaintiff had judgment, and defendant appeals therefrom, and from the order denying its motion for a new trial. The appeal is supported by a bill of exceptions. The facts, briefly stated, are the following: On the 21st day of February, 1891, the defendant, as party of the first part, entered into a written agreement with the plaintiff, as the party of the second part, whereby said party of the first part agreed that upon the performance of the covenants to be kept by the plaintiff it would convey to him a tract of 5 acres of land situate in the county of Fresno, and certain water rights, all of which are fully described. Plaintiff was to pay therefor \$625, as follows: \$125 down, the receipt whereof was acknowledged; \$125 on or before February 21, 1892; and a like sum annually until and including February 21, 1895, with interest payable annually on all deferred payments at 6 per cent per annum. Plaintiff, also, by the agreement, requested the defendant to plant the tract of land to fruit trees, and to cultivate them for three years from February 21, 1891, for all of which plaintiff was to pay \$375, as follows: \$62.50 on execution of the agreement, the receipt whereof was acknowledged, and a like sum semiannually on the 21st days of August and February, until and including August 21, 1893. Plaintiff further agreed to pay all taxes, state and local, and all water rates and dues, assessed or due and payable on said property from and after the date of the agreement. Time was made of the essence of the contract, and performance

by the plaintiff was made a condition precedent whereon depended the agreement of defendant to convey; and, if plaintiff failed to perform his covenants, the party of the first part (defendant) was to be released from all obligations to convey, and plaintiff was to forfeit all moneys paid and all rights under the agreement, and the sums so paid were to be treated, not as a penalty, but as liquidated damages. Plaintiff paid on account of the agreement the sum of \$382.50, viz., two payments of \$125 and interest, as provided in the agreement, and two payments of \$62.50 and interest, on account of the planting and care of the trees, which sums were accepted by defendant. On the 9th day of August, 1895, plaintiff, in writing, tendered to defendant all sums due the latter on account of the agreement, and offered to comply with all the terms and conditions of his contract, demanded a deed, and tendered to defendant a deed for its execution. The tender also contained a further demand that, if defendant refused to accept the sum of \$1,000, tendered, and to execute a deed, defendant return to plaintiff the sum of \$382.50 paid it on account of the contract, all of which was refused by defendant. Plaintiff has never been in possession of the property, or any part thereof.

The complaint contains two counts. The foregoing facts are pleaded in the first count. By the second count the plaintiff seeks a recovery as for money had and received. By the first count, which seems to have been framed upon some theory of equitable relief, the averments of the plaintiff amount to this, and to no more: That he entered into a contract for the purchase of land; that he made certain payments according to his covenants; that he defaulted in later payments; that three and a half years after his first default, and more than six months after default in the time of final payment, he made a tender to defendant of the full amount due under the contract, which tender was refused; that by the express declaration of the parties time was made essential in the contract, and that payment of the moneys upon time was a condition precedent to the right to a conveyance; that, for failure to pay upon time, defendant, by the terms of the agreement, is released from all obligation to convey, and the moneys paid are forfeited as liquidated damages; yet, notwithstanding these covenants, by a tender made and refused long after plaintiff's default, defendant is itself in some way placed in default, and plaintiff may recover his money. This, moreover, without the slightest averment or the shadowiest proof in excuse of plaintiff's breach of contract. The case stands, then, upon this proposition: that under a contract for the sale of realty, where time is of the essence, a vendee, after breach of covenant to pay, performance of which is made a condition precedent to his right to a conveyance, may, without excusing his default, by a tender of the amount due, acquire some legal or equitable right which warrants his recovery of the moneys he has paid. Respondent insists that his position finds abundant support in

the line of cases beginning with *Drew v. Pedlar*, 87 Cal. 443. The trial judge evidently entertained the same view. If this be the law, it is important that it be so declared without equivocation. If it be not, then it is equally important that the misunderstanding and doubts of the profession should be promptly removed. Land is one of the very highest forms of property. Contracts for its sale are required to be solemnly evidenced by signed writings. The value of such sales amounts to untold millions of dollars annually. It becomes a matter of the utmost consequence, then, that the reciprocal rights and duties of vendors and vendees under the conditions and covenants usually found in such contracts—conditions and covenants in such general use that their employment may be said to be universal—should be clearly defined and understood. It is in this view alone that this case becomes important, for the amount involved is only about \$380. But the doubts which seem to exist concerning legal and equitable rights under such contracts demand for their removal a somewhat extended examination of the subject.

It may be as well at the outset to quote the Code provisions bearing upon the question. Their consideration will arise as the discussion proceeds. Civil Code, § 3306: "The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto in case of bad faith the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, and the expenses properly incurred in preparing to enter upon the land." Id. § 3307: "The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller under the contract over the value of the property to him." Id. § 1670: "Every contract by which the amount of damage to be paid, or other compensation to be made for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section." Id. § 1671: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage." Id. § 3384: "Except as otherwise provided in this article, the specific performance of an obligation may be compelled." Id. § 3387: "It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, and that the breach of an agreement to transfer personal property can be thus relieved." Id. § 3389: "A contract, otherwise proper to be specifically enforced, may be thus enforced, though a penalty is imposed or the damages are liquidated for its breach, and the party in default is willing to pay the same."

Of any contract for the sale of land there may be a breach, either by the vendee refusing to pay, or by the vendor refusing to convey. Actions at law for the breach of contracts are as old as the law itself. As the common law long antedated the system of equity jurisprudence, there was a time when the only recovery available to the injured party was a recovery in damages,—money, for money is the only recompense which the law affords for a private injury. The establishment of equity jurisprudence afforded a different redress, one unknown to the law. Acting upon the wrongdoer, it forced him specifically to perform his contract. This, however, but increased the suitor's remedies, and left it optional with him in proper cases either to rest upon his legal action for damages, or to seek in equity the relief of compulsory performance. Even so, however, there still were, and there must always be, breaches of such contracts for which equity is powerless to afford redress. Thus, if a vendor contracts to convey land to which he has no title, equity cannot compel him to obtain title, and the vendee must of necessity be limited to his action at law. If there were not such an action, and a rule and measure of damage under it, he would be remediless. Again, it is to be remembered that equity, designed but to supplement the deficiencies of the law, will withhold its aid where the law affords full redress. For both these classes of cases, then,—that is to say, for those where the law is sufficient, and for those where equity is powerless to aid,—the injured party must seek legal redress.

The two sections of the Code first above quoted deal with the legal redress to which the party is entitled, either at his option or from the compulsion of circumstances. It is true that under our system the court of law and the court of equity are merged into one, and that a party is awarded such legal or equitable redress, as a simple pleading of ultimate facts shows that he merits; but, nevertheless, the distinctions between the kinds of redress and the modes in which they are administered cannot and are not sought to be obliterated. It was well recognized, however, that the damages of the law afforded inadequate compensation for the breach of many contracts. In contracts for the sale of chattels, for a breach the vendee usually (though not always) received adequate compensation in money, since with the money he could buy another article identical in kind and value. In contracts for the sale of land it was otherwise. No other piece of land upon the earth could duplicate that which the purchaser desired. *Pretium affectionis* was an important element of the vendee's contract, and this could not be measured. A pecuniary recompense, then, failed to meet the case. On the part of the vendor, since he is selling his land for a money price, it would appear logically that an action at law for the recovery of damages would answer the requirements of his case upon a breach by the vendee, and that he should not be allowed, therefore, to resort to equity for relief. But mutuality is an es-

sentia element in contracts for which specific performance may be decreed. In other words, before a contract may be specifically enforced against the one party to it, it must be enforceable against the other; and, moreover, as was said by Lord Eldon in expressing his dissatisfaction with the relief against forfeitures granted by equity: "The result of experience is that, where a man, having contracted to sell his estate, is placed in this situation,—that he cannot know whether he is to receive the price when it ought to be paid,—the very circumstance that the condition is not performed at the time stipulated may prove his ruin, notwithstanding all the court can offer as compensation." *Hill v. Barclay*, 18 Ves. Jr. 59. It may frequently be of the utmost consequence to the vendor that he should have the right to enforce the contract and receive payment for his land in money, since he may much prefer the full purchase price to retaining the estate and receiving smaller monetary compensation by way of damages. And, finally, it is to be considered that during the life of such contracts the vendor foregoes his right to convey to another. He may thus lose an opportunity to make an advantageous sale, and, while this right is admittedly valuable, it is extremely difficult to put a price upon it. For these reasons the equitable action for specific performance is as available to the vendor as to the vendee. Pom. Spec. Perf. §§ 6-12.

From this difficulty in meting out adequate compensation at law arose two things: First. The parties, by convention, were allowed to agree upon the value of the injury occasioned by the breach as liquidated or stipulated damages. These damages were not only recoverable at law, but courts of equity would not and could not relieve against them. Story, Eq. Jur. § 1318; *Williams v. Green*, 14 Ark. 315; *Westerman v. Means*, 12 Pa. 97. Second. Equity immediately took cognizance of the violation of such contracts, and made whole the injured party by decreeing specific performance. It also did the same in the case of contracts for the sale of chattels, where the peculiar circumstances warranted it. Thus, in *Senter v. Davis*, 38 Cal. 450, it is said: "The jurisdiction of a court of equity to decree specific performance does not turn at all upon the question whether the contract relates to real or personal property, but altogether upon the question whether the breach complained of can be adequately compensated in damages. If it can, the plaintiff's remedy is at law only; if not, he may go into a court of equity, which will grant full redress by compelling specific performance on the part of the defendant. Accordingly, while it is a general rule that contracts for the sale and transfer of personal property will not be specifically enforced, yet, if there are circumstances in view of which a judgment for damages would fall short of the redress which the plaintiff's situation demands, . . . equity will decree specific performance." In *Krouse v. Woodward*, 110 Cal. 638, this court was again called upon to consider the question, and decreed the return of

specific stock pledged, refusing to allow compensation in money in lieu thereof, because of the peculiar circumstances which rendered damages inadequate and equitable relief necessary. But the presumption is that damages are adequate for the breach of a contract to transfer personal property, and are inadequate, for the reasons we have been considering, for the breach of a contract to convey real property. This is the precise declaration of § 3387 of our Civil Code. It presents the sole reason why liquidated damages are countenanced under § 1671 of the Civil Code, and specific performance is decreed. In further confirmation is found § 3389 of the Civil Code, recognizing the universal rule that liquidated damages are proper in such contracts, and, notwithstanding the fact that damages may be thus stipulated, specific performance will be decreed. This declaration was to set at rest a question which somewhat vexed the courts, namely, that, as the parties made their damages certain by stipulation, uncertainty, which alone justified the interposition of equity, was removed, and therefore only redress at law remained. *Whitney v. Stone*, 23 Cal. 275; *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713; *Williams v. Dakin*, 22 Wend. 201; *Hahn v. Concordian Soc.* 42 Md. 460; *Chilliner v. Chilliner*, 2 Ves. Sr. 528; *McCaull v. Brnham*, 16 Fed. Rep. 37; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464. Thus, so far as this state is concerned, the question is concluded by the Code, and a party may either rest satisfied with a recovery of stipulated damages, or, waiving them, may resort to equity for specific performance.

One other point invites brief attention before application is made of these well-settled principles to the contract and facts in the case at bar. In this, as is usual in such contracts, time is expressly declared to be essential. It was always considered essential at law, but it has sometimes been said that equity will not or does not so regard it. This, however, means, no more than that, if equitable grounds in excuse of the default are shown, equity, to avoid forfeiture, will relieve the vendee, and uphold a tender made after time. It is the more willing to do this since, the price having been agreed upon, the vendor can usually be compensated for the delay by adding interest. In no other sense is the expression true. Where time is expressly made of the essence of the contract, equity will not ignore the provision for equity follows the law, and will neither make a new contract for the parties nor violate that which they have freely and advisedly entered into. *Gray v. Tubbs*, 43 Cal. 359; *Martin v. Morgan*, 87 Cal. 203; *Woodruff v. Semi-Tropio Land & W. Co.* 87 Cal. 275; *Vorwerk v. Nolte*, 87 Cal. 236; *Newton v. Hull*, 90 Cal. 487; *Bennett v. Hyde*, 92 Cal. 131.

The equitable rule where time is not of the essence is succinctly stated in § 1492 of the Civil Code. Now, in such contracts, upon a breach by the vendor of the covenant to convey, what courses are open to the vendee? Obviously these: He may stand upon the

contract, and sue at law for damages for the breach. Here his recovery will be governed by § 3306 of the Civil Code. Or, still standing upon his contract, he may go into equity, seeking its specific performance; or he may sue at law to recover the amount that may have been agreed upon as stipulated damages; or, finally, treating the vendor's breach as an abandonment, he may himself abandon it, when, the contract having thus come to an end, he may sue at law to recover what he has paid in an action for money had and received, for, the contract being at an end, the vendor holds money of the vendee to which he has no right, and to repay which, therefore, the law implies his promise. Upon the other hand, after the vendee's breach of the covenant to pay, what are the vendor's rights? First, to stand upon the terms of his contract, and sue for its breach under § 3307 of the Civil Code; second, still resting upon the contract, he may remain inactive, yet retain to his own use the moneys paid by the vendee, so that it is of no moment whether or not the contract declares that such moneys shall upon the breach be forfeited as liquidated damages; third, going into equity, still upon his contract, he may seek specific performance; or, finally, if his generosity prompts him so to do, he may agree with the vendee for a mutual abandonment and rescission, in which last case, and in which last case alone, the vendee in default would be entitled to a repayment of his money. One thing more he may do, but this is rather incidental to the fact that he has made the contract than a right growing out of it. It has heretofore been said that in certain cases equity will relieve the vendee from the effect of a breach of his covenant to pay upon a day certain. When such relief is granted, it is only after a showing of fraud, mistake, surprise, or other ground of purely equitable cognizance, excusing the breach. Now, as the vendee in default may maintain such an action, so may the vendor call the defaulting vendee into a court of equity, and compel him to show why all his rights under the contract should not be held to be at an end. The vendor, when he prosecutes such an action, does so to cut off the possibility of any future claim by the vendee to equitable relief, which might embarrass or cloud his title. In some forums this is designated an action for rescission. With us it is commonly called an action to foreclose the vendee's rights. *Keller v. Lewis*, 53 Cal. 113; *Fairchild v. Mullan*, 90 Cal. 190.

In the foregoing statement of the rights of the vendor and vendee it has been said that the vendee, upon the breach of the vendor is entitled to recover the moneys stipulated as liquidated damages. The foregoing discussion sets forth the reason: the inability of the law to afford adequate compensation in money, and the right consequently accorded to the contracting parties to stipulate what should be the measure and amount of the detriment caused by the default,—a reason recognized by §§ 3387 and 3389 of the Civil Code. In the case of the vendor, where the vendee's breach is merely

a failure to pay money, under the general principle that damages for a failure to pay money can usually be accurately measured, and compensation made by the allowance of interest, courts have inclined to disallow stipulated damages to the vendor, and have limited him to compensatory damages actually proved. But where the breach of the vendee is of some act not thus readily to be measured, stipulated damages will be allowed the vendor. *Tingley v. Cutler*, 7 Conn. 297; *Leggett v. New York Mut. L. Ins. Co.* 53 N. Y. 394; *Decamp v. Feay*, 5 Serg. & R. 323, 9 Am. Dec. 372; *Remington v. Irwin*, 14 Pa. 143; *Grigg v. Landis*, 21 N. J. Eq. 494.

But while equity will thus, in the cases indicated, refuse to recognize stipulated damages, and will often permit a vendee in default to excuse his breach as to the time of payment, and, after excuse made, compel the vendor to perform, it does not do so arbitrarily. The vendee must always show equitable grounds for relief before equity will interpose. Pom. Spec. Perf. § 335. When an equitable showing is not made to excuse the breach, the vendor has the right in equity, as he always has at law, to retain the moneys paid by the vendee. Therefore we have said that it matters not in such contracts that the parties have declared that the vendor may retain the moneys paid as stipulated damages. The name which the parties thus give does not alter the fact nor change the vendor's rights. If it be said that the clause for stipulated damages is void, still the vendor is entitled to retain the money. Thus, in *Hansbrough v. Peck*, 5 Wall. 497, 18 L. ed. 520, the Supreme Court of the United States, having under consideration this identical question, says: "No rule in respect to the contract is better settled than this: that the party who has advanced money or done an act in part performance of the agreement and then stops short, and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfil all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done." In precise illustration of the proposition may be quoted the language of the learned Chancellor Walworth in *Edgerton v. Peckham*, 11 Paige, 352: "The contract, it is true, contains a general provision that, if default shall be made in either of the payments, Strobeck shall forfeit all the previous payments, and give up the possession of the premises. This, however, is but the legal effect of the contract without such a provision; for, if no such provision had been contained in the agreement, the defendant might have brought an action of ejectment to recover the possession of the premises, which ejectment suit this court would not have restrained, except upon the terms of paying the balance of the purchase money and the costs of suit. Nor could the payments already made pursuant to the terms of the contract have been recovered back if the vendee had refused to complete his purchase, even if this clause of forfeiture had not been inserted in the contract. The question here

presented, then, is whether this clause was intended by the parties to deprive the purchaser of all legal and equitable right to the premises, or to the previous payments, if for any cause the last payment should not be made at the precise moment when it became due and payable; and, if so, whether it is not the duty of this court to relieve against such a forfeiture." Prof. Pomeroy, in his *Equity Jurisprudence* (§ 455), thus considers the matter: "Where an ordinary contract for the sale of land is so drawn that the vendee's estate, interest, and rights under it are liable to be forfeited and lost upon his failure to pay the price at the time specified, the question whether equity will relieve him ought to be a very plain and simple one; but in the face of the authorities it is impossible to be answered in any general and certain manner. . . . I shall therefore simply state the general conclusion derived from the decided cases. It is well settled that where the parties have so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well as of the law, a court of equity cannot relieve a vendee who has made default. With respect to this rule there is no doubt; the only difficulty is in determining when time has thus been made essential. It is also equally certain that when the contract is made to depend upon a condition precedent,—in other words, when no right shall vest until certain acts have been done; as, for example, until the vendee has paid certain sums at certain specified times, then, also, a court of equity will not relieve the vendee against the forfeiture incurred by a breach of such condition precedent."

It has been said that after the vendee's breach the vendor may agree to a mutual abandonment and rescission, in which last instance, and in which alone, the vendee in default would be entitled to a repayment of his money. Such was the precise condition of affairs pleaded, and not denied, in *Drew v. Pedlar*, where it is said: "Both the complaint and answer admitted that the agreement had been rescinded and annulled by the parties; and, as the judgment on the pleadings partly rests upon that fact, it is conclusive evidence of the fact." And again: "From the time the defendants elected to rescind the contract, or to consider and treat it as rescinded, it was their duty to refund the money they had received under the contract, and no demand before suit was necessary." Such, indeed, is the law, and, if *Drew v. Pedlar* be confined to cases in the condition thus represented,—that is to say, to cases where the vendor has rescinded after vendee's breach,—then no misunderstanding need arise, and no confusion will result. What is there said as to the covenant for liquidated damages being void is, as we have seen, of no consequence in contracts such as that and the one at bar, where the liquidated damages are expressed as the moneys paid by the vendee; for in all such cases, as has been shown, the vendor is entitled to retain these moneys, whether designated as liquidated damages or not. *Phelps v. Brown*, 95 Cal. 572, affords a typical in-

stance of such rescission by the vendor. There the vendee was in default, but the vendor elected to rescind, and, notwithstanding the default, refunded to the real-estate agent the moneys that had been paid by the vendee under the contract. The action was against the real-estate agent, and it was correctly decided—and, indeed, over the decision there could be no question—that in such a case the vendee is entitled to recover his money. But while it is essentially true that in case of a rescission the vendee may demand that he be restored to his original condition it does not follow that a vendor who refuses to convey after such breach by the vendee thereby rescinds. To the contrary, in refusing to convey after the vendee's default he is not treating the contract as at an end, but is expressly standing upon it, and basing his rights upon its terms, covenants, and conditions. The misleading feature in *Drew v. Pedlar* comes from the long statement of facts, from which it appears that all the plaintiff vendee did was to make tender long after his default, which tender the vendor refused to accept. But the vendee likewise pleaded a mutual abandonment and rescission, and, as appears from the opinion, the pleading as to these matters was not denied. It would be to the last degree unjust and inequitable to allow a vendee, after his default under such a contract, to put the vendor in default by a mere tender. The practical effect of such a rule would be that a vendee, without risk, could speculate indefinitely in the land of the unfortunate vendor. The vendee would enter into a contract in which time would be declared of the essence, and stipulate under condition precedent, as in this case, to make payment at a certain time. Failing to make payment, he would, three months, six months, one year, or, as in this case, over three years, after the date of the failure, make an offer to perform, and, if the land had risen in value, according to the theory of respondent here, could compel performance; but in every case he could recover the moneys paid. Lord Loughborough, in *Lloyd v. Collett*, 4 Bro. Ch. 469, well says: "There is nothing of more importance than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed, and that it should be certainly known when a man is bound and when not. There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say, the time is not so essential that in no case in which the day has by any means been suffered to elapse the court would relieve against it, and decree performance. The conduct of the parties, inevitable accident, etc., might induce the court to relieve. But it is a different thing to say the appointment of a day is to have no effect at all, and that it is not in the power of the parties to contract that, if the agreement is not executed at a particular time, the parties shall be at liberty to rescind it. . . . I want a case to prove that, where nothing has been done by the parties, this court will hold, in a contract

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of buying and selling, a rule . . . that the time is not an essential part of the contract. Here no step has been taken from the day of the sale for six months after the expiration of the time at which the contract was to be completed. If a given default will not do, what length of time will do? . . . An equity [arising] out of . . . [one's] own neglect! It is a singular head of equity." In *Bradford v. Parkhurst*, 96 Cal. 102, this court, having under consideration *Drew v. Pedlar*, said: "That case does not go to the extent of holding that a vendee can elect to consider the contract at an end, and recover what he has paid, when the vendor has not abandoned the contract." In *Merrill v. Merrill*, 103 Cal. 287, *Drew v. Pedlar* was again under review, and it is said: "Nor do I think it was held in any of the cases cited that a rescission was effected simply by the act of a vendor in claiming a forfeiture. In some of the cases the contract provided that the vendor might rescind upon default of the vendee. In such cases the rescission is by consent of the parties. In others it seems to be held that when the vendor refuses further performance, and claims the damages according to the contract, he abandons the contract, and thereupon the vendee may also abandon it, and reclaim his money. Whether the conclusion be correct or not is not a question here. Unless the rescission is by consent, it is difficult to understand how it has been brought about; for, as respondent justly says, it is, in effect, enacted in § 1691 of the Civil Code that rescission cannot be otherwise effected without a compliance with that section. The idea must be that the abandonment of the contract by the vendor is equivalent to a claim of rescission on his part which may be acquiesced in by the vendee. In *Cleary v. Folger*, 84 Cal. 316, it was simply held that the vendor was also in default, in that he did not tender a deed on the very day it was due on the contract. Both being in default, either could treat the contract as rescinded. It was not there held that when a vendor refuses to complete performance because of a breach on the part of the vendee, and claims damages as stipulated in the contract, he thereby rescinds or consents to a rescission. It has been said in several cases that this doctrine was announced in *Drew v. Pedlar*, 87 Cal. 449. Perhaps it does so hold, but such conclusion seems to be based in that case partly upon the pleadings in which both parties recognize the fact of a rescission. In other words, it was a rescission by mutual consent."

In the case at bar the payment of the final amount under the contract, at the time and in the manner agreed upon, was a condition precedent to the right of the vendee to demand a conveyance. Upon his failure to make payment the vendee committed a breach, and no affirmative act upon the part of the vendor was necessary to bring about this result. Months after, and without any equitable showing to relieve the default, the vendee makes tender, and because of its refusal claims the right of recovery. But the vendor, in refusing to accept the tender and to repay the money, is neither violating his

contract nor rescinding it, nor treating it as at an end. He is standing squarely upon its terms. The vendee is within the rule declared by Pomeroy, and above quoted. The contract is made to depend upon a condition precedent. By its terms no right is to vest in the vendee until certain acts of payment have been done by him, and a court of equity no more than a court at law will relieve a vendee, under such circumstances, from the penalties arising from the breach of such condition, in the absence of an equitable showing to excuse his default. None is here even attempted to be made.

It follows that *the judgment and order should be reversed*, and the cause remanded, and it is ordered accordingly.

We concur: **McFarland, J.; Temple, J.**

Harrison, J., concurring:

I concur in reversing the judgment and order appealed from upon the following grounds:

The plaintiff and the defendant entered into a written agreement February 21, 1891, whereby the defendant agreed that "in consideration of, subject to, and upon the full and due performance of the covenants and agreements on the part of the party of the second part hereinbefore contained," it would convey to the plaintiff a certain tract of land; and whereby the plaintiff, in consideration of said agreement, agreed to pay to the defendant the sum of \$625, as follows: \$125 upon the execution and delivery of the agreement, \$125 on or before the 21st day of February, 1892, and \$125 on or before the 21st day of each succeeding February, the last of said payments to be made on or before the 21st day of February, 1895, with interest at the rate of 6 per cent payable annually on the 21st day of February of each year on each and all deferred payments. The agreement also contained the following provisions: "It is expressly understood and agreed between the parties hereto that in all matters and things hereunder to be done, and all payments hereunder to be made, time is and shall be of the very essence of this agreement. The due performance of all covenants and agreements on the part of the party of the second part is a condition precedent, whereon depends the performance of the agreements on the part of the party of the first part. In the event of a failure of the party of the second part to comply with the covenants and agreements, or any thereof, on his part entered into, the party of the first part shall be released from all obligations in law or in equity to transfer and convey said properties, or any thereof, and the said party of the second part shall forfeit all rights under this agreement, and all rights to any and all moneys which he shall theretofore have paid hereunder, as liquidated damages for such default, and not as a penalty." Other provisions, not necessary to be considered herein, are also found in the agreement. At the execution of the instrument the plaintiff paid to the defendant the sum of \$125 therein provided for, and on February 21, 1892, paid the further sum

of \$125, together with \$7.50 for interest. No other instalment of the purchase price of the land, or interest thereon, was paid. The plaintiff did not enter into possession of the land. August 9, 1895, the plaintiff tendered to the defendant the full amount then unpaid upon the said agreement, and demanded a conveyance of the land, tendering at the same time a deed for execution proper in form. The defendant refused to make the deed, and thereupon the plaintiff brought the present action to recover the money which he had paid to the defendant under the provisions of the contract. Judgment was rendered in favor of the plaintiff as prayed for in his complaint, from which the defendant has appealed.

Under the agreement between the plaintiff and the defendant neither could maintain an action thereon against the other without having performed all of the conditions previously to be performed by himself. The plaintiff could not maintain an action for a conveyance of the land until he had paid or tendered the money which he was to pay therefor. By the terms of the agreement he agreed to pay certain instalments of the purchase price at designated times, and although the defendant could have brought an action for each of these instalments except the last, at its maturity, without tendering a conveyance, yet, if it failed to bring such action until after the maturity of the last instalment, it could not maintain an action therefor without a previous tender of the conveyance. *McCroskey v. Ladd*, 96 Cal. 455. Each of the parties to the contract had the right to compel the other to comply with its terms, and any action of this nature would be an action upon the contract, and to enforce it according to its terms. A contract for the purchase and sale of real estate does not differ from any other contract so far as the rights of the parties under its terms are affected. Parties have the right to make their contracts in such form and with such terms as they desire, and it is the function of courts to construe and enforce them as they have been made by the parties. Each has the right to the enforcement of the obligations of the other, and neither can free himself from his obligation against the will of the other, so long as the contract remains in force. Whether the action be to enforce the contract or to recover damages for its breach, it is incumbent upon the plaintiff in such action to show a performance on his part of all the acts required to be performed by him before he can call upon the other to comply with his part of the agreement, or respond in damages for a failure so to do. *Easton v. Montgomery*, 90 Cal. 307.

There have been many cases before this court involving the rights of parties to agreements for the sale and purchase of real estate, in which it has been held that after the parties have rescinded the agreement, or mutually agreed to abandon it, the vendee may recover the money which he had paid in part performance of his contract (*Dreio v. Pedlar*, 87 Cal. 443; *Phelps v. Brown*, 95 Cal. 572; *Shively v. Semi-Tropic Land &*

W. Co. 99 Cal. 259); but it has never been held that while the contract was insisted upon by the vendor, and he had done no act by which it might be contended that he had abandoned the contract, or was in any respect in default, the vendee could recover the money paid by him in part performance of the contract. On the contrary, it has been held that the vendee, who was himself in default in the payment of a portion of the money, could not, against the will of the vendor, repudiate the contract, and recover the portion already paid. *Bradford v. Parkhurst*, 96 Cal. 102; *Joyce v. Shafer*, 97 Cal. 335; *Garberino v. Roberts*, 109 Cal. 125. In the present case the parties have made their agreement in clear and definite terms. The plaintiff agreed with the defendant that he would pay to it certain sums of money at certain times, and the agreement of the defendant is equally explicit and clear that in consideration of the full and due performance of the agreements on the part of the plaintiff it would execute to him a conveyance of the land. That there might be no misunderstanding of these respective obligations, they further declared that it was expressly understood and agreed between them that in all matters and things to be done, and all payments to be made, by virtue of the contract, "time shall be of the very essence of this agreement;" and, further, that the due performance of all covenants and agreements on the part of the plaintiff was a condition precedent to the obligation of the defendant to perform its agreement. The plaintiff does not claim that he performed his covenants and agreements according to the terms of the contract, but by express allegation shows that he did not do so; nor does he offer any excuse for their nonperformance. Neither does he allege nor contend that the defendant has violated any of the obligations assumed by it under the contract. By the terms of the agreement the defendant was not required to make the conveyance except upon the full payment of the purchase price by the 21st of February, 1895, and it is not alleged in the complaint that such purchase price was then paid, or that it was tendered until many months thereafter. The plaintiff could not maintain an action against the defendant to recover the money paid by him, unless there had been a breach of the contract by the defendant; and the defendant was not guilty of a breach

of its obligation by failing to execute the conveyance, when the plaintiff was himself in default, or by refusing to comply with the demand of the plaintiff made many months after he had lost his right to the enforcement of the contract. Section 1490, Civ. Code, provides: "Where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterwards." The time for the performance of the obligation by the plaintiff was fixed by the contract, and under the provisions of this section he was required to perform his contract at that time, and not before or afterwards. As the contract also declared that time was of the essence of the obligation, the provisions of § 1492, Civil Code, are inapplicable, and the offer of performance subsequent to the time fixed by the contract was unavailing.

The provision that in case of default by the plaintiff to comply with his agreement he should forfeit his right to whatever moneys he might theretofore have paid, and that the defendant should be released from all obligation to convey the property, was but a declaration in express terms of what would have been the legal rights of the parties without such provision. The plaintiff had agreed to pay the money to the defendant as a condition precedent to his right to demand a conveyance of the land, and as the consideration for the defendant's agreement to make the conveyance, and he could not, by his mere default, become entitled to repossess himself of the money which he had paid under this express agreement. Whether the money thus paid was styled by the parties as penalty, or forfeiture, or liquidated damages, is immaterial. This provision was not an executory agreement for "damage to be paid or compensation to be made for the breach of an obligation," for which provision is made in § 1870, Civil Code, but the money therein referred to was money that had been paid by the plaintiff in discharge of an obligation which he had assumed, and the right of the defendant to receive and retain it was not impaired by the terms in which it was styled in the agreement.

We concur: **Garoutte, J.; Van Fleet, J.**

Rehearing denied.

IDAHO SUPREME COURT.

Flora A. DEEDS et al., Appts.,
v.

John STRODE, Resp't.

(.....Idaho.....)

*Plaintiff, a married woman, having a

*Headnote by HUSTON, J.

NOTE.—For right of action growing out of cohabitation under void marriage, see *Morrill v. Palmer* (Vt.) 33 L. R. A. 411, and note; also *Payne's Appeal* (Conn.) 33 L. R. A. 418.
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husband from whom she had never been lawfully divorced, married defendant. The latter marriage having been declared null and void, plaintiff brings action to recover damages from defendant for injuries alleged to have been received by her from defendant while they were cohabiting together, by reason of the defendant's having inoculated her with a venereal disease. Held, that, it not appearing that defendant had

As to divorce or annulment of marriage because of venereal disease, see *Smith v. Smith* (Mass.) 41 L. R. A. 800; and *McMahan v. McMahan* (Pa.) 41 L. R. A. 802.

induced plaintiff to enter into marital relations with him by any fraud, deceit, or misrepresentation, no recovery could be had.

(December 14, 1898.)

APPPEAL by plaintiffs from a judgment of the District Court for Ada County in favor of defendant in an action brought to recover damages for the communication to the female plaintiff of a venereal disease while she was living with defendant as his wife. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hawley & Puckett and E. J. Doockery for appellants.

Mr. W. E. Borah, for respondent:

If plaintiff could be treated as the wife of the defendant for the purposes of action, she could not have cause of action against her husband for tort.

Bandfield v. Bandfield (Mich.) 40 L. R. A. 757; *Abbott v. Abbott*, 67 Me. 394, 24 Am. Rep. 27; *Peters v. Peters*, 42 Iowa, 182; *Freethy v. Freethy*, 42 Barb. 641; *State v. Oliver*, 70 N. C. 60; *Cooley, Torts*, 2d ed. p. 216; *Nickerson v. Nickerson*, 65 Tex. 283.

The plaintiff was not the wife of Strode, but was another man's wife, and received alleged injuries or damages by reason of her criminal relations with a man not her husband.

Under our statute the plaintiff Flora A. Deeds was guilty of bigamy at all times while she was living with Strode, and could have been convicted as a bigamist; in other words, she was living in open violation of law.

Idaho Rev. Stat. §§ 6805, 6809; *Davis v. Com.* 13 Bush, 318.

No man can make his own misconduct the ground for an action in his own favor.

Cooley, Torts, 2d ed. p. 167; *Hall v. Coppell*, 7 Wall. 544, 19 L. ed. 244; *Holt v. Green*, 73 Pa. 198, 13 Am. Rep. 737; *Spalding v. Oakes*, 42 Vt. 343; *Percy v. Clary*, 32 Md. 245; *Wallace v. Cannon*, 38 Ga. 199, 95 Am. Dec. 385; *Barrow v. Landry*, 15 La. Ann. 681, 77 Am. Dec. 199; *Brown v. Tuttle*, 80 Me. 162; *Squires v. Parson*, 5 Watts & S. 357; *Lyons v. Desotelle*, 124 Mass. 389; *McGrath v. Merwin*, 112 Mass. 467, 17 Am. Rep. 119; *Beach, Contrib. Neg.* §§ 3, 4, pp. 7, 9, 15, 26; *Churchill v. Holt*, 131 Mass. 68, 41 Am. Rep. 191; *Greenhood, Pub. Pol.* p. 1; *Jetter v. New York & H. R. Co.* 2 Abb. App. Dec. 464; *Miller v. Ammon*, 145 U. S. 421, 36 L. ed. 759; *Chateau v. Singla*, 114 Cal. 91, 33 L. R. A. 750; *Morrison v. Bennett*, 52 Pac. 553; *Bartle v. Nutt*, 4 Pet. 184, 7 L. ed. 825.

The same principle which we invoke in this case is involved in a case of seduction, wherein it is universally held that as a woman is *particeps criminis* to the wrong, she cannot recover.

Woodward v. Anderson, 9 Bush, 624; 3 Sutherland, Damages, p. 737; *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 347; *Weaver v. Bachert*, 2 Pa. St. 80, 44 Am. Dec. 159; *Freer v. Cameron*, 4 Rich. L. 228, 55 Am. Dec. 663; *Cline v. Templeton*, 78 Ky. 550; *Hamilton v. Lomax*, 26 Barb. 615; *Paul v. Frazier*, 3 Mass. 71, 3 Am. Dec. 96. 43 L. R. A.

Plaintiff and Strode stood in the same relation as if they had never been married; their assumed marriage would not have even protected them from criminal prosecution for bigamy or adultery.

State v. Whitcomb, 52 Iowa, 85, 35 Am. Rep. 258; *Carpenter v. Smith*, 24 Iowa, 200; *Comstock v. Adams*, 23 Kan. 513, 33 Am. Rep. 191; *Stewart, Marr. & Div.* § 46; *Smith v. Smith*, 13 Gray, 209; *Whitcomb v. Whitcomb*, 46 Iowa, 444; *Adams v. Adams*, 51 N. H. 388, 12 Am. Rep. 134; *Johnson v. Coleman*, 23 Wis. 452, 99 Am. Dec. 193; *Crouch v. Crouch*, 30 Wis. 667; *Yorke v. Yorke*, 3 N. D. 343.

Huston, J., delivered the opinion of the court:

This is an action for damages brought by the plaintiffs, husband and wife, against the defendant. A demurrer was interposed by the defendant to the complaint of the plaintiff upon the ground that the complaint does not state facts sufficient to constitute a cause of action. This demurrer was sustained, and from the judgment entered thereon this appeal is taken.

This action is brought by and for the benefit of the plaintiff Flora A. Deeds. The complaint states that said Flora A. and her said husband "have, by mutual agreement and understanding, lived separate and apart from each other for more than seven years last past," and "that plaintiff Rufus M. Deeds is made a party hereto by reason of his being the husband of the plaintiff Flora A. Deeds, and for that reason only." The complaint further states that in the year 1890, at the town of Eugene, in the state of Oregon, plaintiff Flora A. Deeds and her said husband Rufus M. separated, and have since that time lived separate and apart from each other; that in February, 1892, the plaintiff Flora A. Deeds commenced suit in the district court for Ada county, Idaho, against her said husband to procure a divorce; that such proceedings were had in said suit that on the 22d day of December, 1892, a judgment and decree were entered in said court pretending to grant a decree of divorce to said plaintiff Flora A. Deeds from the said Rufus M. Deeds; that on the 31st day of October, 1893, at Boise City, in Ada county, Idaho, the plaintiff Flora A. Deeds, believing, by reason of the judgment and decree hereinbefore referred to, that she was a single woman, and no longer the wife of the plaintiff Rufus M. Deeds, at the solicitation and request of the defendant assented to a marriage ceremony being performed between them, and they were at said time and place married, and from that time, and at all times until the 26th day of February, 1897, lived together in Ada county as husband and wife; that on the 14th day of May, 1897, the plaintiff Flora A. Deeds, still believing she was the wife of defendant, and that the decree and judgment hereinbefore referred to granting a divorce from her said husband Rufus M. Deeds was in full force and effect, commenced in the district court for Ada county, Idaho, an action for divorce against the defendant herein, alleging as the

basis and grounds of said divorce cruel and inhuman treatment on his part. Defendant filed a cross complaint in said action, alleging that the marriage between himself and the said plaintiff Flora A. Deeds was null and void, among other things, because the court, in granting the divorce between herself and plaintiff Rufus M. Deeds, had no jurisdiction to make or enter such judgment and decree; whereupon, and on the 29th day of November, 1897, and after said cause had been heard and determined in said district court, said court rendered its judgment, deciding, among other things, that the judgment and decree in said cause of Deeds against Deeds was null and void, and appeal from said judgment of the district court to the supreme court of the state of Idaho was taken by said Flora A. Deeds, and the said judgment and decree of the district court was by said supreme court affirmed (52 Pac. 161); that while the plaintiff Flora A. Deeds was living with the defendant as his wife aforesaid, and believing herself to be his wife as aforesaid, and in the month of May, 1895, in Ada county, state of Idaho, the defendant, without fault of said plaintiff, and without her knowledge, connivance, privity, or consent, became affected with a certain loathsome and infectious disease, commonly and generally known as gonorrhea, and communicated said disease to plaintiff, and infected her therewith. The complaint then goes on to elaborate the sufferings of plaintiff by reason of said disease, and the neglect and ill treatment of her by the defendant, and closes with a demand for damages in the sum of \$25,000.

It does not appear that the defendant in any way misled the plaintiff, that he made any false representations to her, or practised any fraud upon her, to induce her to enter into the marriage relation with him. If there was fraud or deceit practised in bringing about the relation, it was presumably, under the statements in her complaint, attributable to the plaintiff. She was the incapacitated party. It was by her procurement—upon her motion—that the pretended divorce from Deeds, her former husband, had been procured. She was in a position to know, and is presumed to know, whether that divorce was legal or not; whereas the defendant cannot be presumed to have any knowledge or information upon that subject. There is no allegation in the complaint that defendant knew of the existence of the divorce in Deeds against Deeds. The plaintiff, holding herself out as one capacitated and qualified to enter into the marriage relation, accepted the proposals of the defendant to, and did, enter into such relations with him. Her act was at least a fraud upon the defendant. Plaintiff claims that by, through, and in consequence of said relations she has been damaged, and asks the court to award her compensation for such damage. We know of no principle of law or equity which will support this contention. Appellants' counsel cite 2 Nelson, Div. & Sep. § 1023. The language there used is as follows: "The woman is relieved of her incapacity to sue and be sued. She may sue

the man who has entrapped her into a void marriage, and compel him to account for rents and profits of property he took under such marriage. Where a woman is induced by fraud and deceit to enter into a void marriage, she may recover damages for such tort without first having the marriage annulled." This may be accepted as a correct statement of the law; but how is it made applicable to the case made by the record under consideration? The plaintiff has undoubtedly the right to sue and be sued, but to avail herself of that right she must, like every other person, have a cause of action. There is no question of property rights involved in this case. It is not claimed that the plaintiff brought to the community any estate or property whatever, or that the defendant derived any pecuniary benefit from said relation. The complaint alleges that the defendant is the owner and possessed of property of the value of \$150,000. It is not claimed or pretended that the plaintiff was "induced by fraud and deceit to enter into a void marriage." The case of *McDonald v. Fleming*, 12 B. Mon. 285, cited in note to § 1023 of Nelson on Divorce and Separation, was one in which the parties, after having cohabited together as husband and wife for several years, separated, and the woman brought action to recover for her services during the time of such cohabitation, and also for money advanced by her to the defendant for the purchase of certain real estate. The court held that, while she could not recover for services, she might for the money advanced, and so decreed. The parties in that case were in *pari delicto*. While this decision supports the text in Nelson, it has no application to the facts in the case at bar. *Blossom v. Barrett*, 37 N. Y. 434, 97 Am. Dec. 747, cited by appellants in their brief, was an action "brought [by the plaintiff] to recover damages of the defendant for fraudulently inducing the plaintiff to marry the defendant, and to cohabit with him, he having another wife living from whom he was not lawfully divorced, and the defendant being at the time incapacitated to marry any one while his prior wife was living." The plaintiff's right to recover in that case was based upon the fraud of the defendant. It could not be considered an authority in support of the contention of the plaintiff in this case. In *Robbins v. Potter*, 98 Mass. 532, cited by appellants, the plaintiff sued to recover money advanced to defendant by her while they were living together as husband and wife under a marriage which both parties knew to be void. The court in that case held, in substance, that while the plaintiff would not be allowed to recover for services rendered to defendant during the existence of the illegal relation between them, still she could recover for money loaned defendant during that period, and which he had expressly contracted to pay. *Cooper v. Cooper*, 147 Mass. 370, cited by appellants, was an action for services,—held no recovery could be had. The case of *Higgins v. Breen*, 9 Mo. 497, is not in point,—another case of fraud by defendant. We have examined carefully all of the cases cited by counsel,

and have found not one which supports, even by implication, the contention of appellants. Cooley, Torts, p. 279, has, under the head of "Fraudulent Marriage," the following: "A very serious wrong may be accomplished by inducing anyone through misrepresentation and fraud, to enter into an illegal marriage. . . . The tort in such a case consists in the fraud accomplished, to the woman's serious, and perhaps permanent, injury." Counsel for appellants insist that, the injury of which plaintiff complains having been the result of the wrongful act of defendant, plaintiff should be entitled to recover therefor, the same as though defendant had assaulted or poisoned her. We do not recognize the parallel contended for.

The injury complained of in this case could scarcely have arisen but for the illegal relations existing between the parties, and such relations were entered into voluntarily by plaintiff, and were not induced by any fraud or misrepresentation on the part of the defendant; and the plaintiff's incapacity to enter into marriage relations constituted the illegality. The injury was consequent upon her own illegal act, and we know of no principle of law authorizing recovery for injuries in such a case.

Judgment of the District Court affirmed, with costs to respondent.

Sullivan, Ch. J., and Quarles, J., concur.

ILLINOIS SUPREME COURT.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appt.*,

v.

Emma BEEBE, Admr., etc., of Charles I. Beebe, Deceased.

(174 Ill. 13.)

1. Refusal to take the case from the jury is not error if there is evidence tending to support the cause of action set up in the declaration.
2. Failure of a railroad company to have a good, substantial, and safe track for its trains, or to see that its trains are properly managed, will render it liable for an injury to a passenger therefrom.
3. A passenger lawfully on a freight train, who in the exercise of due care arises when the train comes to a standstill either to leave the train or to feed stock which his contract requires him to do, may recover from the carrier for injuries caused by a sudden start or unusual jerking of the train.
4. A stockowner on a freight train, under a contract to care for his stock but to ride in the caboose, will not be negligent in remaining in the stock car if before he has finished attending to the stock the train starts and proceeds upon its journey.
5. A carrier cannot contract for relief from liability for injuries to a passenger paying fare, caused by its own negligence.
6. A shipper traveling on a freight car with the consent of the carrier, to care for his stock, is regarded as a paying passenger.
7. The law of the state in which a contract for carriage is made controls as to its nature, interpretation, and effect if it is entire and indivisible, although it is to be performed partly in that state and partly in another.
8. If the trial court sustains the objection of the losing party to remarks by the opposing counsel in argument to the jury, he cannot complain on appeal that they

were not ruled out if he did not ask that they should be.

(June 18, 1898.)

A PPEAL by defendant from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for McLean County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

Statement by Magruder, J.:

This is an action on the case brought by appellee against appellant for alleged negligence in causing the death of her intestate. The jury found the issues for the plaintiff, assessing her damages at \$5,000. A new trial was denied, and judgment was rendered on the verdict. Upon appeal to the appellate court this judgment has been affirmed, and the present appeal is prosecuted from such judgment of affirmance. The facts out of which the questions involved arise are substantially as follows: On April 15, 1894, the appellee's intestate, Charles I. Beebe, who lived at Webster City, Iowa, chartered a car over the appellant's railroad from Webster City, Iowa, to West Lebanon, Indiana, and placed his horses (seven in number) in one end of the car, and his household goods in the other end thereof, to be carried to West Lebanon, Indiana, by way of Dunbar, Freeport, Lasalle, and Wenona, Illinois. Between the doors of the car were two barrels of water, and hay and oats and boxes. The train, of which the car chartered by the deceased was a part, was a through freight train, which left Webster City, about 7 o'clock on the morning of said 15th day of April. The train reached Freeport, Illinois, some time after 11 o'clock in the night of that day. The car in question was then put into another train going south, and was the seventh car from the engine. The train leav-

NOTE.—On the question of the risk assumed by a passenger on a freight train, see *note to Ohio Valley R. Co. v. Watson* (Ky.) 19 L. R. A. 810.

As to the rights of a person riding on a pass, 43 L. R. A.

see *note to Muldoon v. Seattle City R. Co.* (Wash.) 22 L. R. A. 794. See also *Meuer v. Chicago, M. & St. P. R. Co.* (S. D.) 25 L. R. A. 81; and *Davis v. Chicago, M. & St. P. R. Co.* (Wis.) 33 L. R. A. 654.

ing Freeport reached Lasalle at about a quarter past 5 o'clock on the morning of April 16, and there stopped to change engines. At Lasalle, Beebe watered his horses, with the consent of the conductor, and pursuant to an arrangement with him. The horses were in the back part of the car, with their heads to the east, and separated from the household goods by a plank nailed across the car, some 3 feet above the floor. The horse next to the plank was a small broncho pony, which had been used for family driving. On account of the way in which the goods were loaded, the east door of the car could not be opened. The deceased was assisted in watering his stock by the conductor and the brakeman. As soon as the last bucket of water was handed up to the deceased through the door on the west side of the car, which was the only door open, the train pulled out,—Beebe being still in the car,—and did not stop again until it reached Wenona, 20 miles to the south. The train arrived at Wenona a little after 6 o'clock on the morning of April 16. At Wenona the appellant's road crossed the road of the Chicago & Alton Railroad Company on an up grade. As the train pulled down over the crossing of the Chicago & Alton Railroad, it was subjected to a severe and violent jerking and jumping; and Beebe who had remained in his car all the way from Lasalle, fell or was thrown out of the west door. His right foot and ankle being caught under the wheels, were crushed, and within three hours amputated by the company's local surgeon. About 7 o'clock in the evening of the next day he died. The appellant introduced in evidence a certain live-stock contract executed on April 15, 1894, between the deceased, Beebe, as shipper, and the appellant, by its agent. Certain provisions in print precede the contract, and refer to the contract as one to be executed in duplicate by the shipper and the agent of the company. The provision hereinafter quoted seems to be a part of the preface to the contract, and not of the contract itself; but, as both parties treat it as being embodied in the contract, it is here set forth as a part thereof. The provision referred to is as follows: "The owner will feed, water, and take care of his stock at his own expense and risk. Free transportation will be given to the owner or his bona fide employees in charge of the stock, as per current instructions given to agents. Persons so passed will be conveyed at their own risk of personal injury from any cause whatever, except injuries arising from gross carelessness of the company, and must ride in the caboose attached to the train conveying the stock."

Messrs. Williams & Capen for appellant.

Messrs. Fifer & Barry and **A. B. Davidson**, for appellee:

The law of the state in which the contract for carrying is made controls as to its nature, interpretation, and effect.

Pennsylvania Co. v. Fairchild, 69 Ill. 260; *Milwaukee & St. P. R. Co. v. Smith*, 74 Ill. 43 L. R. A. .

197; *Michigan C. R. Co. v. Boyd*, 91 Ill. 268; *Rorer, Inter-State Law*, p. 68; *McDaniel v. Chicago & N. W. R. Co.* 24 Iowa, 412; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; *Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415; *Rue v. Missouri P. R. Co.* 74 Tex. 474; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 393, 36 L. ed. 738; *Anstedt v. Sutter*, 30 Ill. 164.

A passenger paying fare by traveling on a pass in charge of his stock, when he pays the regular freight for transportation of his stock, is a passenger for hire, and the company cannot limit its liability for injury caused by its negligence.

New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788; *Monroe v. The Inca*, 50 Fed. Rep. 561; *Lewisohn v. National S. S. Co.* 56 Fed. Rep. 602; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 471; *Indianapolis, B. & W. R. Co. v. Beaver*, 41 Ind. 493; *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Ohio & M. R. Co. v. Nickless*, 71 Ind. 271; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315; *Missouri P. R. Co. v. Ivy*, 71 Tex. 409, 1 L. R. A. 500; *Maslin v. Baltimore & O. R. Co.* 14 W. Va. 180, 35 Am. Rep. 748; *Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10; *Carroll v. Missouri P. R. Co.* 88 Mo. 239, 57 Am. Rep. 392; *Wabash R. Co. v. Brown*, 152 Ill. 484.

Where there is no evidence to show just what the intestate was doing at the time of the injury, for the purpose of showing that he was in the exercise of ordinary care, it is competent to show what his habits were as to being careful and cautious for his own safety.

Chicago, R. I. & P. R. Co. v. Clark, 108 Ill. 113.

The stop at Lasalle only being for two or three minutes Beebe didn't have sufficient time within which to get out of the car and get back to the caboose before the train pulled out. All the trainmen knew that he was in the car at the time the train pulled out.

Florida R. & Nav. Co. v. Webster, 25 Fla. 394; *Illinois C. R. Co. v. O'Keefe*, 154 Ill. 508.

It is only when the conclusion of negligence necessarily results from the statement of fact that the court can be called upon to say to the jury that a fact establishes negligence as a matter of law.

Chicago & E. I. R. Co. v. O'Connor, 119 Ill. 586; *Terre Haute & I. R. Co. v. Voelker*, 129 Ill. 540; *Lake Shore & M. S. R. Co. v. Johnson*, 135 Ill. 647; *Chicago & A. R. Co. v. Byrum*, 153 Ill. 137; *Chicago & A. R. Co. v. Nelson*, 153 Ill. 89.

If Beebe was properly and necessarily in the car he did not lose his rights as a passenger, and the same degree of care was due him as if he had remained in the caboose.

Chicago & A. R. Co. v. Arnol, 144 Ill. 261, 19 L. R. A. 313.

Magruder, J., delivered the opinion of the court:

1. At the close of the evidence the defendant presented to the court a written instruction saying to the jury "that there is no evidence to support a verdict for the plaintiff, if rendered in this case, and you are accordingly instructed to return a verdict for the defendant." This instruction was refused, and its refusal is assigned as error. After a careful examination of the case, we are of the opinion that there was evidence tending to support the cause of action set up in the declaration, and therefore the court committed no error in refusing to take the case from the jury. The declaration alleges, in substance, that, the train having come almost to a standstill, the engineer, negligently, carelessly, suddenly, violently, and without warning, started the engine forward, and thereby, with great force and violence, jerked the car in which the deceased was a passenger, by means of which he was thrown down and out of it, and received the injuries from which he died. One of the questions of fact in the case is whether or not there was any unusual violence in the jerking or bumping of the car, beyond that which is inevitable to freight trains under the circumstances mentioned in the statement preceding this opinion. There was testimony on both sides of this question. Another question of fact was whether the death of appellee's intestate was caused by the fall from the car, or by a kick which he is alleged to have received from one of the horses in the car. There is testimony on both sides of this question. Another question of fact was whether or not the deceased was guilty of contributory negligence. Upon both sides of this question, also, there was much testimony. Upon all these matters of fact the jury were elaborately instructed; thirteen instructions having been given for the plaintiff, and eighteen for the defendant. Six of the instructions given for the defendant were first modified by the court before they were given. Six others asked by the defendant were refused. The verdict of the jury, and the judgment entered thereon in the circuit court, and the judgment of the appellate court affirming the judgment of the circuit court, are conclusive upon these questions of fact, so far as this court is concerned. It is the duty of a railroad company to have a good, substantial, and safe road track for the use of its trains; and it is also its duty to see that its trains are properly managed. When a passenger is injured from a failure to perform this duty, the railroad company is guilty of negligence, for which it may be held responsible in damages. Where a passenger is lawfully upon a freight train, and arises, when the train comes to a standstill, either for the purpose of alighting from the train, or for the purpose of feeding stock, where a contract with the company requires him to do so, and is injured by a sudden start of the train, or by an unusual jerking or bumping of the train, the jury will be justified in finding that the railroad company is guilty of negligence, if it be shown that the plaintiff was in the exercise of ordinary care for his

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safety at the time of the injury. *Florida R. & Nav. Co. v. Webster*, 25 Fla. 394; *Chicago & A. R. Co. v. Arnol*, 144 Ill. 261, 19 L. R. A. 313. It is claimed that the deceased was guilty of contributory negligence, upon the alleged ground that when injured he was in the car chartered by him, where his horses and household goods were, instead of being in the caboose attached to the freight train. It is true that the contract required the deceased to "ride in the caboose attached to the train conveying the stock." But the contract also states that "the owner will feed, water, and take care of his stock at his own expense and risk." The contract must be so construed as to be consistent with itself. If the deceased was obliged to feed, water, and take care of his stock, he had the right to go into the car where the stock was, in order to fulfill this obligation. Counsel for appellant claim that while the train was in motion it was the duty of the deceased to be in the caboose, and that only when the train stopped did he have any right to go to his own car to feed and water his stock. The evidence tends to show that when the train stopped at Lasalle the deceased was in his own car, and was there engaged in watering his stock, and was assisted in so doing by the conductor and brakeman of the train. While he was thus engaged in feeding and watering his stock, the train suddenly started, and did not again stop until it reached the place where the accident occurred. The stop made, at Lasalle would appear to have been a very short one, and not long enough to enable the deceased to finish the acts of attention which he was giving to his stock. It was a fair question to be submitted to the jury, whether, under all the circumstances, the servants of the appellant in charge of the train did not fail to give the deceased sufficient time to feed and water his stock and return to the caboose before the train started. After the train started, and while it was in motion, it was not possible for him to reach the caboose. It was a question, therefore, for the jury to determine, whether or not the deceased was guilty of contributory negligence in being in the car, and whether or not he was not forced to remain there by reason of the conduct of the servants of the appellant, in causing the train to start before he had finished caring for the stock. If there had been no provision in the contract of shipment requiring the deceased to feed and water his stock, it would have been the duty of the appellant to do so, and appellant would have been liable to the deceased for a loss or injury occurring to the stock in case it had failed to discharge this duty. But inasmuch as, by the terms of the contract, the duty of caring for the stock was assumed by the deceased, as the shipper thereof, the appellant was under obligations to afford him a reasonable opportunity and reasonable facilities for doing what the contract required him to do. It failed to furnish him such reasonable opportunity and facilities, if it refused to detain its train long enough at a proper stopping place to enable him to feed and water his stock and return to the caboose

before the starting of the train. 5 Am. & Eng. Enc. Law, 2d ed. pp. 436, 437.

2. It is assigned as error by the appellant that the court gave certain instructions for the appellee upon the trial below. Complaint is made of the first and second of such instructions. These instructions announce, in substance, that such portion of the contract as required the intestate to be conveyed at his "own risk of personal injury, from any cause whatever, except injuries arising from gross carelessness of the railroad company," was null and void, and of no binding effect. The question presented by the objection to these instructions is whether a common carrier can by contract exempt itself from liability for negligence in the conveyance of a passenger, provided only such negligence is not gross in its character. Many of the cases make a distinction between negligence and gross negligence, and hold that a carrier may exempt itself from liability for the former, though not for the latter. Undoubtedly the great weight of authority is in favor of the position that the carrier cannot by contract exempt itself from liability for ordinary negligence. It would certainly seem to be against public policy that a common carrier, owing a duty to the public to carry its passengers safely, and to exercise the highest degree of care and skill in doing so, should be allowed to exempt itself from liability for any degree of negligence which should cause an injury to a passenger. 5 Am. & Eng. Enc. Law, 2d ed. p. 618. It is said, however, that in Illinois a carrier may by contract limit its liability for all negligence, except gross negligence. This rule has been laid down in some cases in reference to the shipment and carriage of property, but does not apply when a carrier intends to limit its liability for personal injury to a passenger paying fare. Where a passenger was traveling in the cars of a railroad company upon a free pass given him by the company, and received injuries to his person, it has been held that a contract exempting it from liability for any other species or degree of negligence than gross negligence was valid. *Illinois C. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260; *Toledo, W. & W. R. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613. But in the present case it cannot be said that the deceased intestate was riding upon a free pass. A person who is traveling, with the consent of the railroad company, upon a freight train, in charge of stock or goods carried by the company for him, is a passenger. (*Indianapolis, B. & W. R. Co. v. Beaver*, 41 Ind. 493; *Lawson v. Chicago St. P. M. & O. R. Co.* 64 Wis. 447, 54 Am. Rep. 634. Even where such a person is traveling in charge of cattle, on a drover's pass, he is a passenger for hire. The consideration for his passage is the service he renders in taking care of the cattle, or the charge made against him or his employer for shipping the cattle. *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; 3 Am. & Eng. Enc. Law, p. 16, and cases cited in notes; *Lake Shore & M. S. R.* 43 L. R. A.

Co. v. Brown, 123 Ill. 162; *New York, C. & St. L. R. Co. v. Blumenthal*, 160 Ill. 40. Inasmuch as the deceased was a passenger, the degree of care required of the appellant for his safety was "the highest reasonable and practicable skill, care, and diligence." *Chicago & A. R. Co. v. Arnol*, 144 Ill. 271, 19 L. R. A. 313, and cases there cited. In the case of *Arnold v. Illinois C. R. Co.* 83 Ill. 273, 25 Am. Rep. 386, it seems to have been held that a railroad company could make a contract with a passenger on a freight train to exempt itself from liability for any other negligence than gross negligence. That case proceeded upon the theory that there was a difference between the obligation of a railroad company to carry a passenger upon a freight train, and its obligation to carry a passenger upon a passenger train, in respect to the degree of care required to be exercised. In later cases, however, it has been held that a carrier will be held to the same strict accountability for the negligence of its servants, resulting in injury to a passenger who is lawfully and properly on a freight train, as governs its liability for such negligence where the transportation is upon a train devoted to passenger service exclusively. *Chicago & A. R. Co. v. Arnol*, 144 Ill. 271, 19 L. R. A. 313; *New York, C. & St. L. R. Co. v. Blumenthal*, 160 Ill. 40. A railroad company cannot exempt itself from the exercise of care and diligence in conveying its passengers, and cannot, even by contract, limit its liability for injuries to passengers to gross negligence alone. It is responsible for any degree of negligence which is sufficient to cause the injury, whether the negligence be called gross or ordinary. The requirement of such responsibility is demanded upon grounds of public policy.

It is contended by appellee that under the law of Iowa, where the contract was made, it was void and of no binding effect. Upon the trial of the case the plaintiff below introduced in evidence § 1308 of the Iowa Code, which is as follows: "Sec. 1308. No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into." The plaintiff below also introduced in evidence the opinion of the supreme court of Iowa in the case of *McDaniel v. Chicago & N. W. R. Co.* 24 Iowa, 412, holding that a contract similar to that here under consideration was made void by said § 1308, and could not be enforced in Iowa. Whether or not the restriction of appellant's liability, as contained in this contract, was void or not by reason of said § 1308, depends upon the further question whether it is to be construed according to the law of Iowa or the law of Illinois, if the law of Illinois were such as it is claimed to be by the appellant. The contract was executed in the state of Iowa. As a general rule, the law of the state in which a contract for carrying is made controls, as to its nature, interpretation, and effect. In *Pennsylvania Co. v. Fairchild*, 69 Ill. 260, we said (p. 263): "The rule upon that subject

is well settled, and has often been recognized by this court, that contracts are to be construed according to the laws of the state where made, unless it is presumed from their tenor that they were entered into with a view to the law of some other state." See also. *Milwaukee & St. P. R. Co. v. Smith*, 74 Ill. 197. We discover nothing in this contract to indicate that in entering into it the parties had in view the law of any other state than that of Iowa. In *Michigan C. R. Co. v. Boyd*, 91 Ill. 268, where the goods were shipped from Massachusetts to Lincoln, Ill. and the contract of shipment was made in Massachusetts, we said (page 271): "The contract for the carriage of the goods having been made in Massachusetts, the law of that state must control, as to its nature, interpretation, and effect." It is contended by counsel for appellant that this contract should be interpreted in accordance with the law of the place where it is to be performed. This action is brought in Illinois, and the injury resulting in Beebe's death occurred in Illinois. There is nothing in the terms of the contract itself to indicate that the parties intended any performance thereof in the state of Illinois. If there was any intention that the contract should be performed in any other state than Iowa, the performance must have been contemplated as taking place in the state of Indiana, rather than in the state of Illinois, because the property carried was to be taken to Indiana. The performance of the contract was to be consummated in the latter state. If, however, the contract be regarded as one which was to be partly performed in Iowa and partly in Illinois, it yet must be said of it that it is a contract which is entire and indivisible. "If a contract be entire and indivisible, and is to be partly performed in the state where it is made, and partly in another, then the *lex loci contractus*, or the law of the state where it is made, governs as to its validity; and, if invalid there, it is invalid everywhere else." Rorer, *Interstate Law*, p. 69; *McDaniel v. Chicago & N. W. R. Co.* 24 Iowa, 412; *Western & A. R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 2 L. R. A. 102. Inasmuch, therefore, as the contract, under the construction contended for by appellant, was partly to be performed in Iowa, it must, as to its validity, nature, obligation, and interpretation, be governed

by the law of Iowa. This being so, it was void, under § 1308, and the instructions complained of were not erroneous.

The objections made by the appellant to the third and eighth instructions given for the appellee are disposed of by what has already been said. As to the objections to the eleventh, twelfth, and thirteenth instructions given for the plaintiff below, it is sufficient to say that appellant asked similar instructions in its own behalf, which were given, and therefore it is estopped from complaining. *Illinois C. R. Co. v. Latimer*, 128 Ill. 163; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614.

3. The appellant further complains that counsel for plaintiff below was guilty of making improper remarks to the jury. The counsel was severe in his comments upon the character of some of appellant's witnesses. These comments, however, were called forth and justified by the remarks previously made in his address to the jury by one of the counsel for appellant. Aside from this, however, when the remark complained of was made by the counsel for the plaintiff below in his closing address to the jury, counsel for appellant objected to the same, and the court sustained the objection. Counsel for appellant are estopped from here complaining of a ruling made by the court below which was in their favor. After the court made a remark which amounted, in substance, to a sustaining of the objection so made, counsel for the appellant did not ask the court for any further ruling upon the subject. They were content with the action of the court, so far as it went. They did not request the court to rule out the objectionable remark, and therefore it cannot now be said that there was a refusal to rule it out. In arguing cases to the jury, attorneys must be allowed to make reasonable comments upon the evidence, and upon the bearing of the witnesses giving the evidence. The interests of public justice require that counsel should not be subjected to any unreasonable restrictions in this regard. We discover nothing erroneous in the action of the court below upon this subject.

The judgments of the Appellate Court and of the Circuit Court are affirmed.

Boggs, J., took no part in the decision of this case.

IOWA SUPREME COURT.

E. E. McPEEK

v.

WESTERN UNION TELEGRAPH COMPANY, Appt.

(.....Iowa.....)

1. A certified copy of a proclamation of the governor which has been deposited

NOTE.—As to the measure of damages for failure to deliver a telegram relating to a business transaction, see also cases in *note* to *Western U. Teleg. Co. v. Brown* (Tex.) 2 L. R. A. 766; *Alexander v. Western U. Teleg. Co.* (Miss.) 3 L. R. A. 71; *Western U. Teleg. Co. v. Collins* (Kan.) 10 L. R. A. 515, and *note*; *Pep-* 42 L. R. A.

in the office of the secretary of state is admissible in evidence under statutes permitting such proof of records in his office where the statutes require him to keep papers deposited to be kept in his office, although no express provision is made as to proclamations.

2. Upon the question of liability for failure to promptly deliver a telegram directing the sendee to "come on first

per v. Western U. Teleg. Co. (Tenn.) 4 L. R. A. 680; *Postal Teleg. Cable Co. v. Lathrop* (Ill.) 7 L. R. A. 474; *Western U. Teleg. Co. v. Wilson* (Fla.) 22 L. R. A. 434; *Fererro v. Western U. Teleg. Co.* (D. C. App.) 35 L. R. A. 548; and *Fergusson v. Anglo-American Teleg. Co.* (Pa.) 35 L. R. A. 554.

train" to arrest a fugitive from justice who had been entrapped by the sendee, evidence of the arrangement between sender and sendee with reference to the capture is admissible.

3. The action by sendee of a telegram for failure to promptly deliver it is based, not on breach of contract, but upon defendant's neglect of its duty as a public carrier of messages.
4. The sendee's damages for failure to promptly deliver a telegram are not limited to what might reasonably have been in contemplation of the parties, but will include compensation for all injurious results which flow therefrom by ordinary natural sequence without the interposition of any other negligent act or overpowering force.
5. Damages for failure to promptly deliver a telegram advising the sendee of the whereabouts of a fugitive from justice may include loss of a reward offered for the capture, although the message did not contain such information on its face, if the company knew that it was important and that the sendee was expecting a message relating to such capture, and although neither the company nor the sendee knew at the time of the offer of reward, since the company was charged with knowledge that the reward might be made and that negligence might result in its loss.
6. Whether or not the failure to capture a fugitive from justice was due to neglect to deliver the telegram conveying information of his whereabouts is a question for the jury, where he had been enticed to a room and disarmed while a person having three assistants and a team engaged was waiting 12 miles away for notice to come and make the arrest.
7. Liability for neglect to deliver a telegram requiring the sendee's presence at another town that night cannot be defeated by showing that no train went until morning, where he had made arrangements to go with horses.
8. A telegraph company which received a message under the agreement to deliver it about 9 o'clock P. M. cannot refuse to deliver it because that is out of office hours.
9. A telegraph operator is acting within the scope of his authority in agreeing that a telegram shall be delivered out of office hours, so that his act will bind the company.
10. Whether or not sufficient diligence was exercised in attempting to deliver a telegram of the importance of which the company was notified is a question for the jury, where the messenger testifies that he went to the sendee's house at the proper time, and repeatedly rapped loudly on the door, but received no response, and members of the sendee's family testify that they were in the house at that time and heard no rapping, although they would have been likely to have heard it had there been any.

(January 26, 1899.)

A PPEAL by defendant from a judgment of the District Court for Henry County in favor of plaintiff in an action brought to recover damages for failure to promptly deliver a telegram. *Affirmed.*

The facts are stated in the opinion.

Messrs. Blake & Blake, for appellant:
The copy of the governor's proclamation

offering a reward for the arrest of the fugitive McPherson was not competent testimony in this action.

The journal kept in the executive office is the best and primary evidence of the official acts of the executive department.

Morrison v. Coad, 49 Iowa, 571; *McCollister v. Yard*, 90 Iowa, 621.

The evidence of conversations between plaintiff and Mrs. McPherson is objectionable for the reason that it would open a wide door for fraud.

Chapman v. Neary, 115 Cal. 79.

The damages claimed are not such as may be fairly supposed to have been within the contemplation of both parties at the time of making the contract as the probable result of a breach of it.

Hadley v. Baxendale, 9 Exch. 341.

Special circumstances involved in the case cannot be considered in estimating the damages, unless it can be made to appear that the company was informed as to them at the time the contract of sending was made.

25 Am. & Eng. Enc. Law, p. 841; *Dubuque Wood & Coal Asso. v. Dubuque*, 30 Iowa, 176; *Prosser v. Jones*, 41 Iowa, 674; *Mihills Mfg. Co. v. Day Bros.* 50 Iowa, 250; *Primrose v. Western U. Telegr. Co.* 154 U. S. 1, 38 L. ed. 883; *Leonard v. New York, A. & B. Electro Magnetic Telegr. Co.* 41 N. Y. 544, 1 Am. Rep. 446; *Baldwin v. United States Telegr. Co.* 45 N. Y. 744, 6 Am. Rep. 165; *Western U. Telegr. Co. v. Kirkpatrick*, 76 Tex. 217; *Western U. Telegr. Co. v. Smith*, 76 Tex. 253; *Western U. Telegr. Co. v. Bryant*, 17 Ind. App. 70; *Crowwell, Electricity*, §§ 590-594; *Thompson, Electricity*, §§ 312, 313.

A proximate cause may be defined as that cause which in natural and continuous sequence unbroken by any efficient intervening cause produced the result complained of, and without which that result would not have occurred.

16 Am. & Eng. Enc. Law, p. 436; *Leonard v. New York, A. & B. Electro Magnetic Telegr. Co.* 41 N. Y. 544, 1 Am. Rep. 446.

There is nothing but the merest surmise, bare probability, or conjecture, and inconclusive inferences as to the success of plaintiff's undertaking had he received the telegram, which are wholly insufficient to authorize a recovery.

Kerr v. Keokuk Waterworks Co. 95 Iowa, 509; *Central U. Teleph. Co. v. Swoveland*, 14 Ind. App. 341.

Even granting that plaintiff would have been successful in effecting the arrest of McPherson, can the jury be allowed to presume, without any evidence, that he would without any uncertainty whatever have delivered him to the proper authorities. There was no evidence on the point whatever.

Central U. Telegr. Co. v. Swoveland, 14 Ind. App. 341; *Chapman v. Western U. Telegr. Co.* 90 Ky. 265; *Western U. Telegr. Co. v. Smith*, 76 Tex. 253; *McAllen v. Western U. Telegr. Co.* 70 Tex. 243; *True v. International Telegr. Co.* 60 Me. 9, 11 Am. Rep. 156; *Western U. Telegr. Co. v. Kendziora*, 77 Tex. 257; *Western U. Telegr. Co. v. Crall*, 39 Kan. 580; *Hampton v. Jones*, 68 Iowa, 317;

Riech v. Bolch, 68 Iowa, 526; *Mond v. Western U. Teleg. Co.* 40 S. C. 524; *Clay v. Western U. Teleg. Co.* 81 Ga. 285; *Stafford v. Western U. Teleg. Co.* 73 Fed. Rep. 273; *Western U. Teleg. Co. v. Hall*, 124 U. S. 444, 31 L. ed. 479; *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 307, 14 L. ed. 157; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487.

In the category of remote damages are to be included all those damages which result from the operation of an intervening efficient cause.

25 Am. & Eng. Enc. Law, pp. 839, 840; *Rodkin v. Western U. Teleg. Co.* 31 Fed. Rep. 124; *Lowery v. Western U. Teleg. Co.* 60 N. Y. 198, 19 Am. Rep. 154; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 252, 26 L. ed. 1071.

The defendant had the right to establish reasonable office hours for the receiving, transmission, and delivery of messages.

Western U. Teleg. Co. v. Harding, 103 Ind. 505; *Given v. Western U. Teleg. Co.* 24 Fed. Rep. 119.

The damages for the breach of a contract must be such as might naturally be expected to follow its violation, and they must be certain both in their nature and in respect to the cause from which they proceed.

Leonard v. New York, A. & B. Electro Magnetic Teleg. Co. 41 N. Y. 544, 1 Am. Rep. 446.

Messrs. Babb & Babb and John D. Dill, for appellee:

There was no denial under oath of the genuineness of the signature of the governor of Iowa to said proclamation, nor an allegation that defendant had no knowledge or information sufficient to enable him to form a belief of the genuineness of said signature.

This being so the law cast the burden of proof on the defendant to show that it was not genuine.

Clark v. Polk County, 19 Iowa, 258; *Blackshire v. Iowa Homestead Co.* 39 Iowa, 624; *Templin v. Rothweiler*, 56 Iowa, 259; *Thompson v. Leuth*, 94 Iowa, 455.

Under these circumstances the proclamation was to be deemed genuine and admitted until overcome by proof to the contrary on the part of the defendant.

The certificate of the secretary of state to the proclamation in question certifies that he is the custodian of said paper. This is a fact which it was his duty to certify, and is proper evidence of the fact.

Clark v. Polk County, 19 Iowa, 259.

The arrangement made between plaintiff and Mrs. McPherson for the capture of Orman McPherson was part of the *res gestæ*.

1 Greenl. Ev. § 108; *State v. Cross*, 68 Iowa, 180; *Sweet v. Wright*, 57 Iowa, 510; *Van Tuyl v. Quinton*, 45 Iowa, 459.

This action is brought, not by the sender of the message, but by the one to whom it was addressed.

His right to recover is based, not on contract, but on the tort of the telegraph company.

Croswell, Electricity, §§ 462-466; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 43 L. R. A.

28 L. ed. 72; *Ellis v. American Teleg. Co.* 13 Allen, 226; *Smith v. Western U. Teleg. Co.* 82 Ky. 104; *Western U. Teleg. Co. v. Dubois*, 128 Ill. 248; *Western U. Teleg. Co. v. Fenton*, 52 Ind. 1; *Western U. Teleg. Co. v. Allen*, 66 Miss. 549; *Western U. Teleg. Co. v. James*, 90 Ga. 254.

The rule for recovery of damages in case of negligence is much broader in this class of actions than in case of contract.

The rule in the former class of cases is that the particular damages need not have been in contemplation of the parties at the time of the commission of the act complained of, provided the damages are the direct result of the act.

Mentzer v. Western U. Teleg. Co. 93 Iowa, 752, 28 L. R. A. 72; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 324, 41 Am. Rep. 41; 1 Sedgw. Damages, p. 130, note; *Eten v. Luyster*, 60 N. Y. 252; *Hill v. Winsor*, 118 Mass. 251; *Lane v. Atlantic Works*, 111 Mass. 136; *Keenan v. Cavanaugh*, 44 Vt. 268; *Little v. Boston & M. R. Co.* 66 Me. 239; *Collard v. South-Eastern R. Co.* 7 Hurlst. & N. 79; *Hart v. Western R. Corp.* 13 Met. 99, 46 Am. Dec. 719; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Metallic Compression Casting Co. v. Fitchburg R. Co.* 109 Mass. 277, 12 Am. Rep. 689; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Perley v. Eastern R. Co.* 98 Mass. 414, 96 Am. Dec. 645; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 223, 7 Am. Rep. 69; *Patten v. Chicago & N. W. R. Co.* 32 Wis. 524, 36 Wis. 413; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Ward v. Vanderbilt*, 34 How. Pr. 144; *Bowas v. The Pioneer Tow Line*, 2 Sawy. 21.

In the case at bar the company had full knowledge that this was an urgent and important despatch, not only from the wording of the despatch—"Come on first train. Answer,"—but from the undisputed evidence that Mr. Ridgeway, the agent for the defendant at Winfield, had been fully informed of the anxiety of the plaintiff in regard to receiving it.

Telegraph messages are almost always brief, owing to the expense of sending them, and the court does not require that the defendant should be informed of the particular transaction to which they refer, or the particular loss that may be expected to follow in those states where there is no statute and the rule is not so broad as it is with us.

Garrett v. Western U. Teleg. Co. 83 Iowa, 257; *Herron v. Western U. Teleg. Co.* 90 Iowa, 129; *American U. Teleg. Co. v. Daughterty*, 89 Ala. 191; *Western U. Teleg. Co. v. Way*, 83 Ala. 542; *Western U. Teleg. Co. v. Hyer*, 22 Fla. 637; *Western U. Teleg. Co. v. Fatman*, 73 Ga. 285; *Western U. Teleg. Co. v. Reynolds Bros.* 77 Va. 173, 46 Am. Rep. 715.

In actions for damages, the requirement that damages must not be uncertain is satisfied with reasonable certainty in this respect.

8 Am. & Eng. Enc. Law, 2d ed. pp. 610, 611.

Where a message is sent to take some ac-

tion in regard to securing in some way a debt by attachment, execution, or otherwise, and by some negligence of the company it is delayed and the debt is lost, the company is liable for the full amount of that debt.

Parks v. Alta California Tele. Co. 13 Cal. 423, 73 Am. Dec. 589; *Fleischner v. Pacific Postal Tele. Cable Co.* 55 Fed. Rep. 742; *Bierhaus v. Western U. Tele. Co.* 8 Ind. App. 246; *Bryant v. American Tele. Co.* 1 Daly, 575; *Western U. Tele. Co. v. Sheffield*, 71 Tex. 570; *Brown v. Western U. Tele. Co.* 6 Utah, 219; *Taylor v. Western U. Tele. Co.* 95 Iowa, 740; *Western U. Tele. Co. v. Cooper* (Tex.) 20 S. W. 47.

But for the negligence of defendant, plaintiff would have captured McPherson before he left, and that was the question submitted to the jury, and they so found.

8 Am. & Eng. Enc. Law, 2d ed. pp. 572-574; Bishop, Non-Contr. L. §§ 450-452.

Ladd, J., delivered the opinion of the court:

September 20, 1896, after mortally wounding John Finley, the marshal of Morning Sun, Orman McPherson, fled. A few days later the plaintiff saw his wife, who promised to assist him in procuring the arrest of her husband. McPeek obtained McPherson's pension papers from Keithsburg, Illinois, for her; and she advised him (being in secret correspondence under an assumed name) of having these, and he came to her room at the hotel at Morning Sun, where she was employed as cook, October 22, 1896, at about 10 o'clock P. M. (having so arranged earlier in the evening), and there remained until between 3 and 4 o'clock the following morning. Before coming in, he gave up his revolvers, and she placed them in a bureau, where they remained during his stay. She had agreed to write to McPeek when she expected her husband, but, if he came unexpectedly, then to telegraph him. At about 7 o'clock P. M. of the 22d, she delivered to the defendant's agent at Morning Sun this telegram: "E. E. McPeek, Winfield: Come on first train. Answer. M. E. M.;" telling him she wanted it "sent right away and delivered, and wanted an answer." Ridgeway, the agent at Winfield, usually closed his office at 6 o'clock, but was ordinarily at the station at about 9 o'clock. He received the message at 9:15 o'clock P. M. and carried it to the plaintiff's house, reaching there at about 9:30. After repeatedly rapping on the door, and being unable to arouse anyone, as he says, he placed the message over the door knob, with the end of the envelope between the door and the jamb, where it was found the next day at between 9 and 10 o'clock A. M. It seems the agent supposed the family was away from home, and would find it upon their return. They had in fact retired, and all testify that they did not hear the rapping of Ridgeway; or any noise at the door, and that they would have heard it, had there been any. The only train carrying passengers leaving Winfield for Morning Sun, a distance of about 12 miles, left the former place at 6 o'clock A. M. McPeek had told Ridgeway he was making an effort to

capture McPherson, and might get a telegram from Morning Sun concerning the matter, and that if a message came, and he was unable to find him, to deliver it to Siberts, a constable. Both had repeatedly called at the office for such a telegram. It also appears that Siberts, by direction of McPeek, had arranged for a team at the livery stable and a driver to be ready for him at any time, and that Siberts was to go with McPeek in case McPherson should come to Morning Sun. The constable at the latter place, and another, had agreed to assist him, though not advised as to the nature of the business, except that it was to make an arrest. The evidence was such that the jury was warranted in finding the facts as stated, though it must be added that Ridgeway denies having previously talked with either the plaintiff or Siberts; and McPherson, who was afterwards arrested, declared he was not at Morning Sun as testified by his wife, and did not correspond with her. On the 21st day of October, 1896, the governor of Iowa, by proclamation, offered a reward of \$300 for the arrest of McPherson, and his delivery to the proper authorities. The plaintiff's action is based on the allegation that he lost this reward through the negligence of the defendant in not delivering the message on the evening of October 22d. With these preliminary statements we shall be able to consider the different questions presented by the record.

1. A copy of the governor's proclamation, duly certified by the secretary of state, was received in evidence over the objection of defendant. That such a reward was authorized by § 58 of the Code of 1873 is not questioned. The method of making the offer is not pointed out, but it is to be paid upon the certificate of the governor. Usage has approved offering such rewards by way of proclamations, and this fully complies with the statute. That original proclamations made by the executive of a state should be preserved, admits of no doubt. The statutes make no express provision for such preservation, but by § 61 the secretary of state "shall have charge of and keep . . . papers which are now or may hereafter be deposited to be kept in his office." The secretary certified that he was the custodian of the record of the official acts of the executive department, and that the proclamation was a part of the files of his office. We take it, then, that this was deposited, to be kept by the secretary of state. Section 4649 provides, in substance, that acts of the executive of this state are proved by the records of the state department. The very evident purpose is to avoid the necessity of calling the governor before a co-ordinate branch of government to give evidence or answer for any of his acts. While the statute does not in express terms make such papers a part of the files to be kept and preserved by the secretary of state, we are of opinion that § 66 is broad enough to include them, that by fair implication § 4649 authorizes them to be so kept, and that, under §§ 4649 and 4635 of the Code, a certified copy thereof is admissible in evidence in lieu of the originals.

2. The defendant also interposed objections to the testimony of the plaintiff, Siberts, and Mrs. McPherson to the arrangement made between them with reference to the capture of McPherson. This was original, and not hearsay, evidence. It related to circumstances and facts essential to be proved as leading up to the sending of the telegram, and had a direct bearing upon the probability of the plaintiff effecting the arrest of McPherson, had the telegram been promptly delivered. It was necessary to show the exact situation, and all that had been done to accomplish that purpose. The appellant is impressed by the danger of fraud in this class of evidence. It is suggested that, if there be possibility of fraud, it may readily be obviated by the exercise of diligence.

3. It is insisted that the damages were remote, and not such as either party might have contemplated from the wording of the message. But extrinsic evidence was admissible to show that defendant had notice of the importance of the message. *Postal Teleg. Cable Co. v. Lathrop*, 131 Ill. 575, 7 L. R. A. 474; *Western U. Teleg. Co. v. Edsall*, 74 Tex. 329. The appellant argues the case on the theory that the action of plaintiff is for the breach of contract. He made no contract with the defendant. This is conceded by appellant in its opening argument, and denied in its reply. The first impression was undoubtedly the correct one. The contract was with the sender of the message, and whether recovery might be had for breach thereof, because made for plaintiff's benefit, we need not determine. This action is based on the negligence of the defendant in the performance of a duty in its public capacity as a common carrier of messages. In all such actions, sounding in tort, the injured party is not limited to damages which might reasonably have been within the contemplation of the parties, but recovery may be had "for all the injurious results which flow therefrom, by ordinary natural sequence, without the interposition of any other negligent act or overpowering force." *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 757, 28 L. R. A. 72; Code, § 2163; *Western U. Teleg. Co. v. Dubois*, 128 Ill. 248; *Western U. Teleg. Co. v. Allen*, 66 Miss. 549; *Ellis v. American Teleg. Co.* 13 Allen, 226; *Western U. Teleg. Co. v. Fenton*, 52 Ind. 1; *Smith v. Western U. Teleg. Co.* 83 Ky. 104; *Milliken v. Western U. Teleg. Co.* 110 N. Y. 403, 1 L. R. A. 281; *Young v. Western U. Teleg. Co.* 107 N. C. 370, 9 L. R. A. 669; *Western U. Teleg. Co. v. Adams*, 75 Tex. 531, 6 L. R. A. 844. There was evidence tending to show that immediate delivery was requested, and that the agent at Winfield knew that McPeck was expecting a message, that it would relate to the capture of McPherson, and that prompt delivery was required. If so, while he may not have known of the reward being offered, he may well be credited with understanding that McPeck was putting forth his efforts to accomplish a purpose from which he anticipated some benefit to accrue to himself. The law authorizes the offering of such

rewards, and it is not too strict a rule to hold the defendant responsible for such losses as may reasonably be anticipated to follow its negligence, whether informed definitely what these may be or not. It was charged with knowledge that such a reward might be made, and it might reasonably reckon on such a contingency, in omitting its duty with reference to such a message. Nor was the plaintiff advised that the reward had actually been offered on October 22d, though he understood it would be, and was acting to secure this and others proposed by local officers. That the omission of the defendant caused greater loss than he then supposed, does not affect its liability, or his right of recovery. Certainly the loss of the reward was the direct result of the failure to arrest and deliver McPherson to the proper authorities, for this was the very condition of its payment.

4. The burden was on the plaintiff to prove that in all reasonable probability the loss resulted from the negligence of the defendant. *Hendershott v. Western U. Teleg. Co.* (Iowa) 76 N. W. 828. Had the plaintiff proceeded by team to Morning Sun, with the assistance of the two constables and another, there seems no good reason to doubt that he would have arrested McPherson, who had been disarmed by his wife. This is not absolutely certain, for many contingencies may be supposed which could have intervened. While these might well be considered, they do not warrant us in saying that these men would not have accomplished that which has often been done before, and which is ordinarily done by officers in like situation. Whether they would in all probability have succeeded, was for the jury to determine.

5. It is suggested that, as the train did not go until 6:06 in the morning, even if the message had been delivered the plaintiff could not have reached Morning Sun in time to make the arrest. But the plaintiff had made every arrangement to go by team. This message was understood by the plaintiff to require immediate attention owing to his agreement with Mrs. McPherson.

6. It may be that the defendant can fix office hours which are reasonable, and that those from 8 A. M. to 6 o'clock P. M. are not unreasonable. This we do not decide. But see *Western U. Teleg. Co. v. Harding*, 103 Ind. 505; *Given v. Western Union Teleg. Co.* 24 Fed. Rep. 119. The company received this message, if Mrs. McPherson is to be believed, with the understanding that it was to be delivered at about 9 o'clock. The agent at Winfield received it, and the company, having undertaken to deliver it, was bound to do so with reasonable diligence. *Western U. Teleg. Co. v. Bruner* (Tex.) 19 S. W. 149; *Thompson, Electricity*, § 300. He was acting within the scope of his agency, although not within the hours fixed for the active discharge of his duties. This could not relieve the company from discharging the obligation incurred by receiving the message to be delivered out of office hours.

7. The defendant asserts that no negligence in failing to deliver the message has

been shown. If the testimony of Ridgeway be accepted as true, it might be that, in loudly rapping on the door repeatedly, and receiving no response, he exercised reasonable diligence. This is in dispute. The daughter of the plaintiff testified that she was at his home from 9 o'clock P. M., and did not retire until a half hour later, and that she heard no noise at the door. Mr. and Mrs. McPeek also testified that they heard no such noise, and that they would have been likely to have heard it, had there been any.

Whether Ridgeway made any effort to arouse the family is put in question by this evidence. If he was advised of the importance of the message as claimed by the plaintiff, he was bound to exercise diligence accordingly, and whether he did so was for the determination of the jury.

Some other matters are discussed, but they are not of sufficient importance to call for special attention.

We discover no error in the record, and the judgment must be affirmed.

MARYLAND COURT OF APPEALS.

George H. PISTEL *et al.*, Appts.,
v.

IMPERIAL MUTUAL LIFE INSURANCE
COMPANY OF AMERICA, of Baltimore
City.

(.....Md.....)

1. A promise to pay an acknowledged indebtedness at such times and in such sums as the debtor "might feel able to pay" creates a legal and moral obligation to pay when the debtor is able, and, although the debtor is made the judge of that fact, his judgment must be honestly exercised.
2. An allegation that defendant has failed and refused to pay, although "able to do so," is not sufficient to show a right of action on a promise to pay when defendant "might feel able to pay," in the absence of any allegation that defendant felt able, or knew it was able, or something equivalent thereto.
3. A promise to pay certificates on condition that all certificates of similar import should be paid *pro rata* and no preference given to any of them over others entitles the holder of such certificates, when all the others have been surrendered and extinguished, only to such amount, if any, as was paid on the others, if they were surrendered without fraud or collusion.

(December 20, 1898.)

APPEAL by plaintiffs from a judgment of the Court of Common Pleas in favor of defendant in an action brought to recover the amount alleged to be due on an instrument executed by defendant. *Affirmed.*

The count in the declaration setting forth the obligation alleged that on the 26th day of April, 1893, defendant made, executed, and issued to plaintiffs' assignor its obligation under seal, or certificate of indebtedness for the sum of \$2,100 in consideration of an indebtedness of that amount then due and payable by defendant to said assignor for value received by it, whereby defendant promised and covenanted to pay said amount

to said assignor at such time and in such sums as it, defendant, might feel able to pay the same; provided that all certificates of similar import should be paid upon *pro rata*, and that no preference should be given to any such certificate over others; and said company has received and accepted a surrender and extinguishment of all other certificates of similar import, but has failed and refused to pay the certificate herein named, although able so to do.

Further facts appear in the opinion.

Mr. Charles W. Field, for appellants:

The legal meaning of these words is that the money should be payable within a reasonable time; or that it should be payable in whole or in part whenever the company should in point of fact be able to pay the whole, or a part thereof.

The certificate being dated April 26, 1893, and the suit having been brought in the summer of 1896, ample time had elapsed for its payment.

The law always sustains written contracts if possible, rather than destroys them.

The benefit of the doubt, therefore, should be given to the holder of the contract, and the court should lean strongest to the rule of construction that makes the paper valid rather than invalid.

Davies v. Smith, 4 Esp. 36; *Mitchell v. Clay*, 8 Tex. 443; *Salinas v. Wright*, 11 Tex. 572; *Works v. Hershey*, 35 Iowa, 340; *Ramot v. Schotenfels*, 15 Iowa, 458, 53 Am. Dec. 425; *Brannin v. Henderson*, 12 B. Mon. 61; *Atwood v. Emery*, 1 C. B. N. S. 110; *Crooker v. Holmes*, 65 Me. 199, 20 Am. Rep. 687; 1 Dan. Neg. Inst. § 44; 1 Wait, Act. & Def. pp. 120-124.

The plaintiffs are entitled to recover either within a reasonable time, which has certainly elapsed, or they are entitled to recover upon proof of defendant's liability to pay the whole or a part of the money, which ability the seventh count sets forth in terms, and which the plaintiffs are prepared to prove at the trial.

Penniman v. Winner, 54 Md. 136.

If all the other certificates had been voluntarily surrendered and canceled by the holders thereof, it is identically the same thing, for the purposes of this cause, as if they had all been paid in full.

For now no possible question can arise of any preference being shown to the certificate

NOTE.—For similar cases as to the effect of agreements to pay on a certain condition, to be determined by the promisor, see also *Smithers v. Junker* (C. C. N. D. Ill.) 7 L. R. A. 264; and *Page v. Cook* (Mass.) 28 L. R. A. 759.

For the analogous question of promises to give satisfaction to the promisee, see *note* to *Church v. Shanklin* (Cal.) 17 L. R. A. 207. 43 L. R. A.

sued upon over the other certificates mentioned.

As soon as they surrendered them voluntarily, they at once ceased to have any further rights against the appellee, and the appellee ceased to have any further right to claim as against the appellants, that it could not pay their certificate, because it was not also able to pay all the other certificates of similar import.

Mr. Richard K. Cross, for appellee:

The alleged contract is too vague and uncertain to create any legal obligation.

Blakistone v. German Bank, 87 Md. 302; *Thomson v. Gortner*, 73 Md. 475; *Taylor v. Brewer*, 1 Maule & S. 290; *Roberts v. Smith*, 4 Hurlst. & N. 315; 3 Am. & Eng. Enc. Law, p. 842; *Buckmaster v. Consumers' Ice Co.* 5 Daly, 313; *Delashmutt v. Thomas*, 45 Md. 140; *Guthing v. Lynn*, 2 Barn. & Ad. 232; *Sherman v. Kitsmiller*, 17 Serg. & R. 45; *Anson*, Contr. p. 5; *Brantly*, Contr. Introduction 1; *Pollock*, Contr. pp. 1, 43; *Cummer v. Butts*, 40 Mich. 322, 29 Am. Rep. 530; *Barnard v. Cushing*, 4 Met. 230, 38 Am. Dec. 362; *Nelson v. Von Bonnhorst*, 29 Pa. 352.

A court should not allow loose expressions, such as this, to go to the jury for the purpose of raising obligations and rights between parties.

Thomson v. Gortner, 73 Md. 475; *Delashmutt v. Thomas*, 45 Md. 140; *Recknagle v. Schmaltz*, 72 Iowa, 63; *Taylor v. Brewer*, 1 Maule & S. 290; *Roberts v. Smith*, 4 Hurlst. & N. 315; *Guthing v. Lynn*, 2 Barn. & Ad. 234; *Sherman v. Kitsmiller*, 17 Serg. & R. 47.

No obligation has been created, and no contract has been made. To call such an agreement a contract, is simply a misuse of terms. Agreements or promises, which in fact reserve an unlimited option to the promisor, are illusory and cannot be regarded as contracts.

Pollock, Contr. p. 44; *Anson*, Contr. pp. 1, 6; 3 Am. & Eng. Enc. Law, p. 842; *Baltimore & O. R. Co. v. Brydon*, 65 Md. 228, 57 Am. Rep. 318; *Walter A. Wood Reaping & M. Mach. Co. v. Smith*, 50 Mich. 565; *Gelston v. Sigmund*, 27 Md. 334; *Griffith v. Frederick County Bank*, 6 Gill & J. 441; *Walsh v. Gilmore*, 3 Harr. & J. 293, 6 Am. Dec. 503; *Smith v. Crandall*, 20 Md. 500; *Brantly*, Contracts, 18, notes, 1, 7.

A promise on condition is absolutely void, unless the condition be performed. It will not remove the bar of the statute.

Higdon v. Stewart, 17 Md. 105; *Wilmer v. Gaither*, 68 Md. 342.

Boyd, J., delivered the opinion of the court:

The declaration filed by the appellants against the appellee contains eight counts.—the first six being the common counts, and the other two on instruments under seal. There was no demurrer filed to the whole declaration, on account of the misjoinder of actions; but there was a demurrer to the seventh count, which the court sustained, and the parties went to trial on the others, which resulted in a verdict for the defendant. Judgment having been entered, the 42 L. R. A.

plaintiffs appealed, and the only question before us is the ruling of the court on that demurrer.

The first objection to this count, urged at the argument was that it alleges that the defendant promised to pay the amount of "the obligation under seal or certificate of indebtedness," described in it, "at such times and in such sums as it, said defendant, might feel able to pay the same;" and it is contended that there can be no recovery on an instrument subject to such conditions. Although we are of the opinion that such allegations as are necessary are not made, even if a suit can be maintained on this instrument, we will refer to some of the cases in which the courts have determined the effect of language somewhat similar to, or resembling, that before us. There is some apparent conflict between them, owing to the fact that many of the cases turned on the question whether the paper sued on was a promissory note or a negotiable instrument, and not whether there could be a recovery in any form of action, when such limitations had been inserted in the evidences of debt sued on.

Most of the decisions hold that a suit on an obligation payable "when the maker is able," or words to that effect, can be maintained upon an allegation and proof that he was able before suit brought. In *Davies v. Smith*, 4 Esp. 36, the defendant admitted he was "bound in honor, and should pay when he was able." Lord Kenyon held that he was liable, upon proof of ability to pay. That was followed in *Mitchell v. Clay*, 8 Tex. 443. In *Salinas v. Wright*, 11 Tex. 572, the suit was on an instrument which said, "Which sum I bind myself to pay so soon as circumstances will permit me." It was held not to be a promissory note, and that the plaintiff could not recover, on that instrument alone, without proof of the ability of the defendant to pay. In *Veasey v. Reeces*, 6 Ind. 406, a note was made payable by the maker "when able," and it was held that it matured so soon as the maker was able. In *Ex parte Tootell*, 4 Ves. Jr. 372, there was a promise to pay "at such a period of time that my circumstances will admit without detriment to myself or family, and not to be distressed upon any account whatsoever until such time that my circumstances will be as above described;" and the conclusion was that an action did not lie without proving that he was in good circumstances.

There is another class of cases in which the makers of the instruments have undertaken to limit the time of payment to their convenience. In *Works v. Hershey*, 35 Iowa, 340, it was held that the maker of a note which read, "On demand, after date, I promise to pay. . . . payable at Cincinnati, when convenient," was bound to pay it within a reasonable time. The court said the latter words could not nullify the words, "On demand, after date, I promise to pay." In *Lewis v. Tipton*, 10 Ohio St. 88, 75 Am. Dec. 408, a note payable "when I can make it convenient with 10 per cent interest till paid," was held to create a legal liability upon the maker, and to be payable within a reasonable

time after its date. In *Smithers v. Junker*, 41 Fed. Rep. 101, 7 L. R. A. 264, Judge Gresham held that a note "payable at my convenience, and upon this express condition, that I am to be the sole judge of such convenience and time of payment," may be enforced by an action, after the expiration of a reasonable time, on demand and refusal of payment. In *Barnard v. Cushing*, 4 Met. 230, 35 Am. Dec. 362, a note was given by which defendants promised to pay a sum named on demand, with interest. At the same time the payees indorsed on the note, "We agree not to compel payment for the amount of this note, but to receive the same when convenient for the promisors to pay it." It was held that no action could be maintained upon the promise. But in *Page v. Cook*, 164 Mass. 116, 28 L. R. A. 759, the suit was on a note which read, "On demand, after date, I promise to pay, . . . payable when payor and payee mutually agree;" and it was construed to mean that it was payable, on demand, when and after the payor ought reasonably to have agreed. The court referred to the case of *Barnard v. Cushing*, and emphasized the fact that by the indorsement on the note in that case the payees agreed that they would not compel payment, and concluded its reference to it by saying, "Possibly, if the question arose now, a different result might be reached from that arrived at in that case." In *Ramot v. Schotenfels*, 15 Iowa, 458, 33 Am. Dec. 425, after the maturity of a note the parties indorsed thereon this agreement, "Renewed for an indefinite time at \$10 interest per month, and the whole amount then to pay when both parties may agree." It was held that, as no definite time was fixed for payment, the note was payable within at least a reasonable time. In *Brannin v. Henderson*, 12 B. Mon. 61, an acceptance, on the back of an order, that "I will see the within paid eventually," was held payable within a reasonable time, if not forthwith. In *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687, a note was made "payable when I sell the place where I now live." Held that the maker was bound to sell the place within a reasonable time, and, failing in that, the note was due.

We have thus referred to a number of cases which show that the tendency of the courts is to hold the makers of notes and other written obligations responsible whenever they admit indebtedness but are only uncertain as to the time of payment. In the last-mentioned case the court said: "The debt is due *in presenti*. Its payment is postponed to a future time, but the debt, none the less, exists. The debt is absolute; the time of its payment indefinite." All of the authorities seem to agree that, on an obligation to pay "when able," the holder can recover upon proof of the ability of the promisor to pay; and when it is payable "when convenient," or "eventually," or like expression, the courts have generally held it is payable within a reasonable time. The case which seems to be most in conflict with any of the above, and, indeed, the only one we have found that is difficult to reconcile with them, is that of *Nelson v. Von Bonnhorst*, 29 Pa. 352. There 43 L. R. A.

a party gave an instrument of writing, under seal, acknowledging an indebtedness to another, which he agreed "to pay whenever, in my opinion, my circumstances will enable me to do so." It was held that such contract imposed no legal obligation, and that no action would lie upon it, even though the court and jury should find that the party was of sufficient ability to pay the debt, because by the terms of the contract, the debtor was made the sole judge of that fact. But we cannot give our assent to that decision without some qualification. If the indebtedness is unqualifiedly acknowledged, as is done in the certificate sued on in this case, but the payment is simply postponed until the circumstances of the debtor will enable him to pay, he is morally and legally under obligations to pay when that condition exists, and, although he is made the judge of the fact, his judgment must be honestly exercised. Upon the allegation and proof that his circumstances did enable him to pay, and that he fraudulently refused to do so, although he knew he was able, such a promisor should be held liable. Any other conclusion, it seems to us, would encourage dishonesty and unfair dealings. The question of fraud was not raised in that case, and hence the court may not have felt called upon to qualify its decision, or the language used, which was, of course, only intended to apply to the facts before the court.

We do not understand a case of this character to be governed by such as those where it is stipulated that an article is to be furnished subject to the approval or satisfaction of the proposed purchaser, which approval or satisfaction is made a condition precedent to the right to recover compensation or the contract price. There the defendant does not get the plaintiff's property and then wilfully refuse to pay for it, and, as the contract is made subject to the condition that he shall approve of or be satisfied with it before accepting it, the court will not dispense with the condition, and say that the article was of a quality or character that ought in reason to have been accepted as satisfactory. But in cases such as this the defendant has received the money or other consideration, and has acknowledged his indebtedness, and the only question is when it shall be paid. The parties contract with the understanding that it is to be paid when the conditions mentioned exist, and, if they do exist, it would be a fraud for the promisors to wilfully refuse to pay, notwithstanding their ability to do so.

Now let us apply the law as thus established to the case before us. If this certificate of indebtedness had been simply to pay "at such times and in such sums" as the defendant was able, upon proper allegations and proof that it was able to pay the whole, or such part as gave the court jurisdiction, the plaintiffs could unquestionably have recovered. The amount being payable when the defendant was able, and it being shown to be able, the obligation would have matured by the very terms of the contract. But the terms are, when it might "feel able." To say that a corporation can "feel able" may

seem odd, at first glance; but, as it must act through its agents, it means, when its officers, directors, or agents, whoever they may be that have charge of such matters, feel able,—that is to say, as we understand the use of that term, when they are “conscious of being” able, or know it is able. It was necessary to make such allegations as would bring the defendant within the meaning of the contract. This count should not only have alleged that the defendant was able to pay either the whole of the obligation or whatever part of it the plaintiff proposed to prove it could pay (so as to embrace the terms, “at such times and in such sums,” etc.), but that it “felt able,” or “knew it was able,” or something that would be equivalent to the terms used in the certificate of indebtedness sued on. If the facts so justified, there could have been added the allegation that it fraudulently refused to pay, etc. If the declaration had so alleged, we think it would have been sufficient, so far as this part of the certificate of indebtedness is concerned, under the authorities we have already cited.

The only cases referred to by the appellee which seem to be to the contrary are those of *Barnard v. Cushing* and *Nelson v. Von Bonnhorst*, and what we have already said will relieve us of a further discussion of them, excepting to add that the case of *Smithers v. Junker*, *supra*, is in conflict with the Pennsylvania case. We do not understand that the cases of *Blakistone v. German Bank*, 87 Md. 302, *Thomson v. Gortner*, 73 Md. 475, and other authorities cited in connection with them, in any wise conflict with these views. In them the question was whether valid contracts had been entered into, and it was determined that the terms used were too vague and indefinite to enable the court to so find. But in this case the contract is sufficiently definite. The amount of the indebtedness is clearly stated, and the only question in doubt was the times of payment; and, as we have already said what the contract means in that respect, a recovery cannot be denied by reason of the contract being too vague and uncertain. As it was not to pay “when able,” but when it “might feel able,” the statement in the narr. that the defendant “has failed and refused to pay the certificate herein named, although able to do so,” was not sufficient, and the demurrer was properly sustained for that reason.

But this count is defective in another respect. The promise to pay was further qualified by saying: “Provided, that all certificates of similar import should be paid upon *pro rata*, and that no preference should be given to any such certificate over others.” That is attempted to be avoided by alleging that “said company has received and accepted a surrender and extinguishment of all other certificates of similar import.” There is no allegation that anything had or had not been paid on them, nor is it stated under what circumstances the other certificates had been surrendered and extinguished. We have nothing to inform us as to the circumstances under which they were issued, and are confined to the narr. But, suppose

the holders of all the other certificates only received a small sum,—5 or 10 per cent, for example,—and then surrendered their certificates, it is apparent that the appellants could not recover, in an action on this certificate, more than was paid to the others, without at least some allegation and proof of fraud or collusion. Or, if all were surrendered and extinguished without any payment, on the belief that they were worthless, or for other reasons satisfactory to the holders, how can the appellants recover on this certificate at least without alleging and proving something that will avoid the effect of that provision, if that is possible? The very contract sued on expressly prohibits the recovery beyond the amounts paid on the other certificates. If the holders of them chose to surrender them without any payment, it may be unfortunate for the appellants; but that is the contract their assignor made with the defendant and, in the absence of fraud or collusion, the effect of the surrender of these certificates on the plaintiffs’ right to recover is fatal, and cannot be avoided. There is not enough in this count to entitle them to recover on the certificate sued on, and the demurrer was therefore properly sustained.

Judgment affirmed, appellants to pay the costs above and below.

Charles H. LINVILLE, Garnishee of Natchaug Silk Company, Appt.,

v.

Harold F. HADDEN *et al.*

(.....Md.....)

1. After the appointment of a receiver for a corporation the directors cannot ratify a transfer of property previously made without authority.
2. Nonresident creditors of a corporation in the hands of a receiver, when they are not residents of the state in which the receiver is appointed, have the same right to contest the receiver's title to property that domestic creditors have.
3. A claim filed with a receiver of a corporation by a nonresident creditor, with an express reservation or condition that by filing it he does not intend to abandon any rights gained by reason of an attachment suit previously brought in another state, does not estop the creditor from pursuing the attachment.

(December 20, 1898.)

A PPEAL by the garnishee from a judgment of the Superior Court of Baltimore City in favor of plaintiffs in an attachment proceeding to reach funds of the Natchaug Silk Company, a foreign corporation. *Affirmed.*

The facts are stated in the opinion.

NOTE.—For rights of foreign receiver as against attachment creditors, see *Gilman v. Hudson River Boot & Shoe Mfg. Co.* (Wis.) 23 L. R. A. 52; also *Holbrook v. Ford* (Ill.) 27 L. R. A. 324; *Commercial Nat. Bank v. Matherwell Iron & S. Co.* (Tenn.) 29 L. R. A. 164; and *Robertson v. Stead* (Mo.) 33 L. R. A. 203.

Messrs. William Reynolds and Paul M. Barnett, for appellants:

Assuming the decree in Connecticut to be valid as against Hadden & Co., it was effectual to vest in Hayden as receiver the title to all the goods in Linville's custody unless such title had already passed to some third party, and it therefore follows that in either of these events Hadden & Co.'s attachment must fail.

When a receiver has been appointed to wind up the affairs of an insolvent corporation, any creditor who files his claim in the case in which the receiver was appointed, and seeks to participate in the fund in his hands for distribution, becomes a party to the cause.

Re City Bank, 10 Paige, 382; *Thomas v. Farmers' Bank*, 46 Md. 45; *Links v. Connecticut River Bkg. Co.* 66 Conn. 277.

An adjudication of insolvency under a state law, which vests in a trustee all the insolvent's property, and releases him from all future liability for his then existing debts, is, while binding on citizens of the same state, invalid to release him from liability to his nonresident creditors, unless they voluntarily become parties to the insolvency proceedings, in which case they are held to have waived all extraterritorial privileges.

Jones v. Horsey, 4 Md. 306, 59 Am. Dec. 81; *Brown v. Smart*, 69 Md. 327; *Cole v. Cunningham*, 133 U. S. 114, 33 L. ed. 542.

The same principle is applied to creditors, who, by filing their claim in an equity case in which a receiver has been appointed, have voluntarily become parties to it.

Loney v. Bayly, 45 Md. 450; *Horsey v. Chew*, 65 Md. 557; *Chaffee v. Fourth Nat. Bank*, 71 Me. 514, 36 Am. Rep. 345; *Pierce v. Equitable L. Assur. Soc.* 145 Mass. 56; *Ferguson v. Oliver*, 99 Mich. 161.

The decree of the Connecticut court vested the receiver with a title to the goods here, which our courts are ready and willing to recognize and enforce upon the principle of comity between states, whenever they can do so after completely protecting its own citizens and laws.

Castleman v. Templeman, 87 Md. 546, 41 L. R. A. 367; *Bagby v. Atlantic, M. & O. R. Co.* 86 Pa. 291; *Gilman v. Ketchum*, 84 Wis. 60, 23 L. R. A. 52; *Merchants' Nat. Bank v. Pennsylvania Steel Co.* 57 N. J. L. 336; *Long v. Girdwood*, 150 Pa. 413, 23 L. R. A. 33; *Catlin v. Wilcox Silver-Plate Co.* 123 Ind. 477, 8 L. R. A. 62.

The board of directors never interfered with Mr. Chaffee or attempted to exercise any supervision or control over him down to the time when they seem to have considered their functions terminated by the appointment of the receiver.

Hadden v. Natchaug Silk Co. 84 Fed. Rep. 83.

The offer of the garnishee to show that on April 22, 1895, Mr. Fenton, the secretary and treasurer, upon the mere verbal order of Mr. Chaffee over the telephone, shipped some \$5,000 worth of the company's goods to Morimura, Arai, & Co. in payment of a debt which was just about to fall due, was ad-
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missible to prove that the secretary and treasurer had no doubt of Mr. Chaffee's authority to turn over to a creditor of the company \$5,000 worth of its goods in satisfaction of his bill against it, without consulting the directors about it.

After completely protecting its own citizens and laws the dictates of international comity would seem to require that the officer of the foreign tribunal should be acknowledged and aided.

Castleman v. Templeman, 87 Md. 546, 41 L. R. A. 367; *Hurd v. Elizabeth*, 41 N. J. L. 1.

Messrs. Nicholas P. Bond and Edward Duffy for appellees.

Fowler, J., delivered the opinion of the court:

The plaintiffs, Hadden & Co., a New York firm, were creditors of the Natchaug Silk Company. The latter became insolvent, and James E. Hayden was appointed its receiver by a decree of the superior court of Windham county, Connecticut, on the 26th of April, 1895. On the 27th of December of the same year the plaintiffs caused to be issued from the superior court of Baltimore city a foreign attachment against the silk company, and it was laid in the hands of the appellant, Charles H. Linville, as garnishee. We held in the former appeal (*Hadden v. Linville*, 86 Md. 210), growing out of this same attachment proceeding, that the transfer from the silk company to the First National Bank of Willimantic, Connecticut, also a creditor of the silk company, was invalid, because it was made by him [the president] without the authority of the board of directors. We also held in the former case that, the transfer we have just mentioned, which was relied on to defeat the attachment, being invalid, the plaintiffs were entitled to maintain their attachment, and the judgment in favor of the garnishee was reversed, and the case was remanded for a new trial. The first step which appears to have been taken in the court below after the case was remanded was a motion to quash the attachment filed by James E. Hayden, receiver of the silk company, on the ground that the plaintiffs had voluntarily made themselves parties to the suit in the Connecticut court by filing their claim there against the silk company, and that they were, therefore, estopped from proceeding in the Maryland courts. But the court below overruled this motion, and the receiver has failed to appeal. However, the same question is presented by the fifth and sixth exceptions of the garnishee, and we will consider it when we discuss them. The judgment below was for the plaintiffs against the garnishee, and the latter has appealed.

The first exception of the garnishee was to the refusal by the court to allow him to prove that Mr. Chaffee, the president and general manager of the silk company, had directed the secretary and treasurer of the silk company to transfer to another creditor several thousand dollars' worth of goods in payment of a debt, and that the goods were in fact shipped, and that Mr. Chaffee's ac-

tion in this matter was never questioned thereafter by any member of the board of directors, although it came to their knowledge very soon. It appears very clear, in view of the conceded facts, that the ruling complained of was correct. The transfer to the New York creditors was made on the 22d of April, but it was not until the 29th of that month that Chaffee informed his board what he had done, saying that he had transferred all the goods of the silk company in New York, Chicago, and Baltimore to the bank. But the board refused to ratify Mr. Chaffee's action upon the ground that the decree of the Connecticut court of the 26th of April, appointing a receiver for the silk company, deprived them of all power to act. The transfer in Baltimore to the garnishee was not made until the afternoon of the 26th of April, and therefore after the receiver had been appointed, and had taken possession of the silk company's affairs. Therefore, even if the board of directors had attempted, after the appointment of the receiver, to ratify the act of Mr. Chaffee in transferring the property of the silk company to the garnishee, or to any other creditor, their action would have been futile; for it is text-book law that "the appointment of a receiver over a corporation is generally equivalent to a suspension of its corporate functions, and of all authority over its property and effects, and is also equivalent to an injunction restraining its agents and officers from intermeddling with its property." High, Receivers, § 200. This must necessarily be so, otherwise both the receiver and the board of directors would be competent to exercise the rights, privileges, and franchises of the corporation, and endless confusion would be the result. If, therefore, we are correct in the conclusion reached in the former case that the transfer by Chaffee of the silk company's property in Baltimore was invalid, it follows that the evidence offered to show that the directors of that company acquiesced in it or ratified it after they ceased to have any power to act, as well as all the evidence which was offered for the purpose of showing that the transfer was made to continue the silk company as "a going concern," was clearly inadmissible. The invalidity of the transfer being established, all evidence tending to prove the good faith of Chaffee in making it, or the valuable consideration which the bank offered for it, was wholly immaterial and irrelevant. We need say nothing further to show that, in our opinion, the rulings of the court below which form the first four exceptions are free from error.

But it was urged that the plaintiffs, being nonresidents, have no standing in our courts, and that they will not be allowed to set up a claim against the title of the Connecticut receiver. The decree appointing the receiver in Connecticut had no extraterritorial force, and therefore, although while a citizen of that state might not be allowed to set up a claim either there or here which ignored the validity of that decree, yet citizens of this state, or of other states than Connecticut, are not bound by it, outside of the last-
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named state, and, in spite of the Connecticut decree, either our own citizens or the citizens of third states may proceed here to collect their debts. The general principle is thus expressed in Beach, Receivers, old ed. § 268, and supported by the citation of many authorities: "Because of the principle of 'judicial comity,' a phrase of well-defined and accepted meaning, a receiver of one state or jurisdiction will be recognized and permitted by the courts of another to do all that is necessary to take and possess the property of the debtor there located, provided that to do so will not violate any law or policy of the latter, or embarrass or do injustice to any of its citizens, or those of a third state who have come there to enforce the payment of their claims against the debtor." It cannot be doubted that if the plaintiffs were citizens of Maryland the inchoate lien and rights secured by the attachment would not be set aside in favor of a foreign receiver. *Bartlett v. Wilbur*, 53 Md. 485; *Lycorning F. Ins. Co. v. Langley*, 62 Md. 196; *Day v. Postal Teleg. Co.* 66 Md. 354. And the fact that the plaintiffs in this case happen to be citizens of New York does not lessen their rights as suitors in the courts of this state. In the case of *Mason v. Union Mills Paper Mfg. Co.* 81 Md. 446, 29 L. R. A. 273, which was also an attachment case, we held that the plaintiffs, who were citizens of Rhode Island, were equally entitled with the citizens of this state to the aid of our courts in enforcing their claims by way of attachment against a foreign creditor. See also *Southern Bldg. & L. Asso. v. Price* (Md.) 42 L. R. A. 206. And so it has been held almost universally. Nor does it appear to us that the fact that the foreign debtor has become insolvent, and that a receiver has been appointed in the state where he resides, to take possession of his property there, alter or diminish the rights of Maryland creditors, or of foreign creditors suing here, if they do not reside in the same state in which the receiver is appointed, because, as we have already said, the authority of the receiver has no force outside of the state where he is appointed.

It was suggested that we have held in the case of *Castleman v. Templeman*, 87 Md. 546, 41 L. R. A. 367, that the claims of a foreign receiver to the personal property of his corporation located in this state will be given precedence to those of all nonresident creditors. But the opinion of the court in that case, delivered by Boyd, J., does not go to that extent. The question there was whether the appellant, after obtaining a decree in the Virginia court appointing a receiver of an insolvent corporation with power to sue for and collect unpaid subscriptions either in Virginia or in other states, could herself sue in Maryland to recover such subscriptions from Maryland stockholders; and it was held that the plaintiff's right to sue was merged in the Virginia decree under which the receiver was appointed and which was passed on a bill filed by her, and that the Virginia receiver, and not the plaintiff, should bring the suit in Maryland. The principle that the functions and powers

of a receiver for the purposes of litigation are limited to the courts of the state within which he has been appointed is recognized in the case just cited. And it is also said that the tendency is to recognize the claims of foreign receivers when it can be done without injustice to our own citizens and laws. But, as we have already seen, the citizens of third states have an equal claim upon us for the protection of our laws in this respect. The only remaining question is that presented by the fifth and sixth exceptions, namely, what is the effect, under the facts of this case, of the filing by the plaintiffs of their claim against the silk company with the receiver of that company in Connecticut? It seems to us that this question is a very simple one. Whatever doubt there may be, if any, in regard to the general question, which was much discussed, all difficulty disappears, we think, when we recall the fact that this attachment suit was instituted in Maryland long before the claim was filed with the receiver in Connecticut, and that, when filed, it was accompanied with an express reservation or condition that the plaintiffs, by filing it, did not intend to abandon any rights that they had gained by reason of this attachment suit. But assuming that we could with any show of reason hold that the act of the plaintiffs now relied on as a waiver or an estoppel has that effect in spite of their express declaration that they did not intend it to have any such effect, and notwithstanding the receiver, in whose behalf this defense is now set up, by his silence, at least, acquiesced for a long time in the position taken by the plaintiffs, yet we think that the authorities cited to sustain the view of the garnishee are very far from doing so. It is, of course, well settled that when a foreign creditor comes into the same state in which insolvent proceedings are pending, and files his claim there, and thus accepts the benefit of such proceedings, he makes himself a party, and he will be accorded the same, and no greater, rights than resident creditors. *Jones v. Horsey*, 4 Md. 306, 59 Am. Dec. 81; *Brown*

v. Smart, 69 Md. 327. But we have no such question here, there being no insolvent proceeding either here or in Connecticut. In *Loney v. Bayly*, 45 Md. 450, and *Horsey v. Chew*, 65 Md. 557, it was held "that a creditor who participates in proceedings in equity for the distribution of property sold under a deed of trust so far makes himself a party to the deed," and will not be allowed to deny its validity, and will be held to have waived any lien or claim he may have against the property, and will be required to look alone to the proceeds of sale. But it will be observed that in the two cases last cited all the proceedings were had in this state, and that the property involved was also here. Of course, if we should allow creditors here to proceed simultaneously in our courts, both at law and in equity, against the same property, great confusion and injustice would result. But the situation is very different in the case now before us, for there is but one proceeding here,—the attachment,—and the other proceeding to which it is contended the plaintiffs have become parties was had in Connecticut. It is, or must be, conceded, under the decisions of this court, that the Connecticut proceedings and the decree therein have no force here, except, perhaps, to enable the receiver, who was thereby appointed, to ask permission in certain cases to sue in the Maryland courts. But, irrespective of authority, we think, under the facts of this case, the filing of the claim by the plaintiffs in the Connecticut proceeding can have no such effect as that imputed to it by the garnishee. It follows, therefore, that in refusing to allow the garnishee to offer in evidence the claim as filed with the receiver, which constitutes the fifth exception, and in rejecting his prayer based upon the theory that the filing of such claim prevented a recovery in this case, which forms the sixth exception, no error was committed.

Judgment affirmed, with costs, except costs of printing documents, pages 16, 27, and 32.

TEXAS SUPREME COURT.

HOUSTON, EAST & WEST TEXAS RAILWAY COMPANY, *Plff. in Err.*,
v.

F. CAMPBELL.

(91 Tex. 551.)

1. A heavy statutory penalty will not be awarded in a case which does not come strictly within the terms of the statute.

NOTE.—*Duty of a railroad company to furnish cars to shippers.*

- I. General or statutory duty.
- II. Contract duty.
- III. Interstate Commerce Act.

I. General or statutory duty.

At common law a carrier was under some obligation to furnish cars for shippers who wished
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2. A penalty for failure to furnish cars to a shipper under Rev. Stat. arts. 4497-4502, cannot be imposed for failure to furnish cars at a switch where the carrier has no agent, as "the agent" to whom, under art. 4500, a deposit must be made of one fourth the freight charge for the car means the agent at or for the station where the cars are desired.

3. The proviso in Rev. Stat. art. 4498, to ship by the carload. This duty has in many states been defined and supplemented by statute. The measure of this duty is that the carrier must use reasonable care and diligence to provide the cars in view of all the circumstances of the case.

The law implies an agreement on the part of a railroad company to furnish necessary cars on a particular day when a request therefor has in due time been made to an authorized

that the place designated in an application for cars "shall be at some station or switch on the railroad," was not intended to require cars to be furnished at such switches as were not otherwise within the terms of the statute.

4. The act of 1887, imposing a penalty on railroad companies for failure to furnish cars to shippers, is in no manner extended or controlled by the laws then existing.
5. A receiver has no power to make a contract to extend beyond the receivership, and to impose a liability upon one who purchases the property under the foreclosure sale made by the court.
6. The duty of a railroad company to furnish cars for transportation to a person making a timely demand therefor is imposed by Rev. Stat. 1895, arts. 4494, 4496, without the necessity of a contract for the cars.
7. Failure of a railroad company to furnish cars to a shipper who has property ready to ship under a contract and demands cars will render the carrier liable for

his damages on account of the failure, although he does not continue to prepare and offer for shipment the remainder of the property required to fill the contract.

8. The damages for failure to furnish cars to ship property in fulfillment of a contract are the profits which the shipper would have made on the contract if the cars had been furnished.
9. Excluding evidence of a fact which is otherwise indisputably true is not material error.
10. A carrier's knowledge of a shipper's contract is not necessary in order to make it liable for failing to furnish cars when demanded in order to make shipments to fill the contract.
11. Declarations of a conductor when leaving cars on a switch, that the railroad company has determined to furnish no more cars for the shipments that were being made, are evidence against the carrier in an action for failure to furnish cars.
12. The cause of the animosity between a railroad company and a per-

agent of the corporation. *Newport News & M. Valley R. Co. v. Mercer*, 96 Ky. 475.

But a wreck on the road which delays the delivering of the cars will exonerate the corporation from liability for breach of its contract implied by law to furnish cars to a shipper at a particular time. *Ibid.*

A mere request to furnish cars to ship stock on the following day, followed by a request made on the day of the intended shipment to have the cars ready for a certain train, does not show a contract to furnish the cars for that train. *Gana v. Chicago G. W. R. Co.* 65 Mo. App. 670.

The carrier is bound to furnish cars upon reasonable notice whenever it can do so with reasonable diligence without jeopardizing its other business. *Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372.

The railroad is bound to furnish reasonable and ordinary facilities for transportation, such as will meet the ordinary demands of the public. It is not bound to provide in advance for or anticipate extraordinary occasions or an unusual influx of freight to the road. *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488; 68 Am. Dec. 574.

The amount of business ordinarily done by a railroad is the only proper measure of its obligation to furnish transportation. The cars should be distributed among the different stations in proportion to such business so that all freight may be shipped in a reasonable time. *Ballentine v. North Missouri R. Co.* 40 Mo. 491; *Dawson v. Chicago & A. R. Co.* 79 Mo. 296.

The liability of common carriers of freight for failure to furnish sufficient accommodation for the transportation of such property as they may be legally called upon to carry, attaches only in favor of those who come, or offer to come, into contractual relations with them as shippers. *Little Rock & Ft. S. R. Co. v. Conaster*, 61 Ark. 560.

A common carrier having a monopoly, who invites public commerce, is bound to provide sufficient power and vehicles to carry all goods which his invitation naturally brings him. He is not at liberty to injure local shippers whose wants he can foreknow for the purpose of accommodating freight from foreign parts which by reason of its unexpected amount will inconvenience local shippers, if he furnishes cars enough to provide for it in full. *Branch v. Wilmington & W. R. Co.* 77 N. C. 347; *Keeter v. Wilmington & W. R. Co.* 86 N. C. 346.

A railroad company should anticipate that 43 L. R. A.

more business will be offered at some times than at others, and it should therefore have a reasonable supply of extra cars and engines, but it is not bound to provide for a great, sudden, and unexpected influx of business so as to prevent all accumulation of freight. *Wibert v. New York & E. R. Co.* 19 Barb. 36.

And this ruling was affirmed in *Wibert v. New York & E. R. Co.* 12 N. Y. 245, but the question in that case was rather as to the capacity of the road than the failure to furnish cars.

If the carrier is unable to furnish cars at the time demanded for transportation of property without undue interference with its business or with the rights of other shippers, it may show such fact in defense of an action to hold it liable for losses occasioned by its neglect to furnish transportation. *Chicago, St. L. & P. R. Co. v. Wolcott*, 141 Ind. 267.

A common carrier is not bound by its general public obligation to provide other means of transportation than such as it owns and uses or holds out to the public on its own route for that purpose. So if cars of a particular through transportation company, such as the White Line, are demanded of which the carrier has none of its own, it will be bound to furnish them only as fast as they can be obtained from connecting roads which own them. *Pittsburgh, C. & St. L. R. Co. v. Morton*, 61 Ind. 539, 28 Am. Rep. 682.

A carrier is not bound to anticipate an unprecedented condition of affairs and take steps to provide against it. So in case a strike occurs in the mines at which it is in the habit of obtaining its coal, necessitating the sending of all its cars to a distant point to procure a supply of coal for its engines, it will not be liable for refusal to furnish cars to the one mine in operation in the strike district to transport the coal mined by it. *Louisville & N. R. Co. v. Queen City Coal Co.* 90 Ky. 217, *Affirming* 13 Ky. L. Rep. 832.

A carrier will not be liable for failure to furnish cars to transport the property offered if it is unable to do so by reason of sudden and unusual demand. *Pittsburgh, C. C. & St. L. R. Co. v. Racer*, 10 Ind. App. 503, 5 Ind. App. 209.

The carrier will not be liable for delay caused by unusual press of business if it allots all carriers their due proportion of cars, and has cars enough to transact the usual business coming to it. *Newport News M. V. R. Co. v. Reed*, 10 Ky. L. Rep. 1020.

son to whom shipments were being made is not material in an action by the shipper against the carrier for failure to furnish cars, although the existence of the animosity may be relevant.

13. A notification to a railroad company by a person to whom shipments were being made under a contract, not to receive any more such shipments, will not relieve the carrier for failure to furnish cars to the shipper when demanded.

(March 14, 1898.)

ERROR to the Court of Civil Appeals for the First Supreme Judicial District to review a judgment which reversed so much of a judgment of the District Court for Polk County as refused to permit plaintiff to recover damages for defendant's refusal to furnish cars for plaintiff's use as a shipper over their road, and affirmed so much as permitted a recovery of penalties. *Modified so as to effect a complete reversal of the judgment of the trial court.*

The carrier will not be liable for failure to furnish cars for shipping cotton if the failure is caused by an increased crop and the fact that the cars on which it has been in the habit of transporting cotton have been rejected by a connecting carrier so that the remaining cars are not sufficient to do all the business, and there is not sufficient time after the notification of rejection before the cotton is offered to procure new cars. *Whitehead v. Wilmington & W. R. Co.* 87 N. C. 235.

A carrier is not bound to be prepared for an emergency such as followed the Chicago fire. *Michigan C. R. Co. v. Burrows*, 38 Mich. 6.

To meet the objection that the carrier had no empty cars at the point where the property was delayed, waiting shipment, the shipper may give evidence that empty cars passed that place going in the opposite direction upon the road, from that in which the shipper's property was bound. *Toledo, W. & W. R. Co. v. Lockhart*, 71 Ill. 627.

If the property for transportation has not been received into the possession of the carrier, and its road is under the control of military authorities who require the use of all the cars for shipment of other property, the carrier will not be liable to the property owner for failure to furnish cars for shipment of his property. *Illinois C. R. Co. v. Hornberger*, 77 Ill. 457; *Phelps v. Illinois C. R. Co.* 94 Ill. 548; *Illinois C. R. Co. v. Ashmead*, 58 Ill. 487.

That some of the cars are off from the carrier's line upon other roads and will not return in time to enable the carrier to provide for an extra press of business, will be no defense to an action for failure to furnish cars. *Newport News M. V. R. Co. v. Reed*, 10 Ky. L. Rep. 1020.

A carrier cannot, in the furnishing of cars for the shipment of grain, discriminate in favor of one warehouse and refuse to furnish cars for grain stored at other places,—especially where the statute requires it to furnish suitable cars to any and all persons who may apply for them. *Rhodes v. Northern P. R. Co.* 34 Minn. 87.

A statute requiring every railroad company to run cars for the transportation of such property as shall within a reasonable time previously thereto be ready or offered for transportation, cannot be extended so as to include coal not yet mined so as to require the cars to be placed where they can be loaded as the coal is raised from the earth. *People v. Illinois & St. L. R.* 43 L. R. A.

The facts are stated in the opinion.

Messrs. W. H. Wilson and Baker, Botts, Baker, & Lovett, for plaintiff in error:

Penal statutes are strictly construed, and a written notice or demand, which is made a condition precedent to a penalty, cannot be artfully inserted into a report regularly made to a railway company in the course of its business, in such a way as not to attract its attention, and so made the basis of a penal liability, when the very purpose of this written demand was to put them upon unequivocal notice.

Rev. Stat. 4227a, §§ 1-6; Sayles's Stat.; Gulf, C. & S. F. R. Co. v. Dwyer, 84 Tex. 200; *Schloss v. Atchison, T. & S. F. R. Co.* 65 Tex. 602; *Gulf, C. & S. F. R. Co. v. Dwyer*, 75 Tex. 583.

Where a promise is a consideration for a promise, in order for a contract enforceable at law to arise, there must be such absolute mutuality of engagement that each party has the right at once to hold the other to a posi-

Co. 122 Ill. 506, Affirming Illinois & St. L. R. & Coal Co. v. People, 19 Ill. App. 141.

To hold the carrier liable for not furnishing the cars under the Wisconsin statute, reasonable notice must be shown to have been given, and also that it was within the carrier's power to furnish the cars. *Richardson v. Chicago & N. W. R. Co.* 61 Wis. 596.

The Texas statute requiring carriers to furnish sufficient accommodations for shippers is but declaratory of the common law, and does not compel the shipper to take all freight offered at a time of unexpected and unprecedented press of business. *Houston & T. C. R. Co. v. Smith*, 63 Tex. 322.

Under the Texas statutes the carrier cannot give any preference between shippers as to the acceptance and forwarding of freight. *Ibid.*

The Texas statute prescribing a penalty for refusal to transport goods does not apply to a case of refusal to furnish cars. *San Antonio & N. P. R. Co. v. Bailey* (Tex. App.) 15 S. W. 203.

Under the Texas statutes the carrier is bound upon application for cars to furnish them within a reasonable time not to exceed six days from the receipt of the application. *Easton v. Dudley*, 78 Tex. 236.

The Texas statute provides that as soon as a reasonable time elapses after cattle are offered for transportation, the carrier should furnish sufficient cars or be liable for the injury caused by the delay, and the question of reasonable time is for the jury. *Davis v. Texas & P. R. Co.* 91 Tex. 505, *Reversing* 42 S. W. 1008.

Under the Texas statute providing a penalty for failure to provide the cars when demanded, which requires application for the cars to be made to the superintendent and a deposit of a certain part of the freight to be made with the agent at the time of making the application, the deposit need not be made with the superintendent, but may be made with the station agent. *Houston, E. & W. T. R. Co. v. Campbell* (Tex. Civ. App.) 40 S. W. 431.

II. Contract duty.

If the railroad company has made a contract to furnish cars at a certain time its obligations are much more onerous than those imposed by law. When the obligation is imposed by law the law will admit a reasonable excuse for failure to perform it. But if the obligation is im-

tive engagement, otherwise there is no contract.

Chicago & G. E. R. Co. v. Dane, 43 N. Y. 240; *Tarbox v. Gotzian*, 20 Minn. 142; *Bailey v. Austrian*, 19 Minn. 535; *East Line & R. River R. Co. v. Scott*, 72 Tex. 72.

The receiver of a railroad company has, incidental to his power, the right to make such contracts as are essential to the running of a railway as a railway.

International & G. N. R. Co. v. Wentworth, 8 Tex. Civ. App. 5; *International & G. N. R. Co. v. Herndon*, 11 Tex. Civ. App. 465.

The obligation of a railway company in the transportation of freight, under the common law and our statutes, is to transport such freight as is offered, ready and prepared for shipment, in the order in which it is offered, without discrimination against persons or places, and no more.

Houston & T. C. R. Co. v. Smith, 63 Tex. 326; *Little Rock & Ft. S. R. Co. v. Conatser*, 61 Ark. 560.

posed by contract the carrier will be held liable in all cases where the circumstances are not such as to relieve from the performance of contracts generally.

If the carrier agrees to furnish cars at a certain rate he will be liable for the damages caused by his failure to do so. *Toledo, W. & W. R. Co. v. Roberts*, 71 Ill. 540.

If the carrier makes a special contract to furnish cars to transport the property at a certain time it will be liable for the injuries caused by its failure to do so. *East Tennessee & G. R. Co. v. Nelson*, 1 Coldw. 272; *Southern Exp. Co. v. Womack*, 1 Helsk. 256.

The company will be liable for the damages in case it fails to comply with its agreement to furnish a car for the transportation of property at a certain time. *Cleveland, C. C. & St. L. R. Co. v. Perishow*, 61 Ill. App. 179.

If the carrier agrees to furnish the shipper with a certain number of cars at a certain time the carrier will be liable for the damages caused by its failure to comply with the contract. *Baker v. Kansas City, St. J. & C. B. R. Co.* 91 Mo. 152; *Louisville, N. A. & C. B. Co. v. Flanagan*, 113 Ind. 488; *Pittsburgh, C. C. & St. L. R. Co. v. Racer*, 5 Ind. App. 209, 10 Ind. App. 503; *Wood v. Chicago, M. & St. P. R. Co.* 68 Iowa, 491, 56 Am. Rep. 861; *Texas & P. R. Co. v. Nicholson*, 61 Tex. 491; *Gulf, C. & S. F. R. Co. v. McCorquodale*, 71 Tex. 41; *Gulf, C. & S. F. R. Co. v. McCarty*, 82 Tex. 610; *Cross v. McFaden*, 1 Tex. Civ. App. 461; 4 Tex. App. Civ. Cas. (Willson & W.) § 91; *Texas & P. R. Co. v. Hamm*, 2 Tex. App. Civ. Cas. (Willson) § 491, p. 436; *Curtis v. Chicago & N. W. R. Co.* 18 Wis. 312; *Ayres v. Chicago & N. W. R. Co.* 58 Wis. 537; *Gulf, C. & S. F. R. Co. v. Martin* (Tex. Civ. App.) 23 S. W. 576; *Gulf, C. & S. F. R. Co. v. Hodge* (Tex. Civ. App.) 39 S. W. 986; *Missouri, K. & T. B. Co. v. Woods* (Tex. Civ. App.) 81 S. W. 237.

If the carrier agrees to have cars in readiness to carry the goods he will be liable for failure to do so. *Gelvin v. Kansas City, St. J. & C. B. R. Co.* 21 Mo. App. 273.

A severe and unforeseen storm which blocks the road is no defense for failure to comply with the contract to furnish cars at a certain time. *Miller v. Chicago & A. R. Co.* 62 Mo. App. 252.

If the carrier agrees to furnish the cars at a certain time its inability to do so will be no defense to an action against it for the damages 43 L. R. A.

Damages which are purely contingent and of such a character that all that a party can claim, he lost was the opportunity of selling something that he would have procured for the purpose of selling same, if the railway had been prompt in furnishing cars to ship the wood which he actually had, are too remote and consequential in their nature to be recovered, in the absence of a special contract made with special reference to the transaction the plaintiff was endeavoring to carry through, and would be too remote, even in such a case, unless he had clearly shown the parties intended to be responsible for damages of that character.

Western U. Teleg. Co. v. Hall, 124 U. S. 444, 31 L. ed. 479.

Messrs. Adams & Campbell, for defendant in error:

Plaintiff shows, by his petition, that he had a good, valid, and binding contract, a thing of value, concerning which plaintiff alleges that defendant had been fully advised

caused by its failure to comply with its contract. *Pittsburgh, C. & St. L. R. Co. v. Hays*, 49 Ind. 207.

The performance by a railroad company of its unconditional contract to furnish cars on a day certain for the purpose of transporting freight is not excused by unavoidable accident preventing the arrival of the cars at the stipulated time. *Harrison v. Missouri P. R. Co.* 74 Mo. 364, 41 Am. Rep. 318.

The mere fact that the shipper wishes his property to reach destination for the purpose of taking advantage of a Sunday market, which is illegal, will be no defense to the carrier for the failure of its agreement to furnish cars. *Waters v. Richmond & D. R. Co.* 108 N. C. 349, 110 N. C. 338, 16 L. R. A. 834.

The action for breach of contract to furnish cars is not defeated by the fact that a state statute provides a penalty for failure to furnish them upon demand. *Missouri P. R. Co. v. Harmonson* (Tex. App.) 16 S. W. 539.

The failure of the carrier to comply with its agreement to have cars ready for shipment on a certain day is not waived by the issuance and acceptance of a bill of lading issued when the goods are shipped on a later day. *Hamilton v. Western N. C. R. Co.* 96 N. C. 398; *McAbsher v. Richmond & D. R. Co.* 108 N. C. 344.

If the carrier receives the property for transportation it cannot plead lack of cars as an excuse for not promptly forwarding the property. *London & L. F. Ins. Co. v. Rome, W. & O. R. Co.* 144 N. Y. 200.

If the carrier has made a contract to furnish cars at a certain time it cannot relieve itself from liability for breach by showing that the cars were furnished to a third person under a contract which the carrier had made with him. *International & G. N. R. Co. v. Wright*, 2 Tex. Civ. App. 198.

If the carrier contracts to carry goods within a specified time he cannot absolve himself from liability for failure to do so by showing an unexpected rush of freight which came upon the road at the time the contract should have been performed. *Deming v. Grand Trunk R. Co.* 48 N. H. 455, 2 Am. Rep. 267.

Heavy and unprecedented traffic will not relieve a railroad company from liability for breach of its contract to furnish cars. *Gulf, C. & S. F. R. Co. v. Hume*, 6 Tex. Civ. App. 653.

Inability to furnish cars according to contract because of unusually heavy business is no

of all its terms, conditions, and requirements; that defendant had induced plaintiff to enter said contract, and had agreed with plaintiff to furnish him sufficient transportation to enable him to carry out said contract. Plaintiff pleads that he was amply able, willing, and ready to carry out said contract to deliver said wood, and would have done so, and complied with the terms of his contract to the letter, but for the wilful refusal, on the part of defendant, to furnish transportation, and the determined efforts on the part of defendant to break this plaintiff up in business, which plaintiff alleges defendant did do, and in so doing destroyed this valuable contract of plaintiff's, damage and margin of profit on which plaintiff sues for as the measure of his damage. The issue on facts, as pleaded by plaintiff, should have been submitted to the jury.

Alamo Mills Co. v. Hercules Iron Works, 1 Tex. Civ. App. 691; *Houston & T. C. R. Co. v. Smith*, 63 Tex. 322; *Maloney v. Roberts*, 32 Tex. 140; 3 Story, Com. p. 123.

excuse for the breach of the contract. *Gulf, C. & S. F. R. Co. v. Hume Bros.* 87 Tex. 211, affirming on this point, 6 Tex. Civ. App. 653; *Gulf, C. & S. F. R. Co. v. Hodge*, 10 Tex. Civ. App. 543.

There is a Massachusetts case which takes a somewhat different view of the liabilities of the carrier under its contract. But in that case the circumstances were perhaps sufficiently peculiar to make the case an exception to the general rule rather than in conflict with it.

The fact that the carrier has contracted to furnish cars to transport certain property will not render it liable for delay which is caused by a pressure of business beyond its facilities,—especially where the shipper's agent attends to the loading of the cars and does not use all the room for him, but distributes it between him and other shippers for whom he is also acting as agent. *Thayer v. Burchard*, 99 Mass. 508.

The presumption that a railroad company was able to furnish cars as promised can be overcome only by the testimony of some person who had knowledge of the general resources of the corporation in that respect at the time in question. *Ayres v. Chicago & N. W. R. Co.* 75 Wis. 215.

A provision in a bill of lading in an interstate shipment releasing a railroad company from liability for breach of a prior verbal contract to furnish cars at a specified time is an unreasonable and oppressive limitation of its common-law liability. *Missouri, K. & T. R. Co. v. Graves* (Tex. App.) 16 S. W. 102.

In Texas if the shipper desires to recover the statutory penalty for failure to furnish cars he must comply with the terms of the statute and make his contract with the superintendent or person in charge of the transportation, but he may recover the damages caused by breach of contract in case he has a valid contract for cars with the carrier, which the carrier fails to fulfil. *McCarty v. Gulf, C. & S. F. R. Co.* 79 Tex. 33.

Where a railroad company is not required by the order for cars to furnish them at a particular hour the delivery at any hour of the day will do. *McGrew v. Missouri P. R. Co.* 109 Mo. 582.

If the shipper relies on breach of contract it is incumbent on him to prove the contract. *Voorhees v. Chicago, R. I. & P. R. Co.* 71 Iowa, 785, 60 Am. Rep. 823; *Missouri P. R. Co. v. Stults*, 81 Kan. 752. 43 L. R. A.

A railway company cannot destroy its corporate existence; therefore its charter duty to the public is not affected by a receivership, and contracts made by a receiver for transportation of freight and passengers, when made at the usual and customary rate, will bind the railway company in the hands of subsequent purchasers.

Gulf, C. & S. F. R. Co. v. Morris, 87 Tex. 692.

The law will not permit a party to accumulate damages, but requires him to make them as light as is in his power to do.

Sayles's Civ. Stat. arts. 4239, 4227a, § 3; Houston & T. C. R. Co. v. Smith, 63 Tex. 322; *Houston & T. C. R. Co. v. Hill*, 63 Tex. 387, 51 Am. Rep. 642.

Gaines, Ch. J., delivered the opinion of the court:

The defendant in error, Campbell, brought this suit against M. G. Howe, as receiver of the Houston, East & West Texas Railway Company, against Appleby and Downey as

A shipper's order calling for a specified number of cars for a particular day will not, unaccepted by the carrier, constitute a contract binding on either. If the carrier agrees to furnish the cars the contract will bind it to furnish them, and will bind the shipper to furnish goods to load the cars. *Missouri P. R. Co. v. Texas & P. R. Co.* 31 Fed. Rep. 864, 4 Intern. Com. Rep. 434.

'Acceptance of freight.'

It is usually held that the acceptance of the freight by the carrier is sufficient to impose upon it the duty to furnish cars.

If the railroad company receives the property it cannot exonerate itself from liability for failure to furnish cars to transport it by the fact that its cars were in the possession of military authorities who had taken possession of the road. *Porcher v. Northeastern R. Co.* 14 Rich. L. 181.

A carrier cannot defeat its liability for delay in transporting property for lack of cars if it received the property for transportation without notifying the shipper that there might be delay because of lack of cars. *Toledo, W. & W. R. Co. v. Lockhart*, 71 Ill. 627.

If the railroad company has received the goods for shipment, the unusual press of business will not relieve it from liability for not promptly making the transportation, but it may, under such circumstances, refuse to receive the property. *Faulkner v. Southern P. R. Co.* 51 Mo. 811; *Pruitt v. Hannibal & St. J. R. Co.* 62 Mo. 527.

If the property has been received the carrier cannot defend its delay to transport it by alleging press of business. *International & G. N. R. Co. v. Anderson*, 3 Tex. Civ. App. 8.

In *Helliwell v. Grand Trunk R. Co.* 7 Fed. Rep. 76, where the carrier had accepted property for transportation on a through contract which involved an ocean voyage, the court assumed that when it accepted the property it was its duty to use diligence and reasonable promptness in furnishing the means of transportation.

If property is left at a railroad warehouse for shipment, and the carrier is notified to furnish a car for transporting it, which he promises to do, he will, after the expiration of the time when the car was to be provided, hold the goods as a carrier, and not as a warehouseman. *Millroy v. Grand Trunk R. Co.* 23 Ont. Rep. 454.

his successors in the receivership, and against the Houston, East & West Texas Railway Company to recover under the statute a penalty for failing to furnish cars upon demand and actual damages resulting from the default. The petition showing that the receivership had been closed, and the receivers discharged, a demurrer by them was sustained, and the suit was dismissed as to them. The case as to the railroad company was tried before a jury, who returned a verdict in favor of the plaintiff for the statutory penalties, but, under the instructions of the court, found for the company on the second cause of action. The railroad company appealed, and the plaintiff filed cross assignment of errors. The court of civil appeals affirmed the judgment for the penalties, but reversed it in so far as it denied the plaintiff the right to recover actual damages, and remanded the cause for a trial of the issues growing out of that ground of action. The railroad company has applied for and obtained a writ of error to the judgment of the court of civil appeals, and the whole case is before us for review.

We will first dispose of the judgment for the penalties, and will here state briefly the facts which bear upon that question. The plaintiff was engaged in the business of manufacturing stove wood to be shipped to Houston. At his solicitation, a switch had been put in on the company's road at a point which was subsequently known as "Campbell's Switch." It was not made a regular station, and the company had no agent there. Livingston was the nearest regular station, and there was a station agent at that place. The statute under which the recovery of the penalties was sought in this case was passed in 1887, and is now embodied in our present Revised Statutes, as follows:

"Art. 4497. When the owner, owners, or managers of any freight of any kind shall make application in writing to the superintendent or person in charge of transportation, to any railway company operating a

line at the point the cars are desired upon which to ship any freight, it shall be the duty of such railway company to supply the number of cars required at the point indicated in the application within a reasonable time, not to exceed six days from the receipt thereof, and shall furnish such cars to the persons applying therefor in the order applied for, without giving preference to any person.

"Art. 4498. Said application for cars shall state the number of cars desired, the place at which they are desired, and the time they are desired: provided that the place designated shall be at some station or switch on the railroad.

"Art. 4499. When cars are applied for under the provisions of this chapter, if they are not furnished, the railway company so failing to furnish them shall forfeit to the party or parties so applying for them the sum of \$5 per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, and all actual damages that such applicant may sustain.

"Art. 4500. Such applicant shall, at the time of applying for such car or cars, deposit with the agent of such company one fourth of the amount of the freight charge for the use of such cars unless the said road shall agree to deliver said cars without such deposit, and said applicant shall within forty-eight hours after such car or cars have been delivered and placed as hereinbefore provided, it shall be the duty of the applicant to fully load the same, and upon failure to do so he shall forfeit and pay to the company the sum of \$25 for each car not used. And if the said applicant shall not use such cars so ordered by him and shall so notify the said company or its agent, he shall forfeit and pay to the said railroad company in addition to the penalty herein prescribed the actual damages that such company may sustain by the said failure of the applicant to use said cars.

"Art. 4501. When cars have been supplied

If the railroad refuses to furnish cars because the tracks at the terminal are so obstructed that the property cannot be unloaded, and the shipper obtains the cars upon the promise that he will unload them, he cannot hold the carrier liable for delay in transportation if it occurs through his own failure to unload the cars when they reach their destination. *Cobb v. Illinois C. R. Co.* 88 Ill. 394.

It is the duty of the carrier when applied to for cars to advise the shipper of the situation and circumstances which would likely occasion an unreasonable delay, and if it does not so advise and obtain the consent of the shipper to it, either express or implied, he becomes bound to carry the goods within a reasonable time, and he will not be heard to say that his delay was caused by some contingency. *Guinn v. Wabash, St. L. & P. R. Co.* 20 Mo. App. 453.

III. Interstate Commerce Act.

The provisions of the Interstate Commerce Act, prohibiting discrimination, have been made to have some bearing on the question of duty to furnish cars.

Where there is a sudden and unexpected demand for cars to transport a particular class of freight, the inability of the railroad company

to furnish enough to transport all freight offered is no violation of the Interstate Commerce Act, but it is the duty of the carrier to operate its cars so as to keep them as much as possible on its own line, and to endeavor to furnish its cars to shippers in proportion to their shipments over the line upon a basis that is relatively and substantially just. *Riddle v. Pittsburgh & L. E. R. Co.* 1 Intern. Com. Rep. 888.

A shipper cannot complain of discrimination under the provisions of the Interstate Commerce Act in the failure to furnish him cars as soon after the lifting of an embargo as they were furnished to rivals, if he made no inquiry or request for cars, as he should have done, while his rivals did so. *Riddle v. Baltimore & O. R. Co.* 1 Intern. Com. Rep. 778.

Under the provisions of the Interstate Commerce Act, if the equipment of a carrier for the transportation of a particular kind of merchandise is not equal to the demand upon it, it is its duty to appropriate other cars to such service or to obtain cars elsewhere, and in the meantime the cars subject to use for the service must be distributed equally among the shippers so as not to give some shippers preference over others. *Riddle v. New York, L. E. & W. R. Co.* 1 Intern. Com. Rep. 787.

H. P. F.

and loaded it shall be the duty of the railway company to deliver the same to the party or parties to whom they are consigned within a reasonable time, and the party or parties to whom the cars are consigned shall unload the same within forty-eight hours after delivery and notice, or forfeit to the railway company the sum of \$25 per day for each car so left unloaded, to be recovered in any court of competent jurisdiction.

"Art. 4502. It shall be necessary for the party or parties bringing suit against any railroad company under the provisions of this law to show by evidence that he or they had on hand at the time any demand for cars was made the amount of lumber, cotton, wool, hides, or other freight necessary to load the cars so ordered: provided, that the provisions of this law shall not apply in cases of strikes or other public calamity."

The statute imposes a heavy penalty, and it is an elementary rule that such statutes must be strictly construed. This does not imply that the courts are authorized to refuse to give effect to the intention of the legislature, but it proceeds upon the theory that it is not reasonable to presume it is their intention to impose a punishment, except in so far as that purpose is clearly manifested by the language employed in the statute. It results as a corollary from this rule that the penalty will not be awarded in a case which does not come strictly within the terms of the statute. Such is the established canon of construction in this court. *Schloss v. Atchison, T. & S. F. R. Co.* 85 Tex. 601, and cases there cited.

Does the present case come within the terms of the statute? As a condition precedent to the recovery, article 4500 provides that "such applicant shall at the time of applying for such car, or cars, deposit with the agent of such company one fourth of the amount of such freight charges for the use of such cars," etc. The words "the agent" do not mean any agent. They clearly imply that a particular agent is meant, and the only reasonable construction is that it is the agent at or for the point of the proposed shipment with whom the deposit was to be made. We cannot interpret the terms as meaning the nearest agent (when the company has no agent at or for the point) without importing into the language words which are neither necessarily nor reasonably implied. They mean the agent at or for the station where the cars are desired, and hence the law cannot be applied to a switch where the company has none. In a remedial statute, the construction might possibly be different; but in a penal act the question is not what the legislature ought to have provided, nor what they may possibly have intended to provide, but what is the reasonable and clear meaning of the words employed.

But it is insisted that the proviso contained in article 4498 shows that the statute was intended to include a place of the character of that in question in this case. But we cannot accede to that proposition. The object of the provision was, in our opinion, merely to exclude what may have been thought a possible construction of the act 43 L. R. A.

without such provision. It was intended to preclude the idea that it was made the duty of a railroad company to furnish cars at a point not established by it for the reception and delivery of freight. A switch is a mere side track, so constructed as to permit the passage of cars from and to the main track, and it is a matter of common knowledge that railroads have many switches where freight is neither received nor discharged. So that to give the proviso the construction claimed for it would be to give it an effect contrary to that intended, and to empower an applicant to require cars to be furnished at a point not provided for shipping goods, and would make every switch a receiving and discharging station. Clearly, the legislature did not intend this. The difficulty in the plaintiff's way is not that the place of shipment of his wood was a switch. It is that it was not a switch at or for which there was an agent, and therefore does not come within the terms of the statute.

But it is also insisted that article 4522 of the Revised Statutes also shows that the statute in question should apply in this case. That article is as follows: "When a company constructs a switch on its road for the accommodation of freighters, they shall be bound to furnish a sufficient number of cars for the transportation of freight therefrom when requested so to do, and in default shall be subject to the same penalties as in other cases of neglect of the like character." This provision is article 4239 of the Revised Statutes of 1879. The act under which this proceeding for the penalties is prosecuted was passed in 1887 as an independent statute and was not passed as an amendment of, or as an addition to, the Revised Statutes, and we are of opinion that it was in no manner extended or controlled by the laws then existing. This case arose before the adoption of the Revised Statutes of 1895, and hence it is not necessary for us to consider the effect which the incorporation of those laws in that revision as parts of our general statute should have upon their construction.

But, even if article 4522 had been passed subsequent to the act of 1887, we do not see that our ruling should be different. Our construction of the latter act is that it does not apply to either station or switch for which there is no agent, and we think that there is nothing in the article which tends to change that construction. The statute in question is probably a salutary one; but, in view of the heavy penalties provided, it seems to us that the legislature may very probably have recognized a distinction between stations and switches where freight was received and discharged for the public at large and for which agents are provided and those private stopping places established for the convenience of private individuals. They may have thought that the penalty should not be imposed at a point for which the companies had no agent to superintend the business and to look after the movement of the cars. The trial court and the court of civil appeals having failed to hold in accordance with the foregoing views, the judgment for the penalty must be reversed.

But we concur in the judgment of the court of civil appeals in so far as it reversed the judgment of the trial court in favor of the defendant upon plaintiff's claim for actual damages. The Houston, East & West Texas Railway Company was placed in the hands of a receiver by the district court of Harris county. Howe was first appointed receiver, but was succeeded by Downey and Appleby. In the suit a mortgage was foreclosed, and the property of the company sold, and became the property of the present Houston, East & West Texas Railway Company, the plaintiff in error. During the receivership of Howe, the plaintiff, Campbell, began a negotiation with one Keller for shipment to him at Houston, from Campbell's switch, 10,000 cords of stove wood. He testified that he approached Howe, and told him of the negotiation, and proposed that he should agree to furnish him a certain number of cars to carry out the contract; that Howe declined to promise any number of cars, but told him to go ahead, and he would give him all the transportation wanted. The contract was made with Keller. The plaintiff entered upon its performance on his part, and for a while cars were furnished as demanded. But after the road had been sold, and had passed into the hands of the defendant company, the plaintiff made repeated demands for cars that were not acceded to; and there was evidence at least tending to show that its agents finally refused to furnish any more cars upon which to ship wood to Keller.

In the view we take of the case, we deem it unnecessary to determine whether or not there was evidence tending to show a binding contract with Howe as receiver to furnish the necessary transportation to ship the wood. There is no evidence to show that he obtained any order from the court which appointed him authorizing him to make such a contract. In the case of *International & G. N. R. Co. v. Herndon*, 11 Tex. Civ. App. 465, it was held by the court of civil appeals of the first district that, without an order of court, the receiver cannot make a contract to bind the property in his hands, and an application for a writ of error in that case was refused by this court. As a general rule, parties dealing with a receiver must be deemed to contract with reference to a termination of the receivership, and the contract must be limited accordingly. A receiver is the mere agent of the court for the preservation and management of the property placed in his control, and certainly has no power to make a contract to extend beyond the receivership, and to impose a liability upon one who purchases the property under the foreclosure sale made by the court. The receiver is not the agent of the purchaser in any sense, and his acts as receiver are not the subject of ratification by the latter. The purchaser may renew the contract in his own behalf; but we fail to find any evidence of renewal, or even of recognition in this case.

But, in the absence of a contract, it was none the less the duty of the defendant to furnish the plaintiff cars for the transportation of his wood upon his making a timely demand therefor. Rev. Stat. arts. 4494, 43 L. R. A.

But article 4494 contains this language: "Every such corporation shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall within a reasonable time previously thereto offer or be offered for transportation at the place of starting;" and it is insisted that the plaintiff did not even have the wood prepared for shipment in this case, and that, therefore, he cannot recover. There was but a small part of the wood ready for shipment at the time the cars were demanded which the defendant failed to furnish. But was the plaintiff bound to provide the wood with which to fulfil his contract with Keller, and to offer it at the depot for transportation, after the agents of defendant had refused to furnish cars for that purpose? We think not. A similar question arose in the case of *Texas P. R. Co. v. Nicholson*, 61 Tex. 491, and it was there held that a tender of the property was unnecessary where the proposed shipper had been informed in advance that it was not required and would not be accepted. That was a case of a breach of contract to ship at a certain time; but the principle is the same. The rule announced is a general one, and applies to all offers and tenders. When the defendant knew that the transportation would not be furnished, he was not bound, in order to recover for the wrong done him, to prepare and offer the wood. As argued by his counsel, it was his duty to pursue that course best calculated to lessen the damage resulting from the wrong. We are also of the opinion that the measure of damages was the profits the plaintiff would have made on his contract with Keller, provided, but for the refusal of defendant to furnish the cars, he could and would have carried out that contract. *Houston & T. C. R. Co. v. Hill*, 70 Tex. 51. The case cited was one of a contract to furnish transportation, but in so far as there is a difference in respect to damages between cases of contract and tort, the measure for a breach of a contract is the more restricted. For these reasons we think the trial court erred in its charge upon this branch of the case, and in not giving the special instruction, the refusal of which is complained of in the fourteenth cross assignment of error.

The other assignments which we deem it proper to notice relate to the introduction and exclusion of evidence, and we will pass upon them briefly.

We think there was no error in excluding the bond entered into between the plaintiff and Keller, by which each bound himself for the faithful performance of the contract on his part. The contract was otherwise indisputably proved. There were no sureties upon the obligation, and hence it did not tend to strengthen the plaintiff's case as to Keller's ability to comply with his contract.

We also think the testimony as to Downey's knowledge of the contract with Keller was properly excluded. It is not necessary, in a case of this character, to show knowl-

edge in order to entitle the plaintiff to recover the damages that may have been inflicted, to the full extent to which they may be reasonably ascertained.

We are of opinion, however, that the court erred in excluding the testimony shown by the plaintiff's ninth bill of exceptions. The conductor, whose language the plaintiff offered to prove, in setting out the cars was acting as agent of the defendant corporation, and hence his declarations are evidence against it. They tended to show that the company had determined to furnish no more cars for the shipment of wood to Keller, and to give the plaintiff notice of that fact.

But we think there was no error in excluding the testimony of the witness Hill as to the cause of the animosity between Keller and the company. It may have been proper to show the existence of the animosity, in order to strengthen the plaintiff's theory that the defendant refused to furnish the cars. But the cause of the animosity was immaterial.

The testimony of Calhoun, as to his having written a letter to defendant instructing it not to receive any more wood from Camp-

bell's switch consigned to him, was improperly admitted. Calhoun, it seems from his testimony, was Keller's agent; but the fact that Keller did not desire the wood to be shipped, and so notified the defendant, did not absolve the defendant from its duty to furnish the transportation. The plaintiff as long as he complied with the agreement on his part, had the right to ship the wood regardless of Keller's wishes, and to hold him to the performance of his contract.

We also think that the testimony of Timpson was erroneously admitted. It was the plaintiff's right to ship his wood to Keller under his contract, and he was not charged with the duty of seeing that the cars were unloaded at the point of destination. For his failure to unload the company had its remedy against the consignee.

For the reasons given the judgment of the court of civil appeals, in so far as it affirms the judgment of the district court, is reversed, but in so far as it reverses that judgment, it is affirmed.

The judgment of the District Court, as a whole, is reversed, and the cause remanded for a new trial.

ALABAMA SUPREME COURT.

BIRMINGHAM TRACTION COMPANY *et al., Appts.,*

v.

BIRMINGHAM RAILWAY & ELECTRIC COMPANY.

(.....Ala.....)

1. An injunction against the construction and operation of an electric railway on a public street cannot be granted to an abutting owner on the ground that the company has no legislative authority to construct the road even by condemnation and payment of compensation, since, if this is true, the construction of the road will constitute only a private trespass which may be adequately compensated at law.
2. An electric-motor street railway built upon street grade, doing no special injury to the fee, is not the imposition of a new or additional servitude upon the highway for which the owner of the fee is entitled to compensation,—especially when the law at the time when the street was made authorized the use of electricity by street railways.

(October 29, 1898.)

APPEAL by defendants from a decree of the Chancery Court for Jefferson County in favor of complainants in a suit brought to enjoin defendants from placing a street railway in a street belonging to complainant without making compensation to it for the right to do so. *Reversed.*

The facts are stated in the opinion.

NOTE.—For electric railway as an additional burden on the street, see also *Zehren v. Milwaukee Electric R. & Light Co.* (Wis.) 41 L. R. A. 575, and cases cited in footnote thereto; as 43 L. R. A.

Messrs. John London and A. T. London, for appellants:

The injunction should be dissolved, there being no insolvency or irreparable injury shown.

East & West R. Co. v. East Tennessee, V. & G. R. Co. 75 Ala. 275; *Highland Ave. & B. R. Co. v. Birmingham Union R. Co.* 93 Ala. 505.

In determining whether the injunction shall be continued the court will consider the relative inconvenience to the parties.

East & West R. Co. v. East Tennessee, V. & G. R. Co. 75 Ala. 275; *Highland Ave. & B. R. Co. v. Birmingham Union R. Co.* 93 Ala. 505; *Columbus & W. R. Co. v. Witherspoon*, 82 Ala. 190; *Harrison v. Yerby*, 87 Ala. 185; *Clifton Iron Co. v. Dye*, 87 Ala. 468; *Whitley v. Dunham Lumber Co.* 89 Ala. 493; *Western Railway of Ala. v. Alabama G. T. R. Co.* 96 Ala. 272, 17 L. R. A. 474.

Irreparable injury is a conclusion of law, and the facts showing it must be alleged.

1 High, Inj. § 722; *Bowling v. Crook*, 104 Ala. 130; *Kingsbury v. Flowers*, 65 Ala. 486, 39 Am. Rep. 14; *Bank of Florence v. United States Sav. & Loan Co.* 104 Ala. 297; *Kellar v. Bullington*, 101 Ala. 267; 20 Am. & Eng. Enc. Law, p. 163; 10 Am. & Eng. Enc. Law, p. 836.

The construction of a street railroad through the streets of a town is not an additional burden, which entitles abutting owners as the ultimate owners of the fee in the street to any compensation therefor.

well as cases in *note* to *Western Railway of Ala. v. Alabama G. T. R. Co.* (Ala.) 17 L. R. A. 478.

Elliott, Roads & Streets, pp. 58, 59, 170; 6 Am. & Eng. Enc. Law, p. 537c; *Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co.* 97 Mo. 457, 3 L. R. A. 240; *Chicago, B. & Q. R. Co. v. Steel*, 47 Neb. 741, 41 L. R. A. 481; *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 255, 29 L. R. A. 485; *New York, N. H. & H. R. Co. v. Bridgeport Traction Co.* 65 Conn. 410, 29 L. R. A. 367.

Messrs. Walker, Porter, & Walker and **R. H. Pearson** for appellee.

Head, J., delivered the opinion of the court:

For the purpose of determining how the largely discretionary powers of the chancellor in the matter of retaining and dissolving temporary injunctions should be exercised in the present cause, the facts of the case (though the parties are in dispute as to some of them) may be briefly stated as follows: The appellee, the electric company, owned in fee simple, for a number of years, beginning before the incorporation of the town of Woodlawn, a strip of land from a point in Birmingham to a point in East Lake, passing through what is now the incorporated town of Woodlawn. This strip is 100 feet wide, and appellee has for more than seven years used it as a way for the operation of a street railway belonging to it, which it was authorized by its charter to operate. The railway track was located in the center of the strip. In April, 1896, by a contract, upon valuable consideration, the appellee agreed to grant and convey to Woodlawn, "for the use of the citizens and the public generally, an easement over that part of its right of way which is within the corporate limits of the town of Woodlawn, and which is not absolutely essential for the operation of its road, this amount being about 25 feet for double track, and such room as is necessary to erect poles and proper waiting stations;" and the strip, saving any interference with the reserved rights of the appellee, has since been a public street of Woodlawn, and so recognized and used by the public generally, the appellee continuing to use the track, stations, etc., as before. The appellant, the traction company, was incorporated as a street-railway company in August, 1897, under the general laws of the state authorizing the purchasers, three or more in number, of other street railroads, to organize as a corporation (Code 1896, §§ 1199, 1200); the corporators having previously purchased, at judicial sale, a line of railway, constructed and in operation, from a point in Birmingham to Gate City, in the same county, by a certainly defined route, "to the village of Woodlawn, at a point near the eastern suburb of said village," thence, by a certainly defined route, to Gate City. The ground over which this company now seeks to build a street railway, and to enjoin which the electric company files this bill, is a part of, and along, the said 100-foot strip, through a portion of the town of Woodlawn, and outside of the central 25 feet of the strip, and not any portion thereof used by, or actually necessary for the use of, the 43 L. R. A.

electric company for the operation of its railway, but being a portion of the strip covered by the easement agreed by the electric company to be granted to Woodlawn, as aforesaid. The traction company having regularly procured the consent of the municipality of Woodlawn to build this line of street railway through said street, insists upon a legal right to do so, without making compensation to the electric company, as the owner of the fee, saying that it only proposes to share the easement of the town, by the town's express consent, and not to take or injure the fee; hence, it says, it is not about to take the private property of the electric company for public use, under the right of eminent domain, and is not obliged to make compensation to that company. The correctness or not of this contention is the vital question presented by the record.

The electric company contends, in the first place, that, under the peculiar terms of its charter, the traction company has no authority to build on said strip, even by condemnation and payment of compensation; that it is confined, in its charter powers, to the operation of the line of road it purchased at the judicial sale. The electric company is not in a position to maintain its bill on this contention, for if the traction company has no legislative authority to condemn a right of way outside of its constructed line, purchased as aforesaid, and if the proposed act of building along said strip is, as the electric company contends, a taking or injuring of its fee in the land, then the bill shows merely a threatened private trespass, which may be adequately compensated at law. It is only where a party authorized by law to exercise the right of eminent domain proceeds in its exercise without a legal ascertainment and payment of compensation, by condemnation proceedings, that a court of equity will enjoin, without regard to the question of irreparable injury or adequacy of legal remedies. *East & West R. Co. v. East Tennessee, V. & G. R. Co.* 75 Ala. 280; *Highland Ave. & Belt R. Co. v. Matthews*, 99 Ala. 24, 14 L. R. A. 462; *Birmingham Traction Co. v. Birmingham R. & Electric Co.* (Ala.) 24 So. 368. We therefore dismiss that branch of the case, and will consider that the traction company was authorized to condemn and build the proposed line of street railway.

It will be borne in mind that no part of that portion of the 100-foot strip which was reserved by the electric company from its equitable grant to the town (the same, in this case, as an executed grant) of the easement aforesaid is sought to be entered upon by the traction company, as was the case in *Birmingham Traction Co. v. Birmingham R. & Electric Co.* (the same parties as here), recently decided by this court, where the traction company undertook to cross the reserved central 25 feet of the strip actually occupied by the electric company with its tracks, without condemnation or making compensation. That authority (the case recently decided by this court) showed, no doubt correctly, the general principle that the crossing by one company, invested with

the right of eminent domain, of the right of way of another, even though such other had only the easement of a way, was a taking of the private property of the owner of such easement, within the meaning of our Constitution, for which condemnation and payment of compensation must first be had. We do not question the correctness of that general proposition, always applicable where no municipal easement and control are involved, as in that case. So, the inquiry to which we address ourselves is: Has the owner of the fee, under the laws in force at the time of the grant, who has granted to a municipal corporation the easement of a public street upon the land, a right to demand compensation for the building and operation upon the street, with municipal consent, of a street railway by a duly chartered street-railway company, the erection being assumed to be upon grade, and not shown to be specially injurious to the fee? The proposed railway of the traction company now sought to be enjoined was to be operated by electricity, according to the methods now of common knowledge. The settlement of this inquiry evidently depends upon the further question whether or not electric street railways, such as they have now come to be commonly known, are to be regarded as additional servitudes upon the streets of towns or cities not within the implied contemplation of the dedicators or grantors at the time of the dedication or grant.

It has been adjudicated with practical unanimity throughout the country, for many years, that street railways operated by horse power, though the cars were confined to fixed tracks built upon the surface of the street for their special use, were, so far as the right of the owner of the fee to complain was concerned, no more than the drawing of any other carriage or vehicle upon the streets, and were therefore legitimate uses of the streets, which the municipality was authorized to permit without violating any right of the owner of the fee. It has been decided by this court that the building of an ordinary steam passenger and traffic railroad upon the public street of a town or city does impose a new servitude, entitling the owner of the fee to compensation (*Western Railway of Ala. v. Alabama G. T. R. Co.* 96 Ala. 272, 17 L. R. A. 474); and the weight of authority elsewhere is to the same effect. The Tennessee court holds that a street railway operated by a dummy steam motor imposes a new servitude). *East End Street R. Co. v. Doyle*, 88 Tenn. 747, and 9 L. R. A. 1001, though some courts hold otherwise. The electric railways, such as we are now considering, are a comparatively recent development; yet, as is of common knowledge, they have practically superseded all systems of street-railway enterprise (saving the cable systems in the larger cities), and their nature and modes of construction and operation, as affecting or not the legitimate use of streets within the implied contemplation of the dedication, have been subjects of frequent consideration and adjudication by courts of last resort in this country; and it may be said that there is almost unanim-

ity in the adjudications that such uses are legitimate uses of streets, by the permission of municipalities, without any right of the owner of the fee to compensation therefor. That most excellent series, the Lawyers' Reports Annotated, has given care to the collection, in its reports of cases and notes, of the authorities upon this subject, and we will cite the following from that series, supporting the view above expressed: *Koch v. North Ave. R. Co.* 15 L. R. A. 377 (75 Md. 222); *Taggart v. Newport Street R. Co.* 16 R. I. 668, 7 L. R. A. 205; *Pennsylvania R. Co. v. Braddock Electric R. Co.* 1 Pa. Dist. R. 626; *Lockhart v. Craig Street R. Co.* 139 Pa. 419; *Detroit City R. Co. v. Mills*, 85 Mich. 634; *Denn v. Ann Arbor Street R. Co.* 93 Mich. 330; *People v. Fort Wayne & E. R. Co.* 92 Mich. 522, 16 L. R. A. 752; *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 380; *State, Kennelly, v. Jersey City*, 57 N. J. L. 203, 26 L. R. A. 281; *State, Roebeling, v. Trenton Pass. R. Co.* 33 L. R. A. 129 (58 N. J. L. 666); *Louisville Bagging Mfg. Co. v. Central Pass. R. Co.* 95 Ky. 50; *Williams v. City Electric Street R. Co.* 41 Fed. Rep. 556; *Ogden City R. Co. v. Ogden City*, 7 Utah, 207; *San Antonio Rapid Transit Street R. Co. v. Limburger*, 88 Tex. 79; *Doane v. Lake Street Elev. R. Co.* 36 L. R. A. 97 (165 Ill. 510); *Reid v. Norfolk City R. Co.* 36 L. R. A. 274 (94 Va. 117). See also the following other cases: *Canastota Knife Co. v. Newington Tramway Co.* 69 Conn. 146; *Simmons v. Toledo*, 8 Ohio C. C. 635; *Oviatt v. Akron Street R. Co.* 2 Ohio N. P. 84; *Sanflet v. Toledo*, 10 Ohio C. C. 460; *Hove v. West End Street R. Co.* 167 Mass. 46; *Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co.* 97 Mo. 457, 3 L. R. A. 240. The case of *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 255, reported with extended notes in 29 L. R. A. 485, is a valuable discussion of the question involved here. The Chicago, Burlington & Quincy Railroad ran on a public street in Chicago, the fee of which was in that company. It was contended that the street-railway company, having the city's authority, had no right to build its line of street railway along another public street across the line of the Chicago, Burlington & Quincy Company, without condemning and paying compensation to that company, as the owner of the fee. The court discussed the question fully, reviewing the authorities, and held against the claim of compensation. It is true the street railway was to be operated by horse power, but the discussion of the case and authorities reviewed showed there was no distinction between that power and electricity. We have seen but two authorities to the contrary,—a Nebraska case (*Jaynes v. Omaha Street R. Co.* 53 Neb. 631, 39 L. R. A. 751) and a New York case. We are not aware that the question has ever received the consideration of this court. In the case of *Highland Ave. & Belt R. Co. v. Birmingham Union R. Co.* 93 Ala. 505, neither of the companies owned the fee, both having mere easements in the public streets of the city; the fee being in some other, not complaining. The question was really involved in the case of *Highland*

Ave. & B. R. Co. v. Birmingham R. & Electric Co. 113 Ala. 239, but was not considered or decided by the court, for the reason that the peculiar physical conditions of the proposed crossing were such as to cause detriment to the public if the crossing should be effected, and the party seeking to cross was shown to have another feasible place of crossing without causing such public detriment. On these accounts the injunction was allowed, without considering the private constitutional right of the Highland Avenue & Belt Railroad Company to compensation as for taking its property for public use.

Unless we can set at naught a most overwhelming volume of well-considered adjudged cases, we are compelled to hold that the now almost exclusively known system of street-railway travel,—the electric-motor system,—built upon street grade, doing no special injury to the fee, is not the imposition of a new or additional servitude upon

the highway, for which the owner of the fee is entitled to compensation, and, consequently, that injunction in the present case, upon the facts as they now appear before us, should not be allowed.

There is another consideration specially applicable to this case. At the time the electric company granted to Woodlawn the easement of a public street over the *locus in quo*, the statute now embodied in subdiv. 8 of § 1193 of the Code of 1896 provided that street-railway companies have power "to use steam or electric forces or mechanical power or animals as a motive agent, subject to the control of the authorities of the city, town, or country, through which the road runs." Did not the grant of the easement, without reservation, carry to the town of Woodlawn, by contract, these specific uses of the street?

Decretal order of the chancellor reversed, injunction dissolved, and cause remanded.

NEW YORK COURT OF APPEALS.

Oliver W. INGERSOLL, *Appt.*,

v.

NASSAU ELECTRIC RAILWAY COMPANY, *Respnt.*

(157 N. Y. 458.)

1. The provision against private or local bills found in Constitution, art. 3, § 18, as amended in 1874, and continued in the revision of 1894, does not affect previously existing legislation.
2. An absolute right of a corporation to use the street-railway tracks of another corporation cannot be burdened by a subsequent statute so as to make the exercise of the right depend on the consent of abutting owners.
3. The consent of abutting owners is not necessary to the exercise by a street-railway company of its contract right to use the tracks of another company.
4. The operation of a street surface railway for which the consent of abutting owners is required under railroad law, § 91, does not include the use of the tracks of one company by another company which has a contract right to use them.

(*Vann, J., dissents.*)

(January 10, 1899.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of a Special Term for Kings County in favor of defendant in an action brought to restrain defendant from operating its railroad on a street in front of plaintiff's property on the ground that it had not obtained the consent of the majority of the property owners to do so. *Affirmed.*

NOTE.—For street railway as burden on street, see *Birmingham Traction Co. v. Birmingham R. & Electric Co.* (Ala.) *ante*, 233. 43 L. R. A.

The facts are stated in the opinion.

Messrs. Wood & Hill and William G. Cooke, for appellant:

It was held in *Colonial City Traction Co. v. Kingston City R. Co.* 153 N. Y. 540, that, under the constitutional amendment of 1874, the fact that one street surface railroad company has the consent of both local authorities and abutting owners to build and operate a railroad through a street does not relieve a second company from the necessity of obtaining further consents from both of these sources to enable it to use the tracks of the first.

The constitutional amendment of 1874 made the consent of abutting owners an immediate and indispensable prerequisite to the use by one street railroad of the tracks of another.

People v. Brooklyn, F. & O. I. R. Co. 89 N. Y. 75, construes the provision according to the strictest and most technical rules of lexicography instead of applying the well-established method of interpretation which finds the meaning in the spirit rather than in the letter of the law.

Holmes v. Carley, 31 N. Y. 290; *White v. Wager*, 32 Barb. 253; *Re New York Dist. R. Co.* 42 Hun, 625; *People, Jackson, v. Potter*, 47 N. Y. 379; *People, Twenty-Third Street R. Co., v. New York Comrs.* 95 N. Y. 558; *Bell v. New York*, 105 N. Y. 144.

It was considered worthy of a constitutional provision, that no street railroad should be authorized by law without the consent of a fixed proportion of the adjacent property owners; or if that consent could not be obtained, without the determination of commissioners.

Re Kings County Elev. R. Co. 82 N. Y. 98.

The clearly expressed purpose was to limit the application of the act of 1839 to cases where consent had been given, and that that law should not, after January 1, 1875, be

deemed a justification of the construction or operation of a street railroad, unless the condition imposed by the amendment was complied with.

When the language employed is ambiguous or a word admits of two meanings, it shall, if possible, be so read as to make the provision salutary and effective.

Farmers' Turnp. Co. v. Coventry, 10 Johns. 389; *Mohawk Bridge Co. v. Utica & S. R. Co.* 6 Paige, 554; *Pillow v. Bushnell*, 5 Barb. 156; *Smith v. Helmer*, 7 Barb. 416; *People, Sinkler, v. Terry*, 108 N. Y. 1; *Sage v. Brooklyn*, 89 N. Y. 189.

The decision in 89 N. Y. was a mistake.

Under the railroad law of 1890, the consent of abutting owners was necessary to the operation of defendant's road.

The Atlantic Avenue Railroad Company possessed no such right to make and carry out the contract in question that it could not be taken away by the amendment of 1874, or the statute of 1890.

The right conferred by the act of 1839 was not a franchise.

Bank of Augusta v. Earle, 13 Pet. 595, 10 L. ed. 311; *Curtis v. Leavitt*, 15 N. Y. 170; *People, Atty. Gen., v. Utica Ins. Co.* 15 Johns. 387, 8 Am. Dec. 243; 3 Kent, Com. p. 458.

The very definition of the word exhibits the absurdity of including within its category the right to make a contract which every citizen owning the same sort of property could make as matter of course.

It merely authorized railroad corporations to enjoy their property as an individual might enjoy his.

The rights of a person considered in their natural capacities are of two sorts, absolute and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons; relative, which are incident to them as members of society, and standing in various relations to each other.

1 Bl. Com. p. 123.

The inalienable prerogative of government to regulate the enjoyment of this second class of rights is what is known as "police power."

4 Bl. Com. p. 162; *Cooley, Const. Law*, p. 704; *License Cases*, 5 How. 583, 12 L. ed. 291; *Munn v. Illinois*, 94 U. S. 125, 24 L. ed. 84; *People, New York Electric Lines Co., v. Squire*, 107 N. Y. 606; *Brick Presby. Church v. New York*, 5 Cow. 540.

The lawful exercise of this power often so operates upon property as to materially interfere with its free use, even to the extent of seriously impairing its value.

People, Schwab, v. Grant, 126 N. Y. 473; *People, Dorr, v. Thacher*, 52 Hun, 549; *People, Cumisky, v. Wurster*, 14 App. Div. 556.

If it be discovered that railroads have a property right in the provisions of the act of 1839 with which no legislative interference is admissible, then individuals have precisely the same property right in the existing provisions of the usury laws and the statute of frauds, so that the rate of interest can never be reduced, nor can any new law regulating contracts ever be enacted.

43 L. R. A.

That a statute impairs the value of property does not make it unconstitutional.

Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323.

Corporate property is entitled to no higher degree of protection than that of an individual.

Cooley, Const. Lim. pp. 704, 709; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 150, 62 Am. Dec. 625.

The legislature may impose upon railroad corporations such additional restrictions and burdens as the public good requires.

People, Kimball, v. Boston & A. R. Co. 70 N. Y. 569; *Kerr v. Dougherty*, 79 N. Y. 327; *Ayres v. Methodist Episcopal Church*, 3 Sandf. 361; *People, New York Electric Lines Co., v. Squire*, 107 N. Y. 593.

Messrs. Charles A. Collin and Henry Yonge, for respondent:

The traffic agreement between the Nassau Electric Railroad Company and the Atlantic Avenue Railroad Company, authorizing the former company to run its cars over the tracks of the latter, is a valid, qualified assignment of the franchise of the one to the other. The consents of the abutting property owners are not necessary to render it effectual.

The right of railroad companies to contract with each other for the use of their respective roads, and thereafter to use them in the manner prescribed by such contract, does not at this late day admit of successful question.

Laws of 1839, chap. 218; *Railroad Law*, § 78; *People v. Brooklyn, F. & C. I. R. Co.* 89 N. Y. 75; *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255; *Ingersoll v. Nassau Electric R. Co.* 89 Hun, 213; *Roddy v. Brooklyn Heights R. Co.* 23 Misc. 373, 32 App. Div. 311; *Kuns v. Brooklyn Heights R. Co.* 25 Misc. 334.

Section 18, art. 3, of the Constitution, taking effect January 1, 1875, limited the powers of the legislature as to future legislation only, and did not repeal or otherwise affect the legislation theretofore enacted and then in force (Laws 1839, chap. 218), authorizing railroad corporations to enter into traffic contracts and leases.

People v. Brooklyn, F. & C. I. R. Co. 89 N. Y. 75; *Beveridge v. New York Elev. R. Co.* 112 N. Y. 1, 2 L. R. A. 648.

The act of 1839 applies to both steam and street surface railroad corporations, and authorized both traffic agreement and leases.

People v. O'Brien, 111 N. Y. 1, 2 L. R. A. 255; *People v. Brooklyn, F. & C. I. R. Co.* 89 N. Y. 75; *Woodruff v. Erie R. Co.* 93 N. Y. 609.

The Revision of 1890 continued the act of 1839 in § 78 of the railroad law, and continued § 15 of the act of 1884, *supra*, omitting the provision prohibiting the leasing of parallel roads in § 103 of the railroad law.

Sections 90 and 91 of the railroad law do not require the consents of property owners to the use by one railroad company of the tracks of another under a traffic contract.

The constitutional amendment of 1875 and subsequent legislation were not intended

to affect the assignability of railroad franchises theretofore perfected and made assignable by the act of 1839.

The right of the Atlantic Avenue Company to assign its railroad franchises on Bergen street to the extent permitted by Laws 1839, chap. 218, and by Laws 1884, chap. 252, § 15, was "a right accruing, accrued, or acquired," under and by virtue of such laws so repealed, within the meaning of the saving clauses of the general corporation law, which provide that such right may be asserted and enforced as fully and to the same extent as if such laws had not been repealed, and were expressly saved by the saving clauses from being in any manner affected or impaired by the revision.

Hudson River Teleph. Co. v. Watervliet Turnp. & R. Co. 135 N. Y. 393; *Cameron v. New York & Mt. V. Water Co.* 133 N. Y. 336; *People, Standard Gaslight Co., v. Gilroy*, 67 Hun, 323; *New York Cable Co. v. New York*, 104 N. Y. 1.

The right of the Atlantic Avenue Railroad Company, acquired under the laws of 1839, to grant by contract the use of its tracks to any other railroad corporation, is a property right of which it could not thereafter be divested except in the proper exercise of the right of eminent domain or of the police power.

People v. O'Brien, 111 N. Y. 1, 2 L. R. A. 255; *Wynehamer v. People*, 13 N. Y. 378; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 524, 31 L. ed. 721; *Roddy v. Brooklyn City & N. R. Co.* 32 App. Div. 311.

The legislation under consideration appears from its nature not to be an exercise of the police power.

Re Jacobs, 98 N. Y. 108, 50 Am. Rep. 636.

An owner of an abutting property bounded by the exterior line of a street, and not owning the fee of any portion of the street, has no cause of action on account of the construction, maintenance, or operation of street surface-railroad tracks on the street, even though such construction, maintenance, or operation be unlawful and a nuisance, unless he alleges and proves special damage to his property, different from that suffered by the public at large.

Fobes v. Rome, W. & O. R. Co. 121 N. Y. 505, 8 L. R. A. 453; *Uline v. New York O. & H. R. R. Co.* 101 N. Y. 98, note to 53 Am. Rep. 123, 54 Am. Rep. 661; *Rummel v. New York, L. & W. R. Co.* 30 N. Y. S. R. 235; *Hier v. New York, W. S. & B. R. Co.* 40 Hun, 310.

So far as interference with his access is concerned he suffers only in theory, and he suffers in common with others, and his greater or less proximity does not count.

Doolittle v. Broome County Supers. 18 N. Y. 160; *Lansing v. Smith*, 8 Cow. 146; *Dougherty v. Bunting*, 1 Sandf. 1; *Pierce v. Dart*, 7 Cow. 609.

Parker, Ch. J., delivered the opinion of the court:

I quite agree that if all the views expressed in the opinion in *Colonial City Traction Co. v. Kingston City R. Co.* 153 N. Y.

540, were intended to be applicable to every conceivable case in which the tracks of one surface railroad might be used by another, then would we, indeed, be placed in an embarrassing position, as we stand confronting a statute that has been in existence since 1839, providing that "it shall be lawful hereafter for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract." That is precisely what the Atlantic Avenue Company undertook to do in contracting with this defendant for the use by the latter of the former company's double tracks through a portion of a certain street in the city of Brooklyn. This statute was not pressed upon the attention of the court of the *Colonial Traction Co. Case*, because there it was not directly involved. Instead of a contract between two railroads by which one was permitted to use some portions of the tracks of the other, that was a proceeding by the one to condemn the right to use the tracks of the other, and was, by that other, resisted to the uttermost. On a motion for a reargument the possible effect of some of the expressions made use of in the opinion, in a situation like this, was pointed out, and the court promptly gave assurance that it had not decided to override the statute of 1839, that statute not being directly involved. This assurance was furnished by an opinion written by the learned judge who had spoken for the court in the decision of the case, and he said: "It is also suggested that our opinion has raised apprehension as to its effect as a precedent upon railroad leases and traffic agreements, of which there are said to be many now in force all over the state. It was not our intention to decide any case but the one now before us, which simply involved the standing of the plaintiff to make the application in question, and our opinion should be read in the light of that purpose. If, as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the questions presented, they are the dicta of the writer of the opinion and not the decision of the court." [154 N. Y. 495.] We are thus brought to the consideration of a question which may have been incidentally written about, but has never been decided by this court. It has never been decided because it has not been involved. Aye, more than that, it has not been considered; for there has been nothing in any situation actually presented to this court to suggest that such a question might arise. This defendant, relying upon the statute to which we have referred, entered into a contract, made in conformity with the provisions of such statute, by which it acquired the right to run its cars over some portion of the tracks of the Atlantic Avenue Railroad. The plaintiff, an abutting owner, sought to restrain the defendant from enjoying the privilege for which it contracted, but the courts have so far held that the defendant's acts were entirely legal, and that the

plaintiff has no legal right or interest with which the defendant interferes through the use of the Atlantic Avenue Railroad Company. That this decision cannot be questioned on principle is certain if it be the fact that at the time of the acquisition of the franchise over the street in question by the Atlantic Avenue Railroad Company such a statute as the act of 1839 was in existence, and was not in conflict with the Constitution or some other statutory provision. All these questions were discussed by the court in *People v. Brooklyn, F. & C. I. R. Co.* 89 N. Y. 75. The assignor in that case, as in this, was the Atlantic Avenue Railroad Company; in each case the right sought to be acquired by the defendant was the right to run its cars over certain tracks of the assignor company, and the justification for the contract according the right was the act of 1839 (chap. 218, § 1). It was claimed in that case that the act of 1839, by the authority of which the contract was made, was rendered invalid by the constitutional provision of 1875 (art. 3, § 18), continued in the revision of 1894. But the court held that the act of 1839 was unaffected by that constitutional provision, in that it did not undertake to affect existing legislation, but instead to restrict legislative power as to future legislation. Said the court: "The whole scope of the section is to dictate to the lawmaking power what it may or may not do thereafter, what bills it may pass and what it shall not, and not at all to affect or act upon past legislation which at the time was entirely lawful." That decision has not been questioned in the slightest degree in any case to which our attention has been called, prior to the present review. But, as it is now challenged, a brief consideration of the reasons justifying it will not be out of place.

It is conceded that the act of 1839, entitled "An Act Authorizing Railroad Companies to Contract with Each Other," has been continued in force from the time of its enactment to the present, and is now to be found in § 78 of the Railroad Law. Upon its incorporation into § 78 of the railroad law by the Revision of 1890, the act of 1839 was, with many other laws, in terms repealed by § 182 of the railroad law. Laws 1890, chap. 565. Section 182, however, declared that: "The provisions of this chapter, so far as they are substantially the same as those of laws existing on April 30, 1891, shall be construed as a continuation of such laws, modified or amended according to the language employed in this chapter, and not as new enactments." Independently of this provision, under the settled doctrine of statutory construction, the effect of the revision of the statutes by a re-enactment of previous statutes would have operated as a continuance of the provisions of the former statute instead of a repeal and a new enactment. But the legislature, by the provision that we have quoted, took away all opportunity for question by enacting that such revision constituted a continuation of the enactments incorporated therein. Thus is fully supported the assertion that the act of 1839 has been in full force and effect from the day of its enactment to and including the present time.

The act applies to both steam and street-surface railroad corporations, and authorizes both traffic agreements and leases. *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255; *People v. Brooklyn, F. & C. I. R. Co.* 89 N. Y. 75; *Woodruff v. Erie R. Co.* 93 N. Y. 609. It is unaffected by the provision of the Constitution that "the legislature shall not pass a private or local bill in any of the following cases." Thirteen specifications follow, one of which contains, among other things, the following: "The legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment may be provided for by general laws. But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or, in case the consent of such property owners cannot be obtained, the appellate division of the supreme court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners." Const. art. 3, § 18, as amended in 1874 and continued in the revision of 1894.

Statutory enactments in existence at the time of the adoption of this provision of the Constitution were not aimed at, for the reason doubtless that chapter 140 of the Laws of 1850 (§ 28, subd. 5) provided that the assent of the corporation of a city was necessary to authorize the construction of any railroad upon the streets of a city, and chapter 140 of the Laws of 1854 (§ 1) prohibited the construction without the consent of a majority in interest of the owners of property upon the streets upon which a railroad is to be constructed. But as it was possible for the legislature to change the statutes in that respect, in the language of Judge Finch, in 89 N. Y. 75, "it [the Constitution] commands the legislature not to 'pass' a private or local bill for certain specified purposes, and ordains that those purposes shall be accomplished through the aid of general laws, and then restrains their range by a further condition that even by a general law the legislature shall not authorize 'the construction or operation of a street railroad' except in certain cases." The framers of the amendment to the Constitution of 1874 apparently saw no objection to the principle of the act of 1839; otherwise they would have prohibited the making of a contract with one railroad by another for the use of its tracks without the consent of the abutting owner. This they did not attempt to do, either in terms or by indirection, and yet they knew, or must be presumed to have known, the legislation pertaining to that general subject. The attempt was to place restrictions upon

the legislative power, but, so far as the section quoted is concerned, it had relation only to the building of new roads, and necessarily to the acquisition of new franchises. It aimed, not at the destruction of vested rights, such as the Atlantic Avenue Railroad Company had acquired in the street in front of the premises of this plaintiff, either directly by overthrowing the statute, or indirectly by compelling the assignee under the contract to obtain the consent of abutting owners. Such consent was in fact given when the abutting owners first consented to the building of the railroad, for the consent was necessarily given in the presence of a statute declaring that the franchises would permit the corporation to contract with another railroad corporation for the use of its road. This assertion is based upon the assumption that the Atlantic Avenue Railroad Company acquired its franchise after the passage of the act of 1854, which required the consent of the abutting owners. We do not, however, rest our decision upon that ground, for we are not advised by the record of the date on which the Atlantic Avenue Railroad Company acquired the right to construct and operate its railroad on Bergen street, between Rogers and Nostrand avenues; but in any event, as we have already seen, both on reason and authority (*People v. Brooklyn, F. & C. I. R. Co.* 89 N. Y. 75), the act of 1839 has not been affected by the Constitution, and hence the Atlantic Avenue Railroad Company has a right to contract with another corporation for the use of its tracks. If the Atlantic Avenue road acquired its franchise after the act of 1854 had been passed, then the plaintiff necessarily consented to the making of such a contract, as we have already observed; if the franchise was acquired before, that road, nevertheless, became vested with the right to make such a contract by the statute of 1839. The Constitutional Amendment of 1874 did not, as we have seen, attempt to take away that right, nor did it attempt to vest in the legislature the power to take it away by legislative enactment. Those provisions had relation solely to future legislation that might affect the creation of new corporations, and not the destruction of old ones, or any of the rights such corporations had secured under statutory authorization. If, then, it be true (as we shall attempt to show later that it is not) that the legislature has since the Constitutional Amendment of 1874 attempted to deprive the Atlantic Avenue Railroad Company and other surface-railroad corporations similarly situated of a valuable part of their franchises, such legislation is unconstitutional and void. If the purpose of the legislation under consideration was to deprive an assignee corporation of the right to use the tracks of another corporation without the consent of abutting owners, then the effect intended and actually accomplished (if the enactment be valid) is to burden what was an absolute right with a necessity for the consents of abutting owners before the right can be made available to the assignee corporation. Such a burden in practical effect might destroy that which

was originally vested in the assignor corporation as a part of its franchise; for, as the law now stands, a railroad corporation desiring to use the tracks of another railroad cannot acquire from the municipality or the abutting owners a franchise to run cars over those tracks. Every part of the franchise was given to and acquired by the corporation constructing the railroad; no part of it was retained, nor any right to carve out of it another franchise, in whole or in part. The consent of the abutting owners that one railroad corporation should use the tracks of another could not, therefore, confer or contribute towards the bestowal of a franchise, and in the event of their refusal to consent they might very well claim that the appellate division is not authorized to grant consent in such a case under our present statutes, and thereupon insist that they were in a position to prevent the use of the tracks by the assignee corporation until their demands should be complied with. If, however, this contention should not avail, the appellate division might in the exercise of its discretion refuse to consent, and thus operation under the contract would be prevented. But if the burden were less onerous,—indeed, if it were only slight,—it would be beyond the legislative power to impose it.

It is well settled that a perfected railroad franchise, constituted either by direct legislative grant or by consent of local authorities and property owners in pursuance of the Constitution and general laws, especially when followed by actual construction and operation, is a property right that cannot be afterwards taken away or diminished, either by subsequent constitutional amendment or by legislative or municipal action, except in the exercise of the police power or the right of eminent domain. *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, and cases cited. In that case Chief Judge Ruger, at page 41 of the opinion, says: "We will refer to a few only of the statutes on this subject from which the implication arises, not only that the state intended to invest these franchises with the character of property, but also to enable their mortgagees, purchasers, and assigns to enjoy their use under an indefeasible title. Thus, railroad corporations, having been authorized to contract with other corporations for a qualified transfer of such franchises for terms unlimited except by the agreement of the parties. Laws 1839, chap. 218. . . . The statutes cited, as well as others not specially referred to, indicate the general policy of the state to render such interests independent of the life of the original corporation, and transferable as property by means of judicial proceedings and otherwise, under certain restrictions not pertinent to our present purpose particularly to consider. *People v. Brooklyn, F. & C. I. R. Co.* 89 N. Y. 84." Salability is an essential element of property, and the destruction or the diminution thereof is a taking of property that cannot be done except through the exercise of the right of eminent domain or of the police power. *Wynehamer v. People*, 13 N. Y. 378; *Re Jacobs*, 98 N. Y. 98 50 Am. Rep.

436; *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255; *Roddy v. Brooklyn City & N. R. Co.* 32 App. Div. 311. In the latter case the court had under consideration the question now before us, and Mr. Justice Hatch, in delivering the opinion of the court, well stated the conclusion necessarily resulting from his argument, as follows: "The right or privilege to contract for its use with other railroads, and thereby derive a profit, was as much a part of its franchise as was the right to lay its tracks or operate its cars. This was a source of use which made its property and franchise valuable, and the corporation could no more be deprived of this right than the right of operating in any other respect as authorized by law." The salability of the property right in question is affected, and its value diminished, if not destroyed, if the assignee thereof cannot make use of it without the consent of the abutting owners. It therefore follows that if the legislation under consideration on its face attempts to prevent a railroad corporation from possessing the right to contract for the use of its road with another corporation, from conferring on that other the absolute right to make such use, it is wholly without authority and void, and for that reason the judgment under review is right. But it seems to us very clear that the legislature has made no such attempt; for there is no statute that has for its purpose the cutting down of railroad franchises so as to eliminate therefrom the element conferred by the statute of 1839. Instead of §§ 91 and 102 being in conflict with § 78, they are in harmony with it, and together clearly state the legislative policy as it has been understood from the beginning by the profession and the courts. They mark out the methods for the creation of franchises, and, together with other sections, measure their extent. The legislation has relation to the creation of surface railroads, not their total or partial destruction. It points out, on the one hand, how, if at all, a franchise to operate a street-surface railroad may be obtained. One of the necessary steps is the obtaining of the consent of the municipal authorities; another is that the consent of a majority in interest of the abutting owners shall be obtained, but if it cannot, then the consent of the appellate division may be obtained in its stead, when the road may be constructed notwithstanding the refusal of the abutting owners to consent. Other sections declare the rights that are thus acquired, which together are called a franchise, and among those sections is § 78, which provides that one of the rights thus acquired is that of contracting with another corporation to lease to it the right to use its road. Thus, somewhat in advance of orderly argument, have I presented my deductions from a consideration of the whole subject. My justification, however, is in the hope that thereby the purpose of the statutes to be referred to may be more readily appreciated.

We have already seen that § 78 of the railroad law continued in force chapter 218 of the Laws of 1839. Indeed, we are all agreed in that respect, and it means much; for it

points out that it has been the public policy in this state for a period of nearly sixty years to permit railroad corporations to contract with other railroad corporations for the use of their roads, a public policy unchallenged in any direction by the people, either through their organic law or through statutory enactments, unchallenged directly in any case by the courts, and challenged indirectly but once. Upon the subject of the granting of similar franchises the Constitution has been the subject of amendment, and later of revision, but no single sentence can be pointed out that indicates a purpose of changing the established public policy so far as it authorizes railroad corporations to contract with other railroad corporations for the use of their roads. This § 78 of the railroad law, therefore, rests on sure foundation, and is buttressed by many more years of influence in railroad construction than the consent of the abutting owners, which was not deemed necessary in this state prior to the year 1854. This assertion may seem strange in the light of the attempt to subordinate every other feature of the railroad law to that of the consent of the abutting owners; but such consent has not been for a very long time really necessary; and, if it be refused, the consent of the appellate division may be had in its stead. Let us now look at the legislation upon the subject of consents. In the early history of the statutes the consent of local authorities and property owners to the construction of street-surface railroads in city streets was not required. The first appearance of legislation upon that subject was a single sentence contained in subdivision 5, § 28, chap. 140, of the Laws of 1850, reading as follows: "Nothing in this act contained shall be construed to authorize . . . the construction of any railroad not already located in, upon, or across any streets in any city, without the assent of the corporation of such city." This subdivision was amended by chapter 582 of the Laws of 1864; but the sentence quoted was not affected, and it was continued in the general railroad act of 1850 without change until its re-enactment in § 91 of the railroad law of 1890. It was not until 1854 that the legislature saw fit to require, as a condition precedent to the construction of a street-surface railroad in a city, the consent of a majority in interest of the owners of property abutting upon streets; but by § 1, chap. 140, of the Laws of 1854 it was provided: "The common councils of the several cities of this state shall not, hereafter, permit to be constructed in either of the streets or avenues of said city a railroad for the transportation of passengers, which commences and ends in said city, without the consent thereto of a majority in interest of the owners of property upon the streets in which said railroad is to be constructed being first had and obtained." This sentence continued in force without change until it was re-enacted in § 91 of the railroad law of 1890. The next general legislation upon this subject was § 3, chap. 252, of the Laws of 1884, which continued in force without amendment until its re-enactment in § 91 of the railroad law.

Since the enactment of the general railroad law, §§ 90 and 91 have been amended by § 91, chap. 676, Laws 1892; Laws 1893, chap. 434; Laws 1895, chaps. 545, 933; and by chapter 855, Laws 1896. A reference to the character of the amendments will not be serviceable, but such portions of existing §§ 90 and 91 of the railroad law as are material to the present discussion read as follows:

"Sec. 90. Street Surface Railroad; General Provision. A corporation organized for the purpose of building and operating or extending a street railroad, or any of its branches, for public use in the conveyance of persons and property in cars for compensation, upon and along any street, avenue, road, or highway, in any city, town, or village, or in any two or more civil divisions of the state, must comply with the provisions of this article."

"Sec. 91. Consent of Property Owners and Municipal Authorities. Such railroad shall not be built, extended, or operated, unless the consent in writing, acknowledged as are deeds entitled to be recorded, of the owners of one half in value of the property bounded on, and also the consent of the municipal authorities having control of that portion of a street or highway upon which it is proposed to build or operate such railroad, shall have been first obtained."

We have thus given a review of the legislation in this state as to the necessity of consents of local authorities and property owners to the construction, maintenance, or operation of street-surface railroad tracks in streets. It is evident that the legislature, from the beginning to the end of this general legislation, has never intended to require consents of local authorities or property owners to the operation by one railroad company of its cars over the tracks of another railroad company by virtue of a traffic contract with such other railroad company, but that it intended to require such consents only to the construction, maintenance, or operation of new railroad tracks constituting either main lines, branches, or extensions. Giving to the phraseology of the statutes its ordinary meaning, we have a perfectly working harmonious system, one that accords, not only with the professional understanding of its purpose, but with the history surrounding the development of the different branches of the law, until finally they were consolidated into one general act. When the legislature incorporated chapter 218, Laws 1839, into the general railroad act, and provided that it should constitute a continuance of that chapter, and not a repeal and re-enactment thereof, it made it perfectly clear that it was the legislative intent, not only that such a right should thereafter be continued to all railroad corporations created under and by virtue of the provisions of the general law, but that it should preserve the statute from even an opportunity of controversy as to whether it was in violation of the spirit of the Constitutional Amendment of 1874. That amendment did not, as we have seen, affect past legislation, and therefore could not by any possibility be said to affect a provision of law upon that subject that

should be continued in a general railroad law instead of being re-enacted. So, too, it continued the legislation upon the subject of the consents of the municipalities, and also the legislation upon the subject of the consent of the abutting owner. It is quite evident that it was the legislative understanding that these several enactments were in harmony with each other and could stand together, and there really does not seem to be any room for questioning it; but, if there were, it would be the duty of the courts to harmonize the enactments. No such effort, however, is needed. By the general railroad law, in order to acquire the right to construct, extend, or operate a railroad upon a public street there must be obtained—First, consent of the municipal authorities; second, consent of a majority in interest of the abutting owners; or, if that cannot be had, the consent of the appellate division. When these consents have been obtained, and the railroad corporation obtaining them has in all other respects complied with the commands of the general railroad law, it acquires what is known as a franchise, and one of the important features of that franchise consists in the right to contract with another corporation for the use of its tracks, which right becomes a part of the franchise. Thus reading together the several sections of the railroad law (and we see no other way in which they can possibly be read except by eliminating absolutely from consideration the oldest and most firmly grounded of all the statutes we have referred to), we come necessarily to the conclusion that the court below was right in holding that the Atlantic Avenue Railroad Company, when it acquired its franchise, secured as a part of it the right to contract with another railroad company to use its tracks, a right that neither the municipality nor the abutting owner could take away or impair.

Already our consideration of the general subject has proceeded to unreasonable length, but it may not be out of place to state the point of divergence resulting in such totally different views. On the one hand, the underlying idea is that, in order to run over the tracks of another railroad, a railroad corporation must acquire a new franchise for that particular purpose, which, if true, would necessarily require the consent of the municipality and the abutting owners; while, on the other hand, it is that such railroad acquires a franchise as to streets upon which it constructs its railroad, but its right to use the tracks of the other railroad it gets by contract with the corporation owning the franchise, and all of it, which includes by the express terms of the statute the right to make a contract for such use. Let us stop a moment to see what is involved in the claim that a new franchise is required to operate on the tracks of another railroad. (1) It necessarily denies that the constructing railroad obtained by its franchise all that the statute provided for. (2) It assumes that there can be more than one franchise over the same right of way, and indeed as many franchises as there might be railroad corporations desiring its use. (3) That

the right to confer it was reserved to the abutting owner, notwithstanding the statute positively declared it should pass to the constructing railroad. (4) That what the statute granted was not an absolute right, but something which might ripen into one provided the necessary consents could be obtained, notwithstanding the absence of a sentence, phrase, or word suggesting such a limitation. (5) That the right to contract for the use of its property conferred by the statute upon the constructing railroad is not interfered with by enjoining every other railroad corporation from making use of the tracks, although a contract for that purpose be obtained. That such a holding would be of far-reaching effect no one can doubt. That it would confer as a right that which at present is but a shadow, and deprive others of rights vested as firmly and as sacredly as any of the rights we treasure and enjoy, there can be no doubt. And where is to be found the basis for this radical change in the well-understood law of the state,—this claim that, notwithstanding the statute invests a corporation with such a right, it is not available, because § 91 of the statute provides that “a street-surface railroad, or extensions, or branches thereof, shall not be built, extended, or operated unless the consent in writing . . . of the owners of one half in value of the property” be obtained? The words “or operate” in that sentence are seized hold of to the exclusion of all the other portions of the railroad law, to destroy the right expressly conferred by another section. There is no rule of construction which will permit a court to give these words such an effect. The history which occasioned the incorporation of the words “or operate” does not suggest that it was intended for such a situation as we have here presented; on the contrary, it is well known that early in the history of street-surface railroad building it was quite common to construct extensions on Sundays or legal holidays, and then for the managers to say, “What are you going to do about it? You can’t tear up our tracks, and you can’t prevent us from using what is our own.” Hence a mandate of the Constitution, and a statute depriving a corporation of any advantage by reason of such construction, by denying to it the right to operate in the absence of consents. The statutes, considered together, as we have already pointed out, show that it was intended to apply to the creation of new franchises, and the language employed is entirely appropriate to that end, and as thus construed it is in harmony with § 78. Special attention is called to § 102 of the railroad law, as clearly indicating the legislative understanding of the sense in which the words used by it were employed. It prohibits a street-surface railroad corporation from “constructing, extending, or operating” its road in any portion of a street in which there is already a street-surface railroad, without the consent of the latter corporation, but authorizes it to use the tracks of the other street-surface railroad for a certain distance upon condemning the right to do so by proceedings in court. A

franchise, in the full sense of that term, to operate in such a street, cannot be obtained without the consent of the other corporation, the municipal authorities and abutting owners. But something that the corporation has can be obtained, *viz.*, the right to run cars over its tracks in that street, and this by condemnation proceedings. The point of view from which it is possible to see in the words “or operate” such portentous meaning as to cause them to override and destroy rights vested by virtue of the command of solemn statutory enactments is taken through sympathy for the abutting owner. No statute has ever, in terms, conferred upon him an absolute right to prevent the operation of cars. He never had any consideration in the premises under the laws of this state until the act of 1854, and from that day to this his refusal to consent has been of no avail if, in the judgment of the appellate division, the public interest required that a railroad should be constructed. But it is said that the language of the statute that was intended to measure out just the amount of consideration that should be paid to him does not do so in fact, because the potency of the words “or operate” enables him to claim as a right that he can prevent the use of the tracks in front of his premises by a new railroad under a contract with the old railroad, to whose construction he had consented. In no judicial opinion reaching such a conclusion have the provisions of the act of 1839 (now § 78 of the railroad law) received consideration, and it is submitted that when read in connection with the other provisions of the railroad law, as it is the duty of the court to do, and read for the purpose of ascertaining the true intent and meaning of the several provisions, the conclusion must be reached that this defendant has the right to use the tracks on the block in question by contract with the Atlantic Avenue Railroad Company.

The judgment should be affirmed, with costs.

Gray, J., concurring:

Although I was not present when the *Colonial City Traction Case* was decided (153 N. Y. 540), I should yield a loyal obedience to its authority, however much I might differ in my views from those expressed in that decision, if I thought it foreclosed the discussion in the present case. But I think it does not do so, and that the question of the effect of the act of 1839 is now so presented, under the facts, as to enjoin upon us, not a nullification of what was decided in the former case, but a consideration of whether the right possessed by a street-railway company to contract with another for the use of its track has been abrogated. The former case did not, necessarily, involve the present question. The opinion of the Chief Judge has pointed out the distinction between the cases, and I feel myself free to concur with him in the conclusions which he has reached.

Bartlett and Martin, JJ., concur in result.

Vann, J., dissenting:

On the 25th of October, 1894, the plaintiff, an abutting owner upon Bergen street, in the city of Brooklyn, brought this action to restrain the defendant, a domestic corporation organized under the general railroad act of 1890, from constructing, operating, or maintaining a surface railroad through Bergen street in front of his premises, upon the ground that it had not obtained the consent of the property owners as required by law. Upon the trial it appeared that on the 19th of June, 1894, the defendant received the consent of the local authorities of said city to construct and operate a street railroad through several streets, including one block on Bergen street, upon condition that it should comply with all the provisions of the railroad law, but it had not obtained the consent of a majority of the property owners on said block or of the appellate division of the supreme court to the construction or operation of said road thereon. The Atlantic Avenue Railroad Company, organized in 1872, had for many years prior to the commencement of this action operated a double-track street-surface railroad along Bergen street in front of the premises of the plaintiff, who owned no part of the street. On the 13th of October, 1894, an agreement was entered into between the defendant and the Atlantic Company, which, among other things, provided that "the Nassau Company, for the purpose of operating its railroad on said portion of Bergen street [being the part in question], may use the tracks and wires of the Atlantic Company thereon, and may, upon and along said portion of Bergen street, place and maintain its feed wires upon the poles of the Atlantic Company, and shall pay the Atlantic Company a proper rental for such use of said tracks, wires and poles." After the commencement of this action, and on the 2d of November, 1894, a second agreement was entered into between said companies, which provided that "the cars of the Nassau Company may be moved over the tracks of the Atlantic Company on Bergen street [through the block in question], and the Atlantic Company agrees to furnish the power to move the said cars on said portion of Bergen street. The Nassau Company agrees to pay the Atlantic Company annually for the use of said tracks and power such sum as the parties hereto may hereafter agree upon, and, if they fail to so agree, the annual compensation shall be determined as provided in § 102 of the railroad law." The action was tried at a special term of the supreme court, and the justice presiding held that the defendant, under "an agreement" (not specifying which), had "the legal right to operate its railroad over the tracks of the Atlantic Avenue Railroad Company in Bergen street, . . . notwithstanding the property owners upon Bergen street . . . have not given their consent to the construction and operation of the defendant's railroad; that the proposed operation by the defendant of its railroad on Bergen street is lawful, and that the plaintiff is not entitled to an injunction enjoining and restraining the defendant from such 43 L. R. A.

operation; that the defendant, not having the consent of the property owners on Bergen street, . . . is not entitled to construct a railroad thereon," and judgment was directed accordingly, without costs to either party. The trial court thus held that the consents of abutting owners were not required for the operation of a street railroad, as distinguished from the construction thereof, and the general term affirmed the judgment, one of the learned justices dissenting.

There is no dispute as to the facts, and the question presented for us to determine is whether the defendant had a legal right, as against the plaintiff, under the circumstances stated, to operate its railroad upon the tracks of the Atlantic Avenue Company through that portion of Bergen street passing in front of the plaintiff's premises. The determination of this question requires us to consider § 18 of article 3 of the Constitution (Laws 1839, chap. 218), and several sections of the railroad law. Said section of the Constitution provides that "the legislature shall not pass a private or local bill in any of the following cases." Then follow thirteen specifications, and among others this: "Granting to any corporation, association, or individual, the right to lay down railroad tracks." After this enumeration the section provides that "the legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment may be provided for by general laws. But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one half in value of the property bounded on, and the consent also of the local authorities having control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad, be first obtained, or in case the consent of such property owners cannot be obtained, the appellate division of the supreme court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners." Const. art. 3, § 18, as amended in 1874 and continued in the revision of 1894. The statute of 1839, entitled "An Act Authorizing Railroad Companies to Contract with Each Other" provides that "it shall be lawful hereafter for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract." Laws 1839, chap. 218. While this act was repealed in 1890, the repealing statute provided that the provisions of the railroad law, so far as they are substantially the same as those of laws previously existing, "shall be construed as a continuation of such laws, modified or amended, according to the language employed in this chapter and not as new enactments." Laws 1890, chap. 565, §

182. By § 78 of the railroad law, the provision already quoted from the act of 1839 is repeated *in hæc verba*. Section 90 of the railroad law, so far as now material, is as follows: "The provisions of this article shall apply to every corporation which under the provisions thereof, or of any other law, has constructed or shall construct or operate, or has been or shall be organized to construct or operate, a street-surface railroad, or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons and property for compensation, upon and along any street, avenue, road, or highway, in any city, town, or village, or in any two or more civil divisions of the state, must comply with the provisions of this article." Laws 1890, chap. 565, § 90; Laws 1893, chap. 434, § 90. Section 91, the next in order, provides that "a street-surface railroad, or extensions or branches thereof, shall not be built, extended, or operated unless the consent in writing, acknowledged or proved as are deeds entitled to be recorded, of the owners of one half in value of the property bounded on, and also the consent of the local authorities having control of that portion of a street or highway upon which it is proposed to build or operate such railroad, shall have been first obtained." The rest of said sections are not material in this controversy, nor are the amendments passed in 1895 and 1896. Laws 1895, chap. 545; Laws 1896, chap. 855. Section 102 prohibits street-surface railroad corporations from constructing, extending, or operating their roads or tracks in that portion of any street in which there is already a street-surface railroad without the consent of the corporation owning and maintaining the same, except that any street-surface railroad company may use the tracks of another street-surface railroad company for a certain distance, varying with the population of the place where it is located, upon condemning the right to do so by proceedings in court. These are all the provisions of the Constitution or statutes that are regarded as material to the determination of the question before us.

The act of 1839 must be regarded as having been continuously in force from the date of its passage, until the present time, for, although that statute has been repealed in form, it has been continued in fact by consolidation with many others in the comprehensive act now known as the "Railroad Law." The statute of 1839, in connection with the constitutional amendment above quoted, received consideration from this court in *People v. Brooklyn, F. & C. I. R. Co.* 89 N. Y. 75, where it was held that said act was not affected by the constitutional provision, which prohibits future legislation only, without reference to previously existing laws. In no other respect is that case regarded as analogous to the one before us, for it was an action brought by the state through its attorney general to restrain the defendant therein from running its cars upon Atlantic avenue in the city of Brooklyn. There was no defendant except the railroad proceeded against. The abutting owners were

not parties, and their rights were not passed upon. On page 91 the court said: "It is the state which sues. No private citizen is seeking to vindicate his individual rights. That would present a very different case from the one before us. It is the state, representing the whole people, which seeks to restrain the defendant from exercising the right which the state, representing the whole people, expressly conferred." The case of *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, was also brought by the attorney general, while *Beveridge v. New York Elev. R. Co.* 112 N. Y. 1, 2 L. R. A. 648, was brought by a stockholder, and in neither were the rights of abutting owners involved. The act of 1839 was doubtless passed with reference to steam railroads only, as no other kind was then in existence. It is questioned whether, as continued in force by § 78 of the railroad law, it has any other application, for it is not found in the article entitled "Street Surface Railroads." Assuming, however, that it now has a general application, the question remains whether the defendant, by virtue of its agreement with the Atlantic Avenue Company, can run its cars over the tracks of the latter in Bergen street, without the consent of the abutting owners or the approval of the supreme court. As stated in another form, the question is whether the running of its cars through its own operating agents, by means of the power furnished by the Atlantic Company on the tracks of the latter, is operating its road; and, if so, is such operation prohibited by Constitution or statute, except on compliance with the conditions mentioned? In *Colonial City Traction Co. v. Kingston City R. Co.* 153 N. Y. 540, we held that "the use by a street-surface railroad company of a few hundred feet of the intervening tracks of another company, to form a connection between the main portions of its own track, over which to run its own cars and transport its own passengers as part of a continuous route," was "an 'operation' of its road, within the meaning of the provisions of the Constitution (art. 3, § 18) and of the statute." The question there presented was whether the Colonial Company could condemn the right to use the tracks of the Kingston Company to connect main portions of a line to be operated as an independent railroad without first obtaining the consent of the local authorities and the abutting owners. That case is therefore analogous to this, to the extent of determining what is meant by the phrase "operating a railroad." In discussing that question, we said: "If the appellant shall finally succeed in acquiring the right to run its cars for a short distance on the respondent's tracks, it will still be operating its own railroad, not that of another company, over that part of its route as well as any other. It clearly would not be operating the respondent's railroad, but using a portion of the tracks of the respondent to operate its own railroad. Two different companies cannot operate the same railroad at the same time, although both may use the same track in part to operate their respective roads. When the statute provides

that "any street-surface railroad company may use the tracks of another street-surface railroad company" upon certain conditions, permission to 'use the tracks,' implies use for the purpose of operating its cars thereon. Manifestly no other use is intended. A railroad is none the less in operation between two points because it runs its cars for a part of the way over the tracks of another road. When a railroad corporation acquires the right to run its cars over a street, whether upon its own track or that of another, that right becomes a part of the railroad, and in exercising that right the corporation operates its own road. The operation of a railroad includes the running of cars, and when a company runs its own cars, receives its own passengers, and collects its own fares over a continuous route of 4 miles, and all the trackage belongs to it except a connecting link of a few hundred feet in the middle, which it acquires the right to use through the power of eminent domain, we think it is to be regarded as operating its own railroad over the entire route, within the meaning of the Constitution and the statute. The prohibition is in the disjunctive, and is directed against operation the same as it is against construction." While in discussing that case language was used not applicable thereto, because it was a case of condemnation, but applicable to a case like this where there is a consent by one railroad to permit another to use its tracks, still the language above quoted was directly applicable and germane to the case then in hand. Upon the reargument we limited the effect of the decision to proceedings *in invitum* to acquire the right to use the connecting track of another company, but in no other respect did we modify our previous conclusion. 154 N. Y. 493. There is no difference between the two cases so far as the meaning of the word "operation" is concerned, except that in this case the power is furnished by the company owning the tracks, while in that case it was to be furnished by the company running the cars. I think the decision was correct, and that, unless it is distinctly overruled in an essential feature, we are bound to hold that the defendant under its agreement with the Atlantic Avenue Company was to operate its own railroad through that portion of Bergen street in question. It adopted the tracks of that company as its own for the purpose of operating its railroad. If running cars is not operating a railroad it is difficult to understand what the statute means by "operate" or "operated." As it was not to operate the Atlantic Avenue Railroad, what road could it operate except its own? The courts below have held that a street-surface railroad may be operated upon a public street without the consent of a majority of the abutting owners or of the supreme court, notwithstanding the command of the Constitution and the railroad law. As we said in the *Kingston Case*, "the consent required is not simply to the laying of the tracks, but also to the operation of the road. . . . An abutting owner might be willing to permit one company to operate its line through the street in front of his property, which

would involve the passage of but three or four cars an hour, but not be willing that several companies should have that privilege, which might involve the passage of a car every two minutes. It is not the laying of tracks, but the running of cars, that constitutes the chief burden, both upon the street and the property of the abutting owners. Consent to the burden of one road should, in reason, be limited to that road with whatever increase of business it may have, but should not be extended to as many roads as can crowd their cars into operation upon the street. It would be an unreasonable construction to hold that this is what the public authorities or the private citizens intend when they consent to the building and operation of a street railroad. Instead of an advantage to the public or to those owning property on the street, which is the inducement to obtain consent, it might result in a heavy and unexpected burden upon both, without any power to prevent it, and yet with no intention to consent to it. It would be a perversion of the consent given by extending it far beyond the intention of the parties." I do not wish to retreat from the position thus taken, which was concurred in by every member of the court who took part in the decision. The legislature had the power to prevent railroad companies from operating their roads without first obtaining the consents of the abutting owners, for it has all the power of legislation that the people can grant except as it is restrained by the Constitution, which contains no prohibition upon the subject. *Koch v. New York*, 152 N. Y. 72, 75. The legislature exercised that power in the very act under which the defendant was organized, and the restriction was, therefore, a part of the charter which gave it the right to exist. By accepting the charter it became bound to comply with all the provisions of the railroad law applicable to corporations of its class. The prohibition was clear and distinct, for § 91 provides that a street-surface railroad "shall not be built, extended, or operated" without the required consents. The operation of the road is as distinctly forbidden as the building or extension thereof. It is impossible to separate the prohibition from any one of the three acts of building, extending, or operating without violence to the language used. If a railroad cannot be built without the consents, it cannot be operated without the consents. The command of the statute applies with the same force to the one act as to the other. We have no power by construction to strike any of the forbidden acts from the statute, but it is our duty to give equal force to each. A forced construction weakens respect for the law and impairs the confidence of the public in the courts.

It is, however, contended that the right of the Atlantic Avenue Company to contract, under the act of 1839, for the use of its tracks by another road, was a property right of which it could not be deprived except by the power of eminent domain or the police power. If the contract had been made between the two roads before the passage of the act requiring consents as a condition prece-

dent to the operation of the defendant's road, a different question would have arisen, as to which I express no opinion. In this case, however, the prohibition was in force, not only before the traffic agreement was made, but before the defendant was in existence, and it has no right to enter into the agreement without complying with the condition required by its charter. The Atlantic Avenue Company is not a party to this action, and its rights are not involved. If the legislature had the right to create the defendant, it had the right to restrict its power in any way that it saw fit, either by wholly preventing it from making certain kinds of contracts, or by preventing it from making them except upon a prescribed condition. A corporation can make no contract whatever except through the permission, express or implied, of the legislature. It is a "mere creature of law," and has no powers except those conferred by statute, either specifically or by necessary implication. When the legislature created the defendant it had the right to prevent it from operating its railroad, under a traffic agreement or otherwise, without the consent of the abutting owners or the procedure in court authorized in lieu thereof.

It is contended that, if we hold that a traffic agreement cannot be made between two surface-railroad companies so that one may operate its railroad over the tracks of the other without the consent of the abutting owners, the precedent will injure the value of railroad properties as well as the bonds secured by mortgages thereon in the hands of purchasers in good faith. The argument based upon inconvenience does not change the meaning of the statute, although in a case of doubtful construction it is worthy of attention. The meaning of § 91 of the railroad law, however, is not doubtful, and, if the managers of street-railroad corporations have misunderstood or disregarded it, the evil should be at once arrested. Moreover, those who have made investments in street railroads are not alone to be considered, but the thousands of abutting owners whose property is diminished in value by the constant running of cars before their doors are also entitled to consideration. The capital invested in street railroads is small when compared with the capital invested in homes that are disturbed, as well as accommodated, by the great traffic on these roads. The rights of both classes of investors are to be considered, but it is for the legislature, under the Constitution, to so regulate their rights as to do the most good with the least harm. We must take the law as it is written, and, as we require obedience from others, must obey it ourselves. The legislature has not left the railroads in the hands of abutting owners, but, in lieu of their consent, has provided a reasonable substitute through judicial proceedings, and it is safe to assume that the railroad companies are quite as capable of taking care of themselves as the abutting owners. It is our province to declare the law, and I think we should discharge that duty in this case by holding that the railroad law prohibits the defend-

ant from operating its road upon the tracks or another company, through a public street, without first obtaining the consents required by that act. The judgment should be reversed and a new trial granted, with costs to abide the event.

PEOPLE of the State of New York, *Respt.*,
v.

Frank DUNN, *Appt.*

(157 N. Y. 528.)

1. The constitutional right of trial by jury is not violated by a statute providing that a jury in a criminal case shall be selected from a special list made from the general list by a jury commissioner.
2. Due process of law is not denied by requiring the jury in a criminal case to be composed of persons taken from the body selected by a special commissioner of jurors from the general list.
3. Judicial powers are not delegated to a special jury commissioner providing that he shall eliminate from the jury list persons declared by law to be unfit or disqualified to sit in criminal cases, and thus prepare a list from which a panel of fit and impartial jurors may be chosen.
4. It is not an unconstitutional discrimination against persons who are to be tried in a criminal branch of the court to require them to be tried by jurors taken from the body of the county whose general qualifications have been more particularly ascertained by a special jury commissioner, but who are still subject to judicial inquiry as to their qualifications and impartiality as in the case of an ordinary panel.
5. The right to appeal from the rulings of the trial court upon challenges to jurors is entirely within the legislative judgment.
6. A statute providing for special juries in each county having a population of 500,000 or more is a general, and not a local, act.

(January 10, 1899.)

A PPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, granting a motion for a special jury to try an indictment against defendant for the crime of murder. *Affirmed.*

Statement by Gray, J.:

The defendant was charged with the crime of murder in the first degree, and, upon being arraigned, pleaded not guilty. Thereafter the people applied for a special jury to try the issue, under the provisions of chapter 378 of the Laws of 1896. The application was granted by the appellate division of the supreme court in the first department. Leave to appeal to this court was then granted, upon the ground that a question of law was presented which ought to be here reviewed, and

NOTE.—As to the constitutionality of a struck jury, see also *Lommen v. Minneapolis Gaslight Co.* (Minn.) 83 L. R. A. 487.

the following question was certified, to wit: "Is the act of the legislature embodied in chapter 378 of the Laws of 1896, providing for a special jury in criminal actions in certain cases, a valid and constitutional exercise of legislative power?" The title of the act is as follows: "An Act Providing for a Special Jury in Criminal Cases in Each County of the State Having a Certain Population and for the Mode of Selecting and Procuring Such Special Jurors; also Creating a Special Jury Commissioner for Each of Such Counties and Regulating and Prescribing His Duties." The first six sections of the act provide, with respect to the manner of appointment of special jury commissioners, "for each county of the state having a population of 500,000 or more," their terms of office, compensation, etc., and that they shall be furnished by the commissioners of jurors of the counties with lists of persons liable to serve as trial jurors, from which to select special jurors, as the justices of the appellate division shall direct, etc. Section 7 prescribes the qualifications for each special juror, namely: He must be: "(1) A male citizen of the United States of at least ten years' standing, and a resident of the county. (2) Not less than thirty nor more than seventy years of age. (3) In possession of his natural faculties, and not infirm. (4) Free from all legal exceptions; of good character; of approved integrity; intelligent; of sound judgment; able to read and write the English language understandingly; and well informed; and he shall have an adequate knowledge of the duties of a juror." Section 8 provides that the commissioner shall not select as a special juror any person by law disqualified or exempt from service as a trial juror; nor one who has been convicted of a criminal offense, or found guilty of fraud or other misconduct, by the judgment of any civil court; nor one whose conscientious opinions are opposed to the death penalty; nor one who doubts his ability to render an impartial verdict, uninfluenced by newspaper reading or hearsay; nor one whose opinions would prevent his finding a verdict of guilty upon circumstantial evidence; nor one whose prejudice against a law of the state would preclude his finding a defendant guilty of violating such law; nor one whose prejudice against any particular defense would prevent his giving a fair and impartial trial upon its merits; nor one who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that no presumption is thereby created against him. Section 9 empowers the commissioner with respect to inquiries and examinations into the qualifications of special jurors, etc. Sections 10, 11, and 12 provide for the keeping of a list of the jurors selected, for the preparation of suitable ballots, and for the exemption of special jurors from service as ordinary jurors, etc. Section 13 provides that either the district attorney or the defendant may apply to the appellate division for a special jury, where it is made to appear "that a fair and impartial trial of such issue cannot be

had without a special jury, or that the importance or intricacy of the case requires such jury, or that the subject-matter of the indictment has been so widely disseminated or commented upon by the press or otherwise as to induce the belief that an ordinary jury cannot, without delay and difficulty, be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case requires that the trial of such issue be had by a special jury." The other sections of the act are unnecessary to be referred to particularly, as they relate to the machinery for the drawing of special jurors and for the formation of a special jury, except that § 19 provides that the rulings of the trial court in admitting or excluding evidence upon the trial of any challenge for actual bias shall be final.

Messrs. David Mitchell and Otto A. Rosalsky, for appellant:

Everyone has a right to demand that he be governed by general rules, and a special statute which without his consent singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be a legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments.

Cooley, Const. Lim. p. 483; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *White v. White*, 5 Barb. 474; *Green v. Shumway*, 39 N. Y. 426.

The act is in violation of the right of trial by jury.

State v. McClear, 11 Nev. 39.

The act delegates to the special jury commissioners judicial powers which the Constitution has vested in the courts.

Cooley, Const. Lim. p. 504; *People, Akin, v. Kipley*, 171 Ill. 44, 41 L. R. A. 775; *Roberts v. State*, 30 App. Div. 106; *Miller v. Alexander*, 122 N. C. 718; *Re Dunford* (Kan. App.) 53 Pac. 92; *People, Tyroler, v. Warden of City Prison*, 157 N. Y. 116.

The act is in violation of the provisions against local or private bills being passed by the legislature.

People v. Petrea, 92 N. Y. 128; *Re Henneberger*, 155 N. Y. 420, 42 L. R. A. 132; *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of H.* 118 U. S. 455, 30 L. ed. 237.

The act is in violation of the constitutional provisions for equality of privileges and equal protection under the law, and an act discriminating against individuals.

Middleton v. Middleton, 54 N. J. Eq. 692, 36 L. R. A. 221; Cooley, Const. Lim. 5th ed. p. 391; *Ho Ah Kow v. Nunan*, 5 Sawy. 552; *State, Bramley, v. Norton*, 5 Ohio N. P. 183; *Barnes v. People, Moloney*, 168 Ill. 424; *State v. Gardner*, 58 Ohio St. 599, 41 L. R. A. 689.

To be deprived of a juror who is competent impairs a substantial right of a defendant.

Hildreth v. Troy, 101 N. Y. 234, 54 Am. Rep. 686; *People v. McQuade*, 110 N. Y. 284, 1 L. R. A. 273; *People v. Casey*, 96 N. Y. 115.

Messrs. Asa Bird Gardiner and Charles E. Le Barbier, for respondent:

The act in question is not unconstitutional.

No right of the defendant has been invaded.

The provision of the United States Constitution, that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed" (U. S. Const. art. 3, § 2, subd. 3); and the provisions of the Constitution of the state of New York that "the trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever" (N. Y. Const. art. 1, § 2),—provide for a common-law jury of twelve men.

Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492; *Walter v. People*, 32 N. Y. 147; *Cancemi v. People*, 18 N. Y. 128; *Wynehamer v. People*, 13 N. Y. 378; *United States v. Shive*, Baldw. 510; *United States v. Morris*, 1 Curt. C. C. 23; *United States v. Battiste*, 2 Sumn. 240.

The legislature may constitutionally change the law as to the mode of procuring and empanelling a jury.

Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 33 L. R. A. 437; *Cooley*, Const. Law, chap. 7, p. 440; *Perry v. State*, 9 Wis. 20; *Proffatt*, Trial by Jury, § 106; *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492; *Walter v. People*, 32 N. Y. 159; *Gardiner v. People*, 6 Park. Crim. Rep. 193.

Irregularity even in the drawing of petit jurors is not ground for reversing a conviction, unless it appears that it operated to the prejudice or injury of the defendant.

Friery v. People, 2 Keyes, 425; *Ferris v. People*, 35 N. Y. 125.

Under the provisions of the Constitution, there was nothing, nor is there to-day anything, to prevent the selection of a jury to try a man charged with a crime according to the methods in selecting an ordinary struck jury, providing only that the three requisites of impartiality, indifference as between the parties, and an unanimous agreement between the jury, is preserved, together with the requisite number.

The provisions of this law do not conflict with the provisions of the United States and state Constitutions, that no person shall be deprived of his life, liberty, or property without due process of law, for that provision does not even guarantee the right of trial by jury.

Wynehamer v. People, 13 N. Y. 378; *Re McAdam*, 27 N. Y. S. R. 353; *Happy v. Mosher*, 48 N. Y. 313; *People, Witherbee, v. Essex County Supers.* 70 N. Y. 228; *Re Curry*, 25 Hun, 321.

The act in question is a general law and not in conflict with Constitution, art. 1, §§ 2-6, art. 3, § 18.

Re New York Elev. R. Co. 70 N. Y. 327; *Re Church*, 92 N. Y. 1; *People, New York Electric Lines Co., v. Squire*, 107 N. Y. 593; *Ferguson v. Ross*, 126 N. Y. 459; *Sun Printing & Pub. Asso. v. New York*, 8 App. Div. 230, Affirmed 152 N. Y. 257, 37 L. R. A. 788. 43 L. R. A.

The duty of the commissioner is in the main ministerial.

People v. Petrea, 92 N. Y. 140; *Lommen v. Minneapolis Gaslight Co.* 65 Minn. 196, 33 L. R. A. 437; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578.

The right of appeal is not guaranteed by the Constitution. That is a matter entirely within the legislative judgment.

Ex parte McCordle, 7 Wall. 506, 19 L. ed. 264; *Baltimore & P. R. Co. v. Grant*, 98 U. S. 398, 25 L. ed. 231; *Grover v. Coon*, 1 N. Y. 536; *Croveno v. Atlantic Ave. R. Co.* 150 N. Y. 225.

Special juries were known to the common law from earliest times.

Forsyth, Trial by Jury, 143; *King v. Edmonds*, 4 Barn. & Ald. 477; *Rot. Parl. V.* 213.

The special jury list was made from the ordinary jurors' book, and from among those described in that book as esquires, or as persons of higher degree, or as bankers or merchants.

Rule in Trinity Term, 8 Wm. III. 6 Geo. IV. chap. 50.

In some of the states juries are selected from the tax lists.

United States v. Collins, 1 Woods, C. C. 499.

Struck juries, which are special juries selected in a particular way, have been known from early days in English law.

Fowler v. State, 58 N. J. L. 423, 59 N. J. L. 585; *Moschell v. State*, 53 N. J. L. 505; *United States v. Loughery*, 13 Blatchf. 267; *United States v. Shackelford*, 18 How. 588, 15 L. ed. 495; *United States v. Stowell*, 2 Curt. C. C. 153; *United States v. Woodruff*, 4 McLean, 105.

Even the number of peremptory challenges allowed in capital cases in the different states has always been subject to the legislative will.

Rapalje, Crim. Proc. § 185; *Walter v. People*, 32 N. Y. 147; *Archbold*, Crim. Pl. 7th ed.: 1 Waterman, p. 560; 12 Am. & Eng. Enc. Law, p. 346; 12 Enc. Pl. & Fr. 478; *Moschell v. State*, 53 N. J. L. 505, 54 N. J. L. 390.

The number of peremptory challenges is a matter of legislative discretion, and may vary according to the Constitution of different communities, and the difficulties in each of securing intelligent and impartial jurors.

Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578.

Gray, J., delivered the opinion of the court:

I think that the question which has been certified to us should be answered in the affirmative, and, were it not for the general interest and the importance which it possesses, we might well leave the discussion with the opinion as delivered at the appellate division. It must be perfectly apparent that the act has but the one direct object, of facilitating the administration of justice in criminal cases, by providing for the impaneling of a fair, competent, and impartial jury, without the difficulty and delay with which the procedure is so frequently attended. If it can be upheld as a valid exercise of the legisla-

tive power, it will confer no inconsiderable boon upon the community,—a consideration which comes somewhat to the aid of the rule that every intendment shall be in favor of the constitutionality of legislative enactments.

The appellant objects to this act as being unconstitutional and invalid upon several grounds. He charges that it is violative of the right of trial by jury; that it creates two classes of jurors and discriminates unequally; that it delegates judicial powers to the special jury commissioner to determine the qualifications of jurors; that it takes away the right of appeal from the ruling of the court on a challenge to the special juror; and that it violated the constitutional provision against the passage of private and local bills.

Is the statute violative of the right of trial by jury, as secured by the Constitution of the state? That instrument provides that "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." Article 1, § 2. This provision, as well as that which secures a person against deprivation of life, liberty, or property without "due process of law" (Id. § 6), were imposed by the people as restraints upon the power of the legislature. The guaranty of the trial by jury is substantially the same as it stood in the original Constitution, and its insertion simply preserved the right as it had been exercised before the adoption of the organic law of the state. This act does not appear, upon its face, to be violative of any constitutional provision; but, upon looking back of the adoption of a Constitution and into the usages of the English people under the common law, do we find anything which would lead us to the belief that the creation of a system of special juries for the trial of causes is subversive of personal and inalienable rights? I find nothing, and we are certainly able to point out that special juries were known to the common law from early times. The institution of trial by jury is entitled to all the reverence which a custom deserves that is so historically interwoven with the growth and development of the rights of the English people. But it should be no superstitious reverence, warping and prejudicing our inquiry into the true significance and extent of the custom which has become a constitutional right. The system of trial by jury had its origin, through many sources, in the early institutions of the English people, and the provision in Magna Charta that no man should be deprived of his life, liberty, or property, or be condemned, "but by lawful judgment of his peers," has been generally credited with establishing, or defining, the right of trial by jury. The correctness of this belief is somewhat open to doubt, inasmuch as the provision more probably referred to the existing custom of a trial by peers. 3 Reeves, Eng. Law, 247; Forsyth, Jury Trial, 108. In Reeves's work it is said that trial by jury was not then known. But, however that may be, it did guarantee a procedure in trials, from which, it is generally agreed, eventually sprang the modern jury system as practised

under the common law of England. That the jury should be composed of twelve persons was due to the fact that twelve was a favorite number in the earliest times for various kinds of legal ceremonies or functions, and, for its great antiquity, was held in reverence. 1 Reeves, Eng. Law, 84 *et seq.* It is not without interest to observe that in the earlier times the jurors were witnesses, who pronounced upon their knowledge of the facts, and it was not until the times of Edward VI. and Queen Mary that the old procedure was softened by the selection of jurors dispassionate and indifferent between the parties, before whom witnesses were called to inform their consciences. 1 Reeves, Eng. Law, 271. That special juries were known to the common law is shown in Forsyth's work on Trial by Jury (p. 173), and an instance is cited, in 1450 (29 Hen. VI.), of "a petition for a special jury; that is, jurors 'who dwell within the shire, and have lands and tenements to the yearly value of xxf,' to try a plea which it was supposed might be pleaded in abatement on a bill of appeal of murder." In *King v. Edmonds*, 4 Barn. & Ald. 471, which was a criminal case tried before a special jury, it was observed of special juries by Chief Justice Abbott that it had not "hitherto been ascertained at what time the practice of appointing special juries for trials *ad nisi prius* first began," and that it was "introduced for the better administration of justice, and for securing the nomination of jurors duly qualified in all respects for their important office. It certainly prevailed long before the stat. 3 Geo. II. chap. 25. and was recognized and declared by that statute, which refers to the former practice." See also *Thomp. & M. Juries*, § 12. Under the provisions of 6 Geo. IV. chap. 50, the special jurors' list was made from the ordinary jurors' book, and from among those described in that book "as esquires, or as persons of higher degree, or as bankers or merchants." There were statutes which, in the reigns of Henry VIII. and of Philip and Mary, authorized the impaneling of bystanders, if a sufficient number of jurors returned by the sheriff did not appear, and such a practice was very early authorized in the United States courts. See U. S. Rev. Stat. §§ 804, 805.

From this brief inquiry, we would seem to be justified in saying that special, as well as struck, juries were resorted to at common law, and that the mode of selection of jurors was a matter for legislation.

It is to be observed that our Constitution does not secure to the defendant any particular mode of jury trial, nor any particular method of jury selection. It secures, simply, the right to a trial by a common-law jury of twelve men. *Wynehamer v. People*, 13 N. Y. 378, 458. Judge Cooley, in his work on Constitutional Law, 3d ed. p. 321, says: "By 'jury' in the Constitution is meant a common-law jury. This is a tribunal of twelve persons, impartially selected for the purposes of the trial, in accordance with rules of law previously established." In *Stokes v. People*, 53 N. Y. 104, 173, 13 Am. Rep. 492, it was held that the mode of procuring an impartial jury "is regulated by law, either

common or statutory, principally the latter, and it is within the power of the legislature to make, from time to time, such changes in the law as it may deem expedient, taking care to preserve the right of trial by an impartial jury." It was further said that "the end sought by the common law was to secure a panel that would impartially hear the evidence, and render a verdict thereon uninfluenced by any extraneous considerations whatever." In *Walter v. People*, 32 N. Y. 147, it was held that the constitutional provision carried no limitation of, or restriction upon, the legislative power, except as to the right guaranteed, viz., a jury trial in all cases in which it had been used before the adoption of the Constitution. In the same case it was considered that, even if the right to peremptory challenges were a right given by the common law, it could, nevertheless, be restrained, or withheld altogether, at the legislative will. In *People v. Petrea*, 92 N. Y., at page 143, it was held competent for the legislature to regulate the mode of selecting and procuring grand jurors (citing *Stokes's Case*),—in institution equally regarded as one of the securities of civil liberty.

The system of trial by jury, as it grew up at common law, had its root in the endeavor to secure to a defendant a trial of his cause by a fairly-selected body of his equals, rather than by his rulers, or by magistrates, or by persons designated by them, and the usage finally obtained of taking twelve jurymen from the vicinage to judge upon the facts developed by the evidence of witnesses. The right was conceded to the citizen of having the judgment of an impartial committee, or body, of his fellow citizens, upon charges involving his life, or his liberty, or his property, and two elements became essential ingredients of the right, viz.: That the jurors should be twelve in number; and that they should be capable of deciding the cause fairly and impartially. I know of no authority, and I can perceive no good reason, for holding that there is some inherent right, superior to legislative regulation, to any particular mode by which the panel of jurors is returned from which the twelve are to be chosen to sit. The ordinary reading of the constitutional provision does not suggest it, and the decisions of this court in the cases referred to negative the idea. That the mode of selecting a jury is within legislative regulation, and that it is not necessary, in order to preserve the right of trial by jury, to preserve any particular mode of designating jurors, however such mode may have been previously in force, is a doctrine which has received the support of the decisions of courts in other jurisdictions. *Lommen v. Minneapolis Gaslight Co.* 65 Minn. 196, 33 L. R. A. 437; *Perry v. State*, 9 Wis. 20; *State, Kansas City & S. R. Co., v. Slover*, 134 Mo. 607; and see, upon the question of struck juries, *Fowler v. State*, 58 N. J. L. 423.

Whether, therefore, we examine the question in the light of authority, or of reason, we find that the object aimed at under the common law, and which the constitutional provision must be deemed to have intended, is the obtaining of an impartial jury of twelve

men, and how that shall be accomplished is a matter within legislative regulation. Of what consequence is it that the trial jury is to be taken from a particular body of persons liable to serve as jurors, which the legislature has provided to be created out of the general body of the county, if the jurors who compose it, in fact, represent the citizens of the defendant's vicinage? Will it be any the less an impartial and a representative jury? While the ordinary commissioner of jurors is to draw from the citizens of the county and pass upon their qualifications and exemptions, the special commissioner of jurors provided for by this act is invested with additional power to facilitate the administration of justice by sifting out from the general body drafted, and eliminating therefrom those who should not sit, or who should be disqualified from acting, in the criminal branch of the court, whether from the standpoint of the prosecution or of the defendant.

Nor can it be rightly said that the defendant is denied that "due process of law" which the Constitution guarantees to him. There is no peculiar magic in these words. They were used in *Magna Charta* in the same sense as the words, "by the law of the land." 2 Co. Inst. 50. They mean law in its regular course of administration through courts of justice, and they secure to the defendant the benefit of those fundamental rules of the common law by which judicial trials are governed. *People v. Sickles*, 156 N. Y. 547. If the law of the state has made provision for the choosing of an impartial jury for the trial of a defendant, his trial is none the less by due process of law because the jury is composed of persons taken from the body selected by the special commissioner of jurors, from the general list, as being generally free from those defects which must, or should, cause them to be rejected, either by the prosecution or by the defendant. That official merely exercises similar functions to those of the ordinary commissioner of jurors, and their exercise is restricted to the list as furnished to him by the latter. As it was observed in the opinion below, "the ordinary jury commissioner does not select the particular panel which is summoned to try a man. Still less does the special jury commissioner. Nor does the latter exercise any judicial function as to the qualifications of the twelve men who may ultimately be chosen to serve. His work is preparatory and tentative. In the end, the court alone exercises the judicial function of deciding upon the qualifications of the jurors, and it does so entirely unhampered by the previous examination and inquiry of the commissioner." [31 App. Div. 139.] I think that we may dismiss the objections that the defendant is deprived by this act of due process of law, or that it subjects him to any unequal discrimination, with the remark that, if he is secured a trial before an impartial jury taken from the county and conducted according to the law of the land, he has had all the benefit of the constitutional guaranty. No substantial right is infringed upon; for, as it is suggested in the opinion below, neither the letter nor the spir-

it of the Constitution guarantees to him a chance to select an ignorant or partial jury.

It is quite to misapprehend the object effected by this act to say that it creates two classes of jurors, and therefore discriminates adversely, in its operation, upon those who are to be tried in the criminal branch of the court. The defendant is to be tried by twelve of those men, taken from the body of the county, whose general qualifications to sit in criminal cases have been, by the machinery of law, more particularly ascertained, but who are still to be subjected to judicial inquiry as to their qualifications and impartiality, as in the case of an ordinary panel. We might assume that there were, in a sense, two classes of jurors provided for in the trial of civil and criminal cases, and still find nothing in the point which affects the validity of the legislation. As we have seen, special juries were known to the common law, and that the legislative body has the power to regulate the method of selecting jurors, within the limitations only that the right to a trial by an impartial jury is not taken away, has been repeatedly recognized in the courts.

Nor are any judicial powers delegated to the special jury commissioner. He exercises the same ministerial power that the ordinary commissioner of jurors does, in examining the qualifications of those liable to serve as jurors. He is the official created by the law, upon whom is devolved the duty of eliminating from the jury list persons declared by law to be unfit, or disqualified, to sit in criminal cases, and of having in readiness, for the time when a special jury is ordered by the court, for the better administration of justice, a list from which a panel of fit and impartial jurors may be chosen. To say, as the appellant does, that the special jury commissioner has the power to select the jurors who are to determine the case, is as incorrect as it is to say that the qualifications of each class of jurors are entirely different. In the first place, all that that official does, or can do, is to prepare such a list of jurors, from the general list of the county, as will enable, not only the prosecution, but the defense, to choose a jury for the impending trial, without that difficulty and delay which would be occasioned by the examination and necessary rejection of persons on the county list who are unfit to serve, morally, mentally, or physically. In the second place, while it is, in a sense, true that the persons upon the two lists are differently qualified with respect to service in the criminal branch, it would be incorrect to regard that difference as other than one based upon their fitness for the jury service demanded. The argument that the defendant has more chances for success, or more rights, before a jury drawn from the general list, is incomprehensible, unless upon the theory that he has some inherent or substantial right to the chance of making his defense before a jury composed of men whose ignorance, or partiality, or mental constitution, might result in a disagreement, if not in an acquittal. That would be reducing the constitutional guaranty to an absurdity.

As to the objection that the right to appeal from the rulings of the trial court upon chal-

lenges is taken away, the opinion below has sufficiently answered it in holding that no right of appeal is guaranteed by the Constitution, and that such a right is entirely within the legislative judgment. The defendant's right to challenge is not taken from him, as in the Nevada case cited by him (*State v. McClellan*, 11 Nev. 39), but only the privilege of an appeal from the rulings of the trial judge.

One more objection remains to be considered, which is that the act is repugnant to § 18 of article 3 of the Constitution, providing that the legislature shall not pass a private or local bill as to "selecting, drawing, summoning, or impaneling grand or petit jurors." The 1st section of the act makes it applicable to "each county of the state having a population of 500,000 or more." The general operation of the law is subject, therefore, but to the one restriction, that the county where it is to apply must have a certain population within the cases of *Re Church*, 92 N. Y. 1, and of *Ferguson v. Ross*, 126 N. Y. 459, this must be regarded as a general, and not a local, act, although, by reason of the limitation based on population, only a limited number of counties of the state may receive its benefit. The *Henneberger Case*, 155 N. Y. 420, 42 L. R. A. 132, affords no support to the appellant's contention. It was decided upon its special circumstances, as it was perfectly proper to do. *People, Clauson, v. Newburgh & S. Pl. Road Co.* 86 N. Y. 6. The act in that case was a most palpable device to evade the constitutional prohibition against passing local bills for laying out highways. It contained seven conditions, which had all to be met before it could become operative. The combination of restrictions was unprecedented in any other act, and was so remarkable as to practically localize the operation of the law, and so we held that it would be absurd to call it a general law. What was said in the course of the opinion sufficiently meets the point now made as to its bearing upon the present case, viz., that, "in so far as acts have been made, by their terms, applicable to counties, cities, towns, or villages, according to their limits of population, or to the cases of counties or towns which adjoin cities of a certain population, although, by strict construction, they might be deemed to contravene the section of the Constitution, they will be saved from condemnation by the rule of construction which determines their validity as general laws upon a consideration of the special circumstances, and declines to view them as only local, because by reason of a limitation based on population, or some condition having reference to population, but one locality, apparently, may actually receive their benefits." There is nothing in this act to limit its general application in all cases where the population of the county has attained a certain size, and such a condition might reasonably be considered as possible generally. As it was pointed out in the *Henneberger Case*, there are good reasons why, in a general law, reference should be had to conditions of population. I think that the act in no respect operates to the prejudice of the defendant, and I

am unable to see any good reason for pronouncing the legislation invalid.

The question certified to this court should be answered in the affirmative, and the order appealed from therefore affirmed.

All concur except O'Brien, J., not voting.

Paul WILLIAMS, *Resp't.*,

v.

William HAYS, *Appt.*

(157 N. Y. 541.)

1. The charterer of a vessel who is in command is not liable for her loss because of a lack of care or skill in her navigation after he has become irresponsible, on account of physical and mental exhaustion resulting from his being on duty almost continuously for three days and nights in efforts to save the vessel during a storm.
2. The question of negligence of the mate of a vessel in failing to resort to strong measures to obtain command of the ship because the captain has become mentally deranged is for the determination of the jury.

(*Bartlett, J., dissents.*)

(January 10, 1899.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of the New York County Circuit in favor of plaintiff in an action brought to hold defendant liable as master of a vessel for its loss which was alleged to have resulted from his negligence. *Reversed.*

The facts are stated in the opinion.

Mr. Henry W. Goodrich, for appellant:

If defendant's condition was solely in consequence of his efforts to save the vessel during the storm, such disability would be a defense to the claim of the plaintiff in this action.

Neither the master nor the ship is liable for a wreck growing out of the sudden disability of the master.

Hays v. Phoenix Ins. Co. 25 Jones & S. 199, Affirmed without opinion, 127 N. Y. 656; *Copeland v. New England Marine Ins. Co.* 2 Met. 432.

Messrs. Black & Kneeland, for respondent:

The vessel was intrusted to the defendant, not as agent, but as to the other owners as charterer, lessee, or bailee, and if he caused her destruction by what in sane persons would be called wilful or negligent conduct, the law holds him responsible.

Williams v. Hays, 143 N. Y. 451, 26 L. R. A. 153.

Let it be assumed that the alleged insanity was the effect of the strain of the storm; yet that result upon the ability of the master would be no greater than if he had become totally insensible by a blow, and the mate

would be in the same position as he actually was, viz., bound to see the incapacity of the defendant, and still charged by the duties of his office with the care of the vessel; and yet if he does nothing to save her, not even taking in sail or anchoring, and refuses the assistance of tugs when he knows the rudder is useless, the master, who employs him, cannot escape responsibility for his neglect.

Cross v. Andrews, Cro. Eliz. pt. 2, p. 622.

The subrogation of the Phoenix Insurance Company to the rights of Parsons & Loud follows from—

Connecticut F. Ins. Co. v. Erie R. Co. 73 N. Y. 399, 29 Am. Rep. 171; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 594, 28 L. ed. 531.

The employment of the crew by the defendant as master made him responsible for their conduct.

Story, Agency, § 314.

Haight, J., delivered the opinion of the court:

This action was brought by the plaintiff, as assignee of the Phoenix Insurance Company, to recover the amount of insurance paid by the company to Parsons and Loud under a policy of insurance issued to them as the owners of one sixteenth of the brig Emily T. Sheldon. The brig had been wrecked on Peaked Hill Bar, on Cape Cod, near Provincetown, Massachusetts; and it is alleged that the loss occurred through the negligence of the defendant, who was the master and part owner of the brig, and who commanded her at the time of the loss. The plaintiff claims the right to recover in this action upon the theory that the insurance company became subrogated to the rights of the owners, whom it had insured. The answer denied the allegations of the complaint that the loss was caused through the negligence, carelessness, misconduct, and improper navigation of the defendant, and alleges that at the time of the wreck he was unconscious of his acts, and irresponsible therefor, and was not in a condition to navigate the brig, on account of sickness, etc. At the conclusion of the evidence, the trial court directed a verdict in favor of the plaintiff, holding that the insanity of the defendant furnished no defense. The defendant's counsel objected to the direction of the verdict, and asked to go to the jury upon the questions: "First, whether or not the defendant became insane solely in consequence of his efforts to save the vessel during the storm; second, whether the defendant became insane solely in consequence of a sickness occasioned by his efforts to save the vessel during the storm, and the quinine which was taken therefor; third, whether the mate was so cognizant of the condition of the master, of the insanity or other incompetency of the master, as to require him to take the command of the vessel away from the master; fourth, whether the mate exercised due judgment in regard to the condition of the master; fifth, whether the defendant, in consequence of his efforts to save the vessel during the storm, became mentally and physically incompetent to give the vessel any further care than he did." These requests were refused by the court,

NOTE.—As to the civil liability of insane persons for torts or negligence see *note* to the decision of the above case on a former appeal in 26 L. R. A. 153.
43 L. R. A.

and a verdict was directed, to which rulings the defendant's counsel duly excepted.

On Thursday, the 18th day of March, 1886, the brig Emily T. Sheldon left Boothbay, Maine, with a cargo of ice, bound for Annapolis, Maryland. At the time of sailing, the weather was fair, and remained so for about sixteen hours, at which time a storm commenced, with high winds and rain, with a light snow. At the time of the commencement of the storm, the vessel was in George's channel, and the defendant tacked to work her about, trying to find his way out, until it became practically impossible to tell where he was. He headed her in what was supposed to be the direction of Cape Cod, but, not being able to make the cape, she was hove to, to ride out the gale. This was about 4 o'clock in the afternoon of the 20th, and she remained hove to until about that time in the afternoon of the 21st and then the defendant stood her off for what was supposed to be Cape Cod. On Monday morning, the 22d, between 4 and 5 o'clock, Thatcher Island lights were sighted by the defendant. The storm had then abated, but there was a heavy roll of the sea. The defendant then turned the vessel over to the mate, telling him to keep her by the wind until he made Cape Cod light. He then went below, and laid down upon a lounge in his cabin, but, before doing so, took fifteen grains of quinine. It appears that during the storm he had had but little rest; had not gone to his berth or undressed; had eaten but little, and that for the last forty-eight hours he had been constantly upon deck; that he was worn out, exhausted, felt sick, and feared he was to have an attack of malaria. At about 11 o'clock, the second mate, to whom the vessel had been turned over, called the mate, saying that the vessel did not act very well. The mate then went upon deck, and about half past 11 the steward called the defendant. He was lying, dressed, upon the lounge. He did not get up at the first call, and subsequently the steward pulled him off from the lounge, in order to arouse him. He then got up, but within a few minutes was again found lying upon the lounge, and the steward went to him again, and finally succeeded in getting him up on the deck of the vessel. There are some little differences in the testimony of the witnesses in reference to the order of events thereafter occurring. According to the recollection of some of the witnesses, the captain came on deck about half past 12, after the crew had been at dinner. After he came on deck, the tug Storm King came up on their weather quarter, and said that the rudderpost of the brig was split, and asked the captain if he did not want a tow. He said that he did not; that he guessed "we are all right." The Storm King then went away, and about 1 o'clock another boat came up under the stern of the brig, and offered a tow, but was refused by the captain. McDonald, who kept the log of the vessel, testified: "After the boats went away, the vessel began to go off and come to, and she would not mind her helm at all, and the sea was edging her into the beach all the time. Then I went over,

and looked over the stern, but I could see nothing. Then I got into the bowline; that is a rope with a noose in it, being around my waist; and I was let down over the stern, and I looked at the rudderpost, and it was split, but I could not tell how badly. I went back on deck, and said that the rudderpost was split, and the captain said he didn't think it was, and said, 'I can't see it, and you can't, I think.' Then I began to think there was something wrong with the captain; that he did not act as he used to. Still, I could not see anything wrong with his manner, except when he spoke to me about the vessel; and he then told me to square the yards to see if the vessel would go off again, and we did, and she did go off, but she came right back again; and I lowered the main try-sail down again, and hove the helm up again, but she did not go off; she went sideways in onto the beach, and struck," at about 2:30 o'clock. Considerable evidence was taken with reference to the condition of the captain, all of which tends to show that he staggered about the vessel, making irresponsible answers to questions, appeared to be in a dazed condition, and to be either drunk or insane. After the brig struck, a life-saving boat came alongside, and offered to take him ashore; but he refused to go, and the crew of the life boat had to remain for several hours before they finally succeeded in coaxing him to go with them. He was taken ashore, but, according to his testimony, remembers nothing that occurred until the next day. The brig became a total wreck.

This action was considered in this court on a former review (143 N. Y. 442, 26 L. R. A. 153), at which time the law of the case was settled, except upon two points. It was then held that the defendant, as charterer of the brig, was liable for losses which occurred through his want of care or skill in the navigation of the vessel; that he was required to exercise such care and skill as a reasonably careful and prudent owner would ordinarily give to his own vessel; and that an insane person is responsible for his torts the same as if sane. The opinion contains some comments of the judge, which have been understood as indicating an intention to do away with any distinction between misfeasance and nonfeasance, and to hold that lunatics and infants were just as liable for their failure to act as they were for their affirmative torts. But, when the judge comes to sum up the result of his examination of the authorities, he concludes by stating the rule to be that, if the defendant "caused her destruction by what in sane persons would be called wilful or negligent conduct, the law holds him responsible." The final conclusion reached by the judge we accept as the law of this case. Whether a lunatic or a person mentally incapacitated should be held responsible in all instances for his nonfeasance or failure to act we will not stop to consider.

The judge then proceeds in his opinion to say: "If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have

had a different case to deal with. He was not responsible for the storm, and while it was raging his efforts to save the vessel were tireless and unceasing, and if he thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought not to be attributed to him as a fault. In reference to such a case we do not now express any opinion. . . . If it should be found upon the new trial of this action that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should, therefore, be held that no fault could be attributed to him on account of what he personally did or omitted to do, then the question would still remain whether the carelessness of his mate and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their carelessness." We thus have two questions presented for consideration: First. Did the defendant become mentally and physically incompetent to care for and navigate the vessel, solely in consequence of his efforts to save the vessel during the storm? And, second, if he was thus mentally and physically incapacitated, were his mate and crew guilty of negligence in not taking the command of the vessel, and procuring a tow? Upon directing a verdict in favor of the plaintiff, the trial court said: "Assuming, as we must, for such purpose, that the condition of the defendant was the result of exhaustion, caused by his efforts to save the ship from the perils of the storm, and the heavy dose of quinine which he took as a remedy, I fail to see how that presents any exception to the principle laid down by the court of appeals, that a person of unsound mind is responsible for the consequences of acts which in the case of a sane person would be negligent. In other words the standard by which he is to be judged is the same as that which must be applied to the actions of a sane person. It certainly seems to be a cruel doctrine; but as it is apparently based upon the principle that, as between two innocent persons, the loss must fall upon him who caused it, rather than upon the other, the best that can be said about it is that it is a rule which serves the convenience of the public, to which individual rights must give way." It will thus be observed that the case was disposed of below upon the ground that the defendant was liable even though assuming that his condition was the result of exhaustion caused by his efforts to save the ship from the perils of the storm, and the question as to whether the mate was guilty of negligence was not considered. The appellate division has affirmed, following in its opinion, the reasoning of the trial judge.

We cannot give our assent to such a view of the law. To our minds it is carrying the law of negligence to a point which is unreasonable, and, prior to this case, unheard of, and is establishing a doctrine abhorrent to all principles of equity and justice. In this case, as we have seen, the storm commenced on Friday, continued through Saturday and Sunday, and it was not until 5 o'clock Monday morning that the defendant was re-

lieved from the care of his vessel. For three days and nights he had been upon duty almost continuously, and for the last forty-eight hours had not been below the deck. The man is not yet born in whom there is not a limit to his physical and mental endurance, and, when that limit has been passed, he must yield to laws over which man has no control. When the case was here before, it was said that the defendant was bound to exercise such reasonable care and prudence as a careful and prudent man would ordinarily give to his own vessel. What careful and prudent man could do more than to care for his vessel until overcome by physical and mental exhaustion? To do more was impossible. And yet we are told that he must, or be responsible. Among the familiar legal maxims are the following: The law intends what is agreeable to reason; it does not suffer an absurdity. Impossibility is an excuse in law, and there is no obligation to perform impossible things. Co. Litt. 78; [*Case of Avocry*], 9 Coke, 22; Co. Litt. 29; 1 Pothier, Obligations, pt. 1, chap. 1, sec. 4, § 3. Applying these maxims to the case under consideration, we think the fallacy of the reasoning below is apparent, and that it cannot and ought not to be sustained.

As to whether the mate should be chargeable with negligence is a question which has not as yet been determined. It is said that he did nothing to save the vessel. It appears that he was on deck, obeying the orders of the captain. The circumstances surrounding him were peculiar. Possibly he might have put the captain in irons, and taken the command of the vessel, but mutiny at sea is criminal, and heavily punished. In order to justify such action, he must be satisfied of the derangement of his superior officer, and be able to command the assistance of the crew. Whether the condition of the captain was so apparent at the time as to charge the mate with negligence in not resorting to strong measures, we think, was a question of fact for the determination of the jury, and that it was not within the province of the court to dispose of it as a question of law.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur except **Bartlett, J.**, who reads for affirmance.

Bartlett, J., dissenting:

I am of opinion there was no question for the jury in this case. The learned counsel for the defendant asked to go to the jury on two questions:

First. "Whether or not the defendant became insane solely in consequence of his effort to save the vessel during the storm." It is true that Judge Earl, writing in this case for the court on the former appeal, stated that, if the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. It is, however, undisputed that the record now before us is identical in all essential respects with the one then under examination, and it

therefore follows that the determination of this court that the insanity of the defendant was no defense is the law of this case, and was properly followed by the trial judge when he directed a verdict for the plaintiff.

Second. "Whether the defendant became insane solely in consequence of a sickness occasioned by his efforts to save the vessel during the storm, and the quinine which was taken therefor." Judge Earl stated in his opinion upon the former appeal that if it were found upon a new trial that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should therefore be held that no fault could be attributed to him on account of what he personally did, or omitted to do, then the question would still remain whether the carelessness of his mates and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their failure to act. There is no conflict of evidence on this latter point, and only a question of law is presented to this court on undisputed facts,—whether the captain was not liable for this loss, not only on account of his insanity, but for the reason that the mates and crew, having full knowledge of the captain's mental incapacity, and that the rudder was useless, failed to intervene and save the vessel, but allowed her to drift with the dead swell upon the beach, with all sails set and no anchors out, in a light wind blowing off shore, in the middle of a pleasant afternoon, with two steam tugs lying by, and offering a tow to a port 9 miles distant. There was no request to go to the jury as to the conduct of the crew. The liability of the captain for the acts of his mates and crew is well settled. Story on Agency (§ 314) states: "The policy of the maritime law has therefore indissolubly connected his [the master's] personal responsibility with that of all the other persons on board, who are under his command, and are subjected to his authority." With the same record before us as on the former appeal, I am unable to understand why the former decision of this court should not be followed. 143 N. Y. 442, 26 L. R. A. 153. I vote for affirmance.

Haskell B. WARREN, by Edward P. Coyne,
Guardian *ad Litem*, et al., *Appts.*,

v.

UNION BANK OF ROCHESTER et al.,
Recpts.

(157 N. Y. 259.)

1. The general guardian of an infant has no right to carry on business in the name and with the capital or on the credit of the infant.

2. The use of the word "fraud" or "fraudulent" is not necessary to charge that acts are fraudulent.

3. No jurisdiction to authorize the

NOTE.—On the subject of the protection of infants by the courts, see also *Roche v. Waters* (Md.) 7 L. R. A. 533; *Wilson v. Hughes* (W. Va.) 30 L. R. A. 292; and *Kromer v. Friday* (Wash.) 82 L. R. A. 671, and *note*. 43 L. R. A.

mortgage of an infant's property is acquired under Code Civ. Proc. chap. 17, art. 4, tit. 7, where the petition, proofs, and all the papers show that the sole purpose is to mortgage the property of the infant to pay a debt contracted by his guardian in carrying on business, without authority, in the infant's name.

4. No presumption can be indulged in favor of the jurisdiction of the court in authorizing the mortgage of an infant's property, as the jurisdiction for that purpose is special and limited, and wholly dependent upon the statute.

5. An original action in equity to set aside an order of court for the mortgage of an infant's property, and the mortgage made under it, can be maintained when they were in fraud of the infant's rights, and were procured by fraud and collusion.

(November 22, 1898.)

APPEAL by plaintiffs from a judgment of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of a Monroe County Equity Term in plaintiffs' favor in an action brought to set aside a mortgage on plaintiffs' real estate. *Reversed.*

Statement by **Martin, J.:**

This action was to set aside proceedings to mortgage certain real estate of the infant plaintiff, including the mortgage as a part of such proceeding. The mortgage was executed on behalf of the infant by his special guardian appointed in that proceeding, was payable to Gilman H. Perkins, and by him assigned to the Union Bank of Rochester. It was made to secure the sum of \$25,000, and was upon the real property described in the complaint. The proceeding was instituted in the supreme court by Holmes B. Stevens as general guardian of the infant. At the commencement of this action the plaintiff Warren was under fourteen years of age, and resided with his mother, in the city of Rochester. In February, 1895, and for several years before, he was the owner in fee simple and in possession of the premises described in the complaint, upon a portion of which there was a brewery, with the appliances for manufacturing beer and ale. Prior to November 25, 1891, Holmes B. Stevens was the general guardian of the person and property of such infant, and was the administrator with the will annexed of Edward K. Warren, who died seised and possessed of the real property in question, and who was the grandfather of the infant. For some time prior to November 25, 1891, the defendant Stevens, as such administrator, had carried on upon the premises the business of a brewer, buying and selling barley, and manufacturing beer and malt and ale. On that day the accounts of Stevens as administrator were finally settled, and all the personal property used in connection with the brewery was turned over by him as administrator to himself as guardian of the infant plaintiff, in pursuance of a decree of the surrogate's court. From that time until the 1st day of July, 1893, Stevens, claiming to act as general guardian of the infant, conducted upon the premises the busi-

ness of a brewer, buying and selling barley and malt, manufacturing beer and malt and ale, selling the products of the brewery for cash and upon credit, and buying supplies for cash and upon credit. He then sold all the personal property used in that business to a corporation, and took in payment its stock of the par value of \$23,000. During that time he borrowed money of the Union Bank, which he used in the business, and gave notes therefor, signed "Haskell B. Warren, by Holmes B. Stevens, General Guardian," and on the 6th day of May, 1895, he made and delivered to the bank a promissory note of that date for \$25,431.90, which was signed in the same manner. This note represented the money, and interest unpaid thereon, which was borrowed by Stevens of the bank while carrying on the brewery business, between the 25th of November, 1891, and the 1st of July, 1893. In the month of February, 1895, as such general guardian, Stevens presented a petition to the supreme court, setting forth the existence of the indebtedness to the bank upon such note; alleged that it amounted to \$24,500 and upwards; that the bank was pressing for the payment of it, and threatened to sue therefor unless it was paid; that the real property of the infant would be thus sacrificed if it was not paid; that the interests of such infant would be promoted by paying the debt to the bank; that the income of the infant from his property was not sufficient to pay that indebtedness; and that, unless the money could be raised to pay the bank, the property of the infant would be sacrificed to pay it. It was then alleged that William S. Kimball had offered to loan the sum of \$25,000 upon the property, subject to the existing mortgage, at the interest or rate of 6 per cent per annum, payable quarterly, the principal to be paid one year from date, and the petitioner, Stevens, then asked that the real estate mentioned might be mortgaged for \$25,000 under the direction of the court. Such proceedings were had therein that the attorney for the defendant bank was appointed the special guardian of the infant. The usual order of reference and proceedings before the referee were had, and a contract was made between the special guardian and Kimball, the president of the bank, by which it was agreed that a mortgage should be executed to him by the special guardian upon the real estate described in the complaint for the sum of \$25,000. While the proceedings were pending, Kimball died, and a new agreement was made between the special guardian and the defendant Perkins, who was vice president and a director of the bank, for the execution and delivery of a mortgage for the same amount. The referee reported that it would be for the benefit of the infant to mortgage the property mentioned, for the reason that the brewery business conducted by Stevens as guardian was not productive, and resulted in loss; that when the business was transferred to the corporation it was largely in debt, and it became necessary to pay those debts to protect the estate; that a large sum of money was borrowed of the bank upon the notes of Stevens as guardian, aggregat-

ing \$24,500; that the bank had called in such loans, and threatened to sue the notes unless paid, and that there was no money to pay the same unless it could be realized by mortgaging the property of the infant; that the latter had no funds or property to draw upon to pay that debt; that Perkins would loan \$25,000 upon the property, and that from that sum should be paid the amount of the debt due the Union Bank, so far as the money would pay the same. This report was received, and the special guardian was ordered to contract for mortgaging the infant's property. Subsequently he reported that he had entered into an oral agreement to mortgage the property to Perkins for \$25,000. He was then directed to execute the mortgage, and from the \$25,000 first to pay the expenses of the proceeding, which amounted to \$430.50, and to pay the remainder, \$24,569.50, upon the note of Stevens held by the Union Bank. Subsequently the special guardian executed and delivered to Perkins the mortgage mentioned, and received therefor the sum of \$25,000, which was paid as directed by the previous order. Shortly afterwards Perkins executed and delivered to the bank an assignment of the mortgage, and the bank paid him the \$25,000 he advanced. The sole purpose of the proceeding to mortgage the infant's real estate was to discharge Stevens' indebtedness to the bank, and it was instituted in pursuance of an agreement between Stevens and the officers of the bank to secure that end. Perkins advanced the \$25,000 to the special guardian under an agreement with Stevens and the bank that the net proceeds thereof should be applied upon the debt of the bank, and to no other purpose, and that the bank should refund to Perkins the money paid by him, and the mortgage should be assigned to the bank. The bank received the assignment of the mortgage with full knowledge that the money paid by the special guardian had been applied upon the indebtedness of Stevens which was secured by his notes, and that the purpose and effect of the proceeding to mortgage the infant's real estate was to secure and pay the individual debt of Stevens to the bank, and for that purpose alone. Nothing has been paid upon this mortgage since its execution and delivery, but it remains an apparent lien upon the real property described.

Mr. Charles J. Bissell, for appellants:

The complaint states a cause of action, and the proper, and indeed the only, remedy available to the infant plaintiff to set aside the mortgage and the proceedings resulting in its execution is by action.

The universal rule in the English court of chancery, and which rule was ingrafted upon our procedure in the state of New York, was that an infant had a year and a day after becoming of age in which to show cause against a decree rendered against him which deprived him of his estate, or any part thereof.

Cooper, Eq. Pl. pp. 88 *et seq.*; *Richmond v. Tayleur*, 1 P. Wms. 737; 1 Dan. Ch. Pl. & Pr. p. 164; *Freeman*, Judgm. § 513; *Bank of*

United States v. Ritchie, 8 Pet. 128, 8 L. ed. 800; *Savage v. Carroll*, 1 Ball & B. 548, 2 Ball & B. 451; *McLemore v. Chicago, St. L. & N. O. R. Co.* 58 Miss. 514; *Loyd v. Malone*, 23 Ill. 43, 74 Am. Dec. 179; *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Lloyd v. Kirkwood*, 112 Ill. 329; *Kingsburg v. Sperry*, 119 Ill. 280; *Allison v. Drake*, 145 Ill. 500; *Wright v. Miller*, 1 Sandf. Ch. 103, 4 Barb. 600, 8 N. Y. 9, 59 Am. Dec. 438; *Losey v. Stanley*, 147 N. Y. 560; *Re Price*, 67 N. Y. 231; *Lefevre v. Laraway*, 22 Barb. 167; 2 Story, Eq. Jur. 1334, 1337.

Where the inevitable result of the act of a person is to defraud another, the alleging and proof of those acts is sufficient without using harsh language and making use of the word "fraud" or "collusion."

National Tube Works Co. v. Gillfillan, 124 N. Y. 303; *Douglass v. Ireland*, 73 N. Y. 100; *Boynton v. Andrews*, 63 N. Y. 93; *Knowles v. Duffy*, 40 Hun, 485; *Whittlesey v. Delaney*, 73 N. Y. 571; *Goldsmith v. Goldsmith*, 145 N. Y. 313; *Delaney v. Valentine*, 154 N. Y. 692; *Sharp v. New York*, 40 Barb. 256; *Warner v. Blakeman*, 4 Keyes, 487.

The fraud and the fraudulent intent necessarily flow from the acts themselves.

The proceedings leading up to the mortgage and the mortgage itself were properly set aside by the judgment of the special term upon the ground that the proceedings were collusively set on foot and conducted, and the debt for which the mortgage was given was not the debt of the infant, but that of another.

A general guardian cannot bind the infant's estate by his promissory note, although made in the name of the infant. It is the guardian's debt, and not the infant's.

Forster v. Fuller, 6 Mass. 58, 4 Am. Dec. 87; *Schouler*, Dom. Rel. pp. 464, 479.

A guardian will not be allowed to risk the capital of his ward, or even the income from the capital in trade. He certainly will not be allowed to speculate with it, and certainly will not be allowed to embark it in the hazards of a manufacturing business carried on upon credit.

Hooper v. Eyles, 2 Vern. 480; *Macpherson*, Infants, pp. 265, 271, 277; *Killick v. Fleaney*, 4 Bro. Ch. 161, note 4; *Booth v. Booth*, 1 Beav. 125; *Cotham v. West*, 1 Beav. 380; *Ryan v. Smith*, 165 Mass. 303.

There is no question in this case of a bona fide purchaser. The bank had full knowledge that Stevens was carrying on the business of a brewer, buying and selling on credit.

Neither the petition filed in the proceedings to mortgage the real estate of the infant, nor the proceedings subsequently had thereon, gave the supreme court jurisdiction to direct the execution of the mortgage.

The supreme court has no inherent jurisdiction to direct the sale or mortgage of an infant's real estate; its jurisdiction rests wholly upon the statute, and it is only by virtue of a strict observance of statutory requirements that a court in decreeing a sale or mortgage comes within its jurisdiction.

Rogers v. Dill, 6 Hill, 415; *Re Turner*, 10 Barb. 552; *Baker v. Lorillard*, 4 N. Y. 257; *Onderdonk v. Mott*, 34 Barb. 106.
43 L. R. A.

There is no presumption of compliance in the absence of proof.

Ellwood v. Northrup, 106 N. Y. 172; *Battell v. Torrey*, 65 N. Y. 294.

The purpose of the proceeding being in fact one to substitute a mortgage in the place of the outstanding note, and not one to pay the infant's debt, was a purpose unauthorized by the statute and made the proceedings absolutely void.

Weinstock v. Levison, 26 Abb. N. C. 244.

The appointment of the attorney of the Union Bank as the guardian *ad litem* for the infant was of itself an irregularity sufficient to invalidate all of the proceedings, and ought to render them absolutely void at the suit of a person interested.

Hecker v. Seaton, 43 Hun, 593; *Re Van Beuren*, 13 N. Y. Supp. 201; *Buderus v. Inmen*, 20 N. Y. Week. Dig. 88; *Knickerbocker v. De Freest*, 2 Paige, 304.

The extreme rigidity and care with which the courts uniformly hold to the rule that these proceedings must be conducted in direct accordance with the mandate of the statute is exemplified in a large number of cases.

Re Lampman, 22 Hun, 239; *Re Valentine*, 72 N. Y. 184; *Ellwood v. Northrup*, 106 N. Y. 172; *Stillwell v. Swarthout*, 81 N. Y. 109.

Mr. George F. Danforth, for respondent:

If the action or proceeding has an independent purpose, and contemplates some other result or relief, although the overturning of the judgment may be important or even necessary to its success, the attack upon the judgment is collateral and falls under the rule which prohibits one court from re-examining the decisions of another court of competent authority on the same subject.

Black, Judgm. § 252.

All that the plaintiffs were entitled to prove were the facts contained in the complaint, and if those are insufficient to establish a cause of action the defendants were entitled, as a matter of legal right, to have the complaint dismissed.

Tooker v. Arnous, 76 N. Y. 397; *Pope v. Terre Haute Car & Mfg. Co.* 107 N. Y. 61.

The court under whose direction the mortgage was executed had competent jurisdiction over the subject-matter, and over the parties; power to entertain the application to mortgage, and make the order. That order is conclusive until set aside or reversed; and is obligatory upon the parties who have rights depending upon the same matters embraced within that proceeding.

The petition and report not only described the debts or demands against the estate, but their origin and consideration and circumstances of the estate, and other smaller debts. There arose an equitable obligation, binding the infant's estate, incurred by his guardian in good faith, to be determined upon equitable principles.

Hyland v. Baxter, 98 N. Y. 610; *Clarke v. Van Surlay*, 15 Wend. 436, Affirmed, 20 Wend. 365.

From the time of filing the petition praying for an order directing a mortgage, the infant was by statute a ward of the court

with respect to its real property and matters concerned.

Code, § 2360.

By virtue of its authority to control procedure and administer justice between its ward and parties dealing with him, it could act without seeking for a contract enforceable at law, but upon the inquiry and ascertainment of "what is just" it could recognize and enforce an equitable claim, or one good in equity, even if not at law.

Dyett v. North American Coal Co. 20 Wend. 570; *Noyes v. Blakeman*, 6 N. Y. 567; *Randall v. Dusenbury*, 7 Jones & S. 174, Affirmed, 63 N. Y. 645; *New v. Nicoll*, 73 N. Y. 131, 29 Am. Rep. 111; *Hyland v. Bazter*, 98 N. Y. 610.

When the condition of the property demands, for its protection or preservation, the expenditure of money which the trustee or guardian is unable to provide from the income of the estate, he may advance it and even pledge the credit of the trust estate to provide for its necessities.

Vilas v. Page, 106 N. Y. 439; 2 Perry, Tr. § 476.

The adjudication which resulted in the mortgage is founded upon the equity of the case as one within the statute.

Code, § 2348; *Noyes v. Blakeman*, 6 N. Y. 567; *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111; *Van Slyke v. Bush*, 123 N. Y. 50.

The court adopted the report of the referee upon this matter, and after examination directed the execution of the mortgage as a means of raising money for payment of the described demand. This conclusion, within well-settled rules, is an adjudication binding all the parties in this proceeding.

Thompson v. Tolmie, 2 Pet. 157, 7 L. ed. 381; *Voorhees v. Jackson Bank of U. S.* 10 Pet. 449, 9 L. ed. 490; *Blakeley v. Calder*, 15 N. Y. 617; *Simpson v. Hart*, 1 Johns. Ch. 91; *Bateman v. Willoe*, 1 Sch. & Lef. 201; *Ludlow v. Dale*, 1 Johns. 16; *New York v. Brady*, 115 N. Y. 616; *Stillwell v. Carpenter*, 59 N. Y. 423.

It was competent for the court entertaining the proceedings to determine whether the statute had been complied with (*Howell v. Mills*, 50 N. Y. 229), and decide whether the case was a proper one in which to award the relief asked by the petition.

Porter v. Purdy, 29 N. Y. 106, 86 Am. Dec. 283.

If the court or officer has jurisdiction of the subject-matter, then the exercise of that jurisdiction, however irregular or erroneous, is conclusive until reversed.

Roderigas v. East River Sav. Inst. 76 N. Y. 320, 32 Am. Rep. 309; *Black, Judgm.* § 245; *Blake v. Lyon & F. Mfg. Co.* 77 N. Y. 626; *Re Macfarlane*, 2 Johns. & H. 673; *Le Guen v. Gouverneur*, 1 Johns. Cas. 492, 1 Am. Dec. 121.

There is in the complaint no averment of fraud or collusion, imposition, mistake, or any other ground of equitable jurisdiction.

No decree can be made in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged.

Bailey v. Ryder, 10 N. Y. 363; *Rome Exch.* 43 L. R. A.

Bank v. Eames, 1 Keyes, 588; *Kelsey v. Western*, 2 N. Y. 506.

It is not sufficient merely to raise a suspicion, or to show what is sometimes called constructive fraud, but there must be actual fraud; there must be a fraudulent affirmative act, or a fraudulent concealment of a fact for the purpose of obtaining an undue and unjust advantage of the other party, and procuring an unjust and unconscionable judgment.

Ward v. Southfield, 102 N. Y. 287; *Revere Copper Co. v. Dimock*, 90 N. Y. 33; *Heiser v. New York*, 104 N. Y. 68; *New York v. Brady*, 25 Jones & S. 14, Affirmed, 115 N. Y. 599; *Webb v. Pell*, 3 Paige, 368; *Ross v. Wood*, 70 N. Y. 10; *Stillwell v. Carpenter*, 59 N. Y. 423, 2 Abb. N. C. 263; *Verplanck v. Van Buren*, 11 Hun, 328; *Patch v. Ward*, L. R. 3 Ch. 203; *Davoue v. Fanning*, 4 Johns. Ch. 199; *Krekeler v. Ritter*, 62 N. Y. 372.

In the absence of fraud the proceedings and the mortgage should be upheld.

Davoue v. Fanning, 4 Johns. Ch. 199; *Krekeler v. Ritter*, 62 N. Y. 372; *Patch v. Ward*, L. R. 3 Ch. 203.

The mortgage to Perkins, under whom the Union Bank claims as assignee, was for a valuable consideration, given in good faith under the order of the supreme court and conformed to it. It has by force of the statute the same validity and effect as if it was executed by Warren, and as if he was of full age.

Code, § 2358; *Clarke v. Van Surly*, 15 Wend. 436, 20 Wend. 365.

Martin, J., delivered the opinion of the court:

It is obvious that the sole purpose and object of the proceeding to mortgage the infant's real estate was to obtain about \$25,000, with which to pay the debt of Holmes B. Stevens to the defendant bank. It is equally apparent that the proceeding was commenced and continued to its conclusion, and that the assignment of the mortgage to the bank was made under and in pursuance of an agreement between the officers of the bank and the general guardian that the real estate of the infant should be mortgaged to secure the debt of the former, and that the mortgage thus obtained should be substituted as security for and in place of his debt to the bank. Stevens, as the general guardian of the infant plaintiff, had no right or authority to embark in or conduct the business of brewing, or the purchase and sale of barley or other merchandise, in the name of his ward, and employ therein the capital or credit of the latter. It is a well-established and elementary principle of the law relating to the rights and liabilities of trustees that, in the absence of an express and sufficient authority therefor, the employment of trust property in trade or speculation, or in manufacturing, is a gross breach of trust upon the part of the trustee. This rule applies even where he simply continues the business or trade of a testator. It is the duty of a trustee to close up the trade or business, to withdraw the funds, and invest them in proper security at the earliest convenient moment. Per-

ry, Trusts, § 454. The employment by trustees of the property or credit of an infant in trade, or in the prosecution of manufacturing or speculative enterprises, has been uniformly condemned as illegal, and constituting a devastavit of the estate. *Wilmerding v. McKesson*, 103 N. Y. 329, 336; *King v. Talbot*, 40 N. Y. 76, 90; *Fellows v. Longyor*, 91 N. Y. 324; *Wetmore v. Porter*, 92 N. Y. 70.

Another principle firmly established by the cases is that trust funds invested by trustees in the hands of third persons, who have knowledge of their character, still remain impressed with the obligation of the trust in the hands of the holder, and are subject to be reclaimed and restored to the trust fund. *Wilmerding v. McKesson*, 103 N. Y. 329, 336; *Wetmore v. Porter*, 92 N. Y. 76; *Rogers v. Squires*, 98 N. Y. 49; *Clark v. Hougham*, 2 Barn. & C. 149; *Perry, Tr.* §§ 828, 832; *Wms. Exrs.* p. 801; *Field v. Schieffelin*, 7 Johns. Ch. 150, 11 Am. Dec. 441. It is beyond the power of a trustee to bind the estate he represents to any use of its funds by contract with third persons who have knowledge of the character of the property transferred, except in the ordinary and usual course of administration of the trust, and in furtherance of its object. *Deobold v. Oppermann*, 111 N. Y. 531, 538, 2 L. R. A. 644. That these rules apply with much greater force where a trustee seeks to dispose of the real property of his *cestui que trust*, who is an infant of tender years, to pay losses of a business carried on by himself without any semblance of authority, there can be no manner of doubt. The relation which existed between Stevens as guardian and his infant ward was that of trustee and *cestui que trust*. Therefore the debt for which the real estate of the infant was mortgaged was not the debt of the infant at all, but was the debt of the guardian, for which, so far as the record discloses, he had no claim against the infant or his estate either in law or in equity.

This transaction, plainly and correctly stated, is that Stevens was individually indebted to the bank in the sum of about \$25,000. For the purpose of imposing a liability upon the property of the infant for what must be regarded as his own debt, and to relieve himself from its burden, he entered into an agreement with his creditor, by which it was agreed that a proceeding in court should be instituted to secure a transfer of the individual debt of the guardian to the property of the infant, and thus obtain the payment of the guardian's debt to the bank from the infant, who was in no way liable therefor. This was a clear and palpable fraud upon his rights. The guardian was guilty of a breach of his trust in embarking the property of his ward in business. When it proved disastrous, he, in conjunction with his creditor, sought to impose the consequences of his own disaster upon his infant ward. This purpose was obvious. It is equally manifest that the bank and its officers must have understood that the purpose of the proceeding to mortgage was to wrongfully deprive the infant of his legal rights and property. That such was the effect of the transaction is clear, 43 L. R. A.

and it must be presumed that the parties who conferred and acted in concert in instituting and prosecuting the proceeding intended the natural consequences of their acts. Therefore it must be regarded as conclusively established that, in pursuance of a plan or scheme contemplated and agreed upon, the officers of the bank and the general guardian intended to substitute, and procured the property of the infant to be substituted, in place of the debt of the guardian, and thus, to that extent, defrauded the former of his rights in the property. It was the plain legal duty of the general guardian not to waste the property of his ward, or suffer it to be wasted, and, above all, not to be instrumental in effecting its loss. It was his duty to protect, and not to destroy. Utterly disregarding that duty, he entered into an agreement with his own creditor to inaugurate a proceeding which would necessarily and wrongfully deprive his ward of his property. This arrangement between the officers of the bank and the general guardian amounted to collusion. "Collusion," as defined by Bouvier, is "an agreement between two or more persons to defraud a person of his rights by the forms of law or to obtain an object forbidden by law." Thus, the mortgage was secured in pursuance of a collusive agreement between the defendants, the purpose of which was to deprive the infant of his property without sufficient consideration, and for their own benefit. Having entered into a collusive agreement to illegally deprive the infant of his property, in furtherance of it the general guardian alleged in his verified petition that, unless the property of the infant was mortgaged, it would be sacrificed, and that the interests of the infant would be promoted by paying the debt to the bank. The guardian in no way apprised the court of the collusive agreement between himself and the officers of the bank, or that the debt for which he sought to mortgage the infant's property was his own, and not that of the infant. On the other hand, he employed language in the petition which was well calculated to convey the idea to the court that the debt was the debt of the infant, although that fact was not directly alleged.

It is not seriously denied by the respondents that the infant's just rights have been imperiled by the execution and delivery of this mortgage. Nor is it claimed that he has no remedy for the injury he has sustained. Their principal contention is that a court of equity has no authority in this case to award the relief to which the infant plaintiff is entitled. It is difficult to believe that a court of equity is so impotent, or its arms so paralyzed, that it cannot reach out and remedy this wrong. More than twenty years since, this court declared: "It is the just and proper pride of our matured system of equity jurisprudence that fraud vitiates every transaction; and, however men may surround it with forms, solemn instruments, proceedings conforming to all the details required in the laws, or even by the formal judgment of courts, a court of equity will disregard them all, if necessary, that justice

and equity may prevail." *Warner v. Blake-man*, 4 Keyes, 487, 507. There seems no doubt of the general power of a court of equity, in proper cases, in one suit to grant relief from a decree or order in another, either by a bill of review, or by a supplemental bill in the nature of a review, or by an original bill. The general grounds upon which the interposition of a court of equity may be successfully invoked do not include cases where the sole ground of relief is that the former decision was contrary to equity or good conscience. While the courts of England and of this country have, with great uniformity, refused aid in all cases where their action would involve either the usurpation of appellate jurisdiction or the granting of a second opportunity of presenting a cause upon its merits, they have, upon the other hand, invariably extended it over a large and well-defined class of cases, to prevent the retention of an unconscientious advantage by a party in a court of law or equity, through his own fraud, or through some excusable mistake or unavoidable accident on the part of his adversary. Where it appears to be against conscience to execute a judgment which the injured party could not have prevented, or where he might have prevented it except for fraud or accident, unmixed with any fault or negligence of himself, a situation is presented which will justify a court of equity in granting the necessary relief. Without pursuing this subject further to ascertain all the cases in which a party may avail himself of such an action where his defense was not available in the original action, or he was, without fault on his part, prevented from asserting it, it is sufficient for the determination of this case that the rule is firmly established that a judgment of either a legal or equitable tribunal may be vacated by a court of equity if obtained by fraud or collusion. *Smith v. Nelson*, 62 N. Y. 288; *Ward v. Southfield*, 102 N. Y. 287; *Freeman*, Judgm. chap. 22. The proposition upon which the respondents rely to uphold the judgment of reversal relates to methods and procedure rather than to substantive rights of existing equities. They contend that in no aspect of the case does the complaint herein state facts sufficient to constitute a cause of action. Examining it, we find that it is alleged that the plaintiff Warren is an infant; that he owned real estate, of which the brewery and mortgaged property constituted a part; that the defendant Stevens carried on the business of a brewer there, and borrowed money, as general guardian of the infant, for that purpose; that he conducted the business in the name of the infant without any authority, and contracted individual debts at the Union Bank, for which the infant was in no wise liable; that he and the officers of the bank entered into an agreement by which proceedings to mortgage the real estate of the infant were to be undertaken, and the premises mortgaged, for the purpose of discharging the indebtedness of the guardian, and for no other purpose; that in pursuance thereof the general guardian as such presented to the court a petition, setting forth such indebtedness as the

debt of the estate, and praying that the real estate of the infant might be mortgaged for its payment; that upon that petition proceedings were had which resulted in a mortgage upon the infant's real property to secure \$25,000 and interest, and that the moneys secured thereby were employed to pay the expenses of that proceeding and the debt of the guardian; that the mortgage was given and the money was paid for those purposes, and those alone; and that in pursuance of the original agreement between them the mortgage was assigned to the bank with full knowledge in both the mortgagee and assignee that the moneys paid to the special guardian were obtained for and applied to the indebtedness of Stevens. Thus, the complaint shows that the guardian, as trustee of his ward, was guilty of a breach of his trust, thereby incurring an individual liability of about \$25,000. This was known to the bank and its officers. Notwithstanding these facts, the guardian and officers of the bank entered into an agreement to employ the processes and machinery of the court to mortgage the real estate of the infant to pay the individual debt of the guardian. This was a fraud upon the court as well as upon the infant and his rights. We think the complaint fully sets forth all the wrongful acts of the parties, and as fully states a cause of action as it would if it had charged all the acts thus alleged to have been fraudulently and wrongfully performed. The Code only requires a plain and concise statement of the facts constituting a cause of action. That the complaint in this action contained. If the acts charged were wrongful, or necessarily fraudulent, it was not essential to a cause of action that they should be charged as having been wrongfully or fraudulently performed. The acts charged were not less fraudulent because the word "fraud" or "fraudulent" was not employed by the pleader in characterizing them. *Warner v. Blake-man*, 4 Keyes, 487. Where, as in this case, the law presumes fraud because it is the necessary consequence of the acts alleged, and they carry in themselves inevitable evidence of fraud, independent of the motive of the actor, it is unnecessary to characterize the acts alleged as fraudulent or otherwise. Whether or not fraud exists is a conclusion of law derived from facts and circumstances. 9 Enc. Pl. & Pr. p. 688; *Beach*, Modern Eq. Jur. § 72. Therefore, an allegation in a complaint of facts from which such a conclusion necessarily results must be regarded as sufficient. In *Maher v. Hibernia Ins. Co.* 67 N. Y. 290, there was no specific allegation of mistake of facts, but facts were averred in the complaint showing that the parties were mistaken as to the effect of the language employed, and it was held that this was a sufficient allegation to justify a reformation of the contract. In *Whittlesey v. Delaney*, 73 N. Y. 575, the facts substantially as proved upon the trial and found by the court were averred in the complaint, although the precise and particular charge of fraud as a ground of relief was not specifically, and in terms, put forth. It was there held that it was not necessary to employ the word

"fraud" or "fraudulent" in order to characterize the transaction or specify the ground of relief. We think the general doctrine of these cases is applicable here, and that the absence of the word "fraud" or "collusion" does not render the averments of the complaint less sufficient to constitute a cause of action for the fraud or collusion of the defendants to deprive the infant of his property. In the language of Judge Finch, "Calling names does not alter facts." We are of the opinion that the respondents' claim that the complaint was insufficient cannot be sustained. Moreover, as the proof in the case established all the facts set out in the complaint, we think it was amply sufficient to justify the special term in setting aside the mortgage and proceedings to mortgage the infant's real estate upon the ground that they were procured by the fraud and collusion of the defendants.

The question whether the court before which the proceeding to mortgage was instituted acquired jurisdiction to grant the order directing the mortgage, or to confirm the action of the special guardian in making it, is also presented. The jurisdiction of a court to direct the execution of a mortgage upon an infant's real estate is derived wholly from the provisions of the Code of Civil Procedure relating to that subject. Code Civ. Proc. chap. 17, art. 4, title 7. It can only be exercised in such cases, under such circumstances, and in the manner in which the statute directs. Section 2348 of the Code specifically points out the cases in which the real property of an infant may be sold, mortgaged, or leased. The first is: "Where the personal property, and the income of the real property, of the infant, . . . are, together, insufficient for the payment of his debts, or for the maintenance and necessary education of himself and his family." This is the only provision which has any application to this case, and the one under which the general guardian sought to mortgage the infant's real estate. It is to be observed that it is only in case the personal property and the income of the real property are insufficient to pay the debts, or for the maintenance and education of the infant and his family, that his property may be mortgaged. When we turn to the petition in the proceedings to mortgage, we find that the only debt for the payment of which it was sought to mortgage the infant's property was the debt of the guardian, and not the debt of the infant at all. There was no allegation in the petition, nor proof upon the hearing, of the existence of any debt of the infant which the income of his property was not amply sufficient to pay. Indeed, it appears in the petition that he had sufficient personal property and income from his real property to pay all his debts, and hence the condition necessary under the statute to authorize the mortgage was not shown to exist.

The precise question presented is whether, where the petition, proofs, and all the papers in a proceeding under this statute show, without dispute or contradiction, that its sole purpose is to mortgage the property of an infant to pay the debt of another, and 43 L. R. A.

there is no proof or claim that the personal property and income of the infant are insufficient for the payment of all his own debts, and for the necessary education of himself and family, but, on the contrary, the proof tends to show that they are sufficient, a court acquires jurisdiction to direct his property to be mortgaged. We are of the opinion that the court acquired no jurisdiction in that proceeding to direct the property of the infant to be mortgaged for the debt of the guardian, and that there were no facts in the petition which would have justified the court in mortgaging the infant's property, even for the payment of his own debts. The action of the court was invoked therein for a single purpose, which was to direct a mortgage upon the infant's real estate for an object which was wholly unauthorized by the statute. That it had no jurisdiction to do. The filing of a petition which disclosed the existence of a valid outstanding debt of the infant, which required the mortgaging of his property to pay it, was, under this statute, necessary to confer jurisdiction upon the court of the subject-matter. *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 531. In such a proceeding the requirements of the statute must be strictly followed. This court has repeatedly held proceedings instituted under this statute to be void when not taken in conformity with it. *Battell v. Torrey*, 65 N. Y. 294; *Re Valentine*, 72 N. Y. 184; *Ellwood v. Northrup*, 106 N. Y. 172; *Losey v. Stanley*, 147 N. Y. 560, 573. It has also held that a court of equity has no inherent power to direct a mortgage of the real property of infants. If we are correct in our conclusion that the court had no jurisdiction of the proceedings to mortgage, then the proceedings and mortgage are open to collateral attack for that reason, and should be set aside. *Risley v. Phenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421; *Losey v. Stanley*, 147 N. Y. 560. If it be said that the court before which this proceeding was taken was a court of general jurisdiction, still, as the proceeding does not fall within the ordinary proceedings of a court of common law, its jurisdiction is yet special and limited, wholly dependent upon the statute; and no presumption can be indulged in favoring that particular jurisdiction. In that class of cases the statute must be strictly pursued, whatever jurisdiction the court may possess.

The respondents also insist that, as the purpose of this action was to set aside the mortgage, and not solely to set aside the proceedings to mortgage, the attack upon the proceedings was collateral, and falls within the rule which prohibits a court from re-examining its decision upon the same subject; and cite Black, Judgm. § 252, as sustaining the claim. The authority cited is to the effect that, to constitute a direct attack upon a judgment, it is necessary that a proceeding be instituted for that very purpose. But if the action has an independent purpose, and contemplates some other relief or result, although the overturning of the judgment may be important, or even necessary to its success, then the attack upon the judgment is collateral, and falls within the rule. On

the other hand, a complaint alleging that a judgment is void, but is apparently a lien upon land described, is said by that author to be a direct, and not a collateral, attack upon it. This action was to obtain a judgment declaring all the proceedings void, including the mortgage. The mortgage was, at most, a part of the proceeding, and had no validity independent of it. It was as much a part of the proceeding as any paper or order in it. Hence, we find nothing in the fact that the plaintiff asked to have the mortgage, as well as the other proceedings, set aside, which in any way changes the character of the action, or deprives the plaintiff of the right to the relief sought.

It is also claimed that the learned appellate division seems to have, in effect, held that the guardian might have had some equitable claim against the infant, and hence he could properly maintain a proceeding to mortgage his real estate to secure or pay it. We do not perceive any ground upon which such a doctrine can be upheld. We not only find nothing in the statute which authorizes the inauguration of such a proceeding to obtain an accounting in equity between a guardian and his ward, and then impose upon his real estate a mortgage to secure the amount found due, but we find nothing in the record to show even the existence of any equity as a basis for such a claim. The equities of the guardian were in no way involved in that proceeding. It was a special proceeding under a special statute for a single purpose, which certainly did not include an accounting between the guardian and his ward.

The appellants claim that, under a well-established principle or rule in equity, where an important decree, which deprives an infant of his inheritance, has been rendered against him, either with or without actual fraud or surprise, the infant has a remedy during his minority, either by a bill of review, original bill in the nature of a bill of review, or by original bill directly attacking the decree for error, and cite as sustaining that proposition: *Cooper, Eq. Pl. p. 97; Richmond v. Tayleur, 1 P. Wms. 734; 1 Dan. Ch. Pl. & Pr. p. 164; Freeman, Judgm. § 513; Bank of United States v. Ritchie, 8 Pet. 128, 8 L. ed. 890; Savage v. Carroll, 1 Ball & B. 548; McLemore v. Chicago, St. L. & N. O. R. Co. 58 Miss. 514; Loyd v. Malone, 23 Ill. 43, 74 Am. Dec. 179; Kuchenbeiser v. Beckert, 41 Ill. 172; Lloyd v. Kirkwood, 112 Ill. 329; Kingsbury v. Sperry, 119 Ill. 280; Allison v. Drake, 145 Ill. 500; Wright v. Miller, 1 Sandf. Ch. 103; Wright v. Miller, 8 N. Y. 9, 59 Am. Dec. 438; Losey v. Stanley, 147 N. Y. 560; Re Price, 67 N. Y. 231; Lefevre v. Laraway, 22 Barb. 167; McMurray v. McMurray, 66 N. Y. 175. It is impossible, within the proper limits of this opinion, to review these authorities in detail. But a careful examination of them discloses that, while some are not applicable to the question here, yet the weight of their authority sustains the contention of the appellants, at least so far as they claim to be authorized to maintain an original action in equity to set aside the order and mortgage in this case as being in fraud of the infant's individual*

or property rights, and being procured by fraud and collusion of the parties. Those authorities fully justify this action, and authorize its maintenance upon the ground that the agreement between the defendants to obtain the infant's property to pay the debt of the guardian was collusive, and their action under it was in fraud of his rights; and as the rights of a bona fide purchaser, without notice, were not involved, they fully sustain the judgment of the special term in this case. In those cases many similar questions have arisen, and the courts have, with great uniformity, held that, under circumstances similar to those existing in this case, a court of equity has the right, by original bill, to set aside a judgment thus obtained. As illustrative of the principle of these authorities, we may refer to a few in this state which seem to bear upon the legal questions involved in this controversy. In *Wright v. Miller* it was said that the jurisdiction of a court of chancery to set aside a decree obtained by fraud, upon an original bill filed for that purpose, has long been unquestioned. In that case an action had been commenced against infants, and a decree obtained setting aside a conveyance made in trust for their benefit, without giving them a day to show cause after they became of age, and it was held that such a decree was erroneous, and that the infants, by an original bill filed, might be relieved against it. When that case reached this court, it was again held that the infants were authorized to bring an action in equity to avoid the fraudulent disposition of the trust property, and that equity would entertain a suit to vacate a decree obtained by collusion between the trustees and tenants in possession of a trust estate to defeat the rights of persons entitled to equitable interests therein in remainder. In the *McMurray Case* a party died seized of certain premises, which were mortgaged to the defendant. The former devised to his widow, whom he made his executrix, a life estate in a portion of the premises, with remainder to the plaintiffs. The balance, with his personal property, he directed his executrix to sell, and with the proceeds pay and discharge his debts, including the mortgage. After the testator's death, the mortgagees commenced an action of foreclosure, making the widow and the plaintiffs, who were infants, parties. They were served with process, but no guardian *ad litem* was appointed. The widow answered, but under an arrangement with the defendant that he would lease to her for life, at a nominal rent, a portion of the mortgaged premises, executed a deed to him of a portion of the premises directed to be sold. She withdrew her answer, and stipulated that the defendant might take judgment, which he did, taking judgment by default against the plaintiffs, under which the premises were sold, and bid in by the defendant. An original action was brought to set aside the judgment and sale, and it was held that the facts sustained a finding of fraud and collusion and that the plaintiffs were entitled to have the decree of foreclosure avoided as to them, and could maintain an origi-

nal action in equity for that purpose. In *Michigan v. Phenix Bank*, 33 N. Y. 9, 27, it was said: "It is needless to multiply cases showing that the courts, upon bill filed, will set aside as a nullity a judgment, decree, or award obtained by fraud." In *Hackley v. Draper*, 60 N. Y. 92, where it was conceded that the special term had authority to hear a motion and grant the relief sought, it was held that, even if the motion could have been made, an equitable action would lie to vacate an order of a court obtained for a fraudulent purpose, and a sale made in pursuance of it. In *Tiernan v. Wilson*, 6 Johns. Ch. 411, a sheriff's sale of real estate was set aside in an action brought for that purpose, upon the ground that it was fraudulent in law, as the sheriff was charged with a gross act of negligence and abuse of trust. The same question was again considered by this court in *Stevens v. Central Nat. Bank*, 144 N. Y. 50, which was an action to set aside a judgment in the United States circuit court, and it was held that, as it was fraudulent as against the plaintiffs, they might maintain an original action to set it aside. Under the doctrine of these cases it is obvious that the plaintiffs had a right to institute this suit to set aside the proceedings and mortgage which were the result of a collusive agreement between the defendants, and which was obtained by a palpable fraud upon the rights of the infant, which presumably was known to all the defendants.

The contention of the respondents that the same questions were before the supreme court in the proceedings to mortgage as are presented in this action cannot be sustained. Surely, there was no proof in the original proceeding of the collusion between the defendants to procure an appropriation of the infant's property to pay the guardian's debts. After a full and careful examination of the facts and law applicable to the questions presented upon this appeal, we have reached the conclusion that the special term possessed abundant authority to entertain this action, and was fully justified by the facts in setting aside the proceedings to mortgage and the mortgage made therein, and that the learned appellate division erred in reversing the judgment of that court. In reaching this conclusion we have recognized the correctness of the rule, invoked by the respondents, that the judgment of the appellate division should not be reversed, unless there was no error of law committed by the trial court to justify it. We have found nothing in the record to indicate the commission of any such error which authorized a reversal of the judgment entered upon its decision.

It follows that the judgment of the appellate division should be reversed, and that of the special term affirmed, with costs to the plaintiffs in all the courts.

All concur, except **Parker, Ch. J.**, and **Gray, J.**, not voting.
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PEOPLE of the State of New York, *ex rel.*
George TYROLER, *Appt.*,
v.

WARDEN OF THE NEW YORK CITY
PRISON, *Resp't.*

(157 N. Y. 116.).

1. Forbidding all but duly appointed agents of transportation companies from engaging in the business of ticket broker is a violation of the liberty guaranteed to citizens by the Constitution which is not justified by the police power of the state.
2. It is the duty of the courts to examine legislation complained of as a violation of the rights secured to the citizens by the Constitution for the purpose of ascertaining whether the health, morals, safety, or welfare of the public justifies its enactment under the police power of the state.
3. That dishonest persons have engaged in the ticket brokerage business, and that the business enables the transportation companies to engage in unfair competition, will not justify the legislature in prohibiting all persons except those designated by the transportation companies from engaging in it.

(*Bartlett, Martin, and Gray, JJ., dissent.*)

(November 22, 1898.)

APPEAL by relator from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of a Special Term for New York County dismissing a writ of habeas corpus which sought to obtain petitioner's release from custody to which he had been committed for violation of the statute against ticket brokerage. *Reversed.*

Statement by **Parker, Ch. J.**:

The relator is a citizen of the state of New York and of the United States, and immediately prior to his arrest, and for several years before that time, had been engaged in the city of New York in the business of selling, and offering for sale, and procuring, tickets, giving, and purporting to give, the right to a passage and conveyance on vessels and railway trains. He is charged with having received the sum of \$6.30 as a consideration for a passage or conveyance upon a ferryboat, train, and vessel from the city of New York to the city of Norfolk, Virginia, and for the procurement of a ticket giving the absolute right of passage and conveyance upon such ferryboat, train, and vessel, he not being at the time an authorized agent of the owners or consignees of such vessel, or of the company running such train. It is not pretended that the relator did not come into the possession of the tick-

NOTE.—For statutes against ticket brokerage, see also *Burdick v. People* (Ill.) 24 L. R. A. 152, and *note*; and *State v. Corbett* (Main.) 24 L. R. A. 498.

ets lawfully, and by purchase from the transportation companies issuing them. The relator sued out a writ of habeas corpus, and demanded his discharge from the custody of the defendant, on the ground that the act of 1897 (chap. 50) violated certain provisions of the Constitution of the state of New York and the Constitution of the United States, and was therefore void. The special term made its order dismissing the writ, and remanded the relator. The appellate division affirmed that order.

Messrs. Louis Marshall, Samuel Untermyer, and Abraham Gruber, for appellant:

The statute under which the relator is prosecuted is unconstitutional because it deprives him of his liberty without due process of law; because it deprives him of rights and privileges secured to a citizen of the state, and because it abridges his privileges and immunities as a citizen of the United States, and denies to him the equal protection of the laws.

The prohibitory act invades the liberty of the citizen and fosters monopoly.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220; Tiedeman, Pol. Power, p. 202; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marz*, 99 N. Y. 377, 52 Am. Rep. 34; *People v. Gillson*, 109 N. Y. 389.

It has always been supposed that the public welfare demanded the encouragement of competition; that the maxim that "competition is the life of trade" was dictated by the most wholesome considerations of public policy.

People v. Sheldon, 139 N. Y. 263, 23 L. R. A. 221; *Judd v. Harrington*, 139 N. Y. 105.

It certainly is within the power of a railroad company, as well as of a merchant, to carry on business, even without a profit, for a period of time, if it is supposed that thereby business can be attracted.

People v. Gillson, 109 N. Y. 389.

A combination for the purpose of regulating rates and preventing competition among the railroads is violative of the anti-trust law passed by Congress.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007.

An act which provided for the summary seizure of any boat or vessel used by one person in interfering with oysters or other shell fish belonging to another, and for its forfeiture and sale, was held to be unconstitutional, because it deprived the owner of the vessel of his property without due process of law.

Colon v. Lisk, 153 N. Y. 188.

In *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, an act of the legislature of Louisiana providing that any person, firm, or corporation who, in any manner whatever, does an act in that state to effect for himself or for another insurance on property then in that state in any marine insurance company which has not complied in all respects with the laws of the state, shall be subject to a fine, was held to be unconstitutional.

See also *Baltimore v. Radcoke*, 49 Md. 217, 33 Am. Rep. 239.

If this is a police regulation, then any legislation which puts it in the power of one member of the community to prevent his competitor from continuing in the business in which he has competed has the sanction of the Constitution.

Gilman v. Tucker, 128 N. Y. 190, 13 L. R. A. 304; *Forster v. Scott*, 136 N. Y. 577, 18 L. R. A. 543; *Colon v. Lisk*, 153 N. Y. 188.

This legislation is likewise unconstitutional, because it deprives the relator of his property without due process of law.

People, Eckerson, v. Haverstraw, 151 N. Y. 75.

It amounts to a regulation of commerce among the several states by the legislature of the state of New York.

Black, Const. Laws, 170, 171; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382; *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547; *McCall v. California*, 136 U. S. 104, 34 L. ed. 392; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134; *Western U. Tele. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306; *Western U. Tele. Co. v. Alabama State Bd. of Assessment*, 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649.

A state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785; *Robbins v. Shelby County Tazing Dist.* 120 U. S. 489, 30 L. ed. 604, 1 Inters. Com. Rep. 45; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658.

A state law prohibiting the sale of intoxicating liquors is void when it comes into contact with an express or implied regulation of interstate commerce by Congress, declaring that traffic in such liquors as articles of merchandise between the states shall be free.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691.

A statute providing for the inspection of meat and flour brought from one state to another, and requiring the inspection to be marked thereon, and imposing a penalty for offering such wares for sale without such inspection, has been declared to be repugnant to the commerce clause of the Constitution.

Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 In-

ters. Com. Rep. 485; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638.

An act of the legislature of this state requiring convict-made goods to be branded as such was an unconstitutional attempt to regulate commerce.

People v. Hawkins, 20 App. Div. 494.

The power of Congress is so far exclusive that no state had the power to make any law of regulation affecting the free and unrestrained intercourse of commerce between the states.

Brown v. Houston, 114 U. S. 622, 29 L. ed. 257; *Brennan v. Titusville*, 153 U. S. 300, 38 L. ed. 722, 4 Inters. Com. Rep. 658; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347.

This legislation further offends the Constitution of the state of New York, because it is practically an abdication of governmental functions in favor of private individuals and corporations.

Barto v. Himrod, 8 N. Y. 483, 59 Am. Dec. 508.

Messrs. James D. McClelland and Charles E. LeBarbier, with **Mr. Asa Bird Gardiner**, for respondent:

Unless the act of the legislature is plainly at variance with some portion of the Constitution, it will be upheld, and doubtful questions will be resolved in favor of the validity of the act.

Rogers v. Buffalo, 123 N. Y. 181, 9 L. R. A. 579; *People v. Budd*, 117 N. Y. 29, 5 L. R. A. 559; *Hill v. Thompson*, 16 Jones & S. 481, 18 Jones & S. 165; *Live Stock Dealers & B. Asso. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 388; *Slaughter-House Cases*, 10 Wall. 36, 106, 21 L. ed. 304, 418; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34; *People v. Gillson*, 109 N. Y. 398.

The legislature is vested with the entire police power possessed by the people of this state.

People v. Ewer, 8 N. Y. Crim. Rep. 383; *Com. v. Wilson*, 14 Phila. 384; *People v. Cannon*, 10 N. Y. Crim. Rep. 497; *People v. Bartholf*, 139 N. Y. 32.

There is a recognized necessity for the restrictions imposed, and the suppression of a most prolific source of crime.

There is nothing in the act which deprived the petitioner of the property in the ticket.

Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. Rep. 65.

Neither individual rights nor the right to property are absolute, and both may be contracted for the welfare of the public without encroaching upon constitutional rights.

People v. Rosenberg, 67 Hun, 52.

Parker, Ch. J., delivered the opinion of the court:

The statute that appellant insists is in derogation of the limitation placed upon the legislative power by the people, through the Constitution of the state reads as follows:

"Sec. 1. The Penal Code is hereby amended 43 L. R. A.

ed by inserting therein a new section, to be known as section 615, to read as follows: § 615. Sale of Passage Tickets on Vessels and Railroads Forbidden, Except by Agents Specially Authorized.—No person shall issue or sell, or offer to sell, any passage ticket, or an instrument giving or purporting to give any right, either absolutely or upon any condition or contingency to a passage or conveyance upon any vessel or railway train, or a berth or state room in any vessel, unless he is an authorized agent of the owners or consignees of such vessel, or of the company running such train, except as allowed by sections 616 and 622; and no person is deemed an authorized agent of such owners, consignees or company, within the meaning of the chapter, unless he has received authority in writing therefor, specifying the name of the company, line, vessel, or railway for which he is authorized to act as agent, and the city, town, or village together with the street and street number, in which his office is kept, for the sale of tickets.

"Sec. 2. Section 616 of the Penal Code is hereby amended so as to read as follows: § 616. Sales by Authorized Agents Restricted.—No person, except as allowed in section 622, shall ask, take, or receive any money or valuable thing as a consideration for any passage or conveyance upon any vessel or railway train, or for the procurement of any ticket or instrument giving or purporting to give a right, either absolutely or upon a condition or contingency, to a passage or conveyance upon a vessel or railway train, or a berth or stateroom on a vessel, unless he is an authorized agent within the provisions of the last section; nor shall any person, as such agent, sell, or offer to sell, any such ticket, instrument, berth, or stateroom, or ask, take, or receive any consideration for any such passage, conveyance, berth, or stateroom, excepting at the office designated in his appointment, nor until he has been authorized to act as such agent according to the provisions of the last section, nor for a sum exceeding the price charged at the time of such sale by the company, owners, or consignees of the vessel or railway mentioned in the ticket. Nothing in this section or chapter contained shall prevent the properly authorized agent of any transportation company from purchasing from the properly authorized agent of any other transportation company a ticket for a passenger to whom he may sell a ticket to travel over any part of the line for which he is the properly authorized agent, so as to enable such passenger to travel to the place or junction from which his ticket shall read."

The remaining portion of the section relates to the redemption of tickets purchased from an authorized agent of a railway company, under certain contingencies, and within certain periods of time, and is not in any wise involved in this appeal.

Having observed how the statute reads, it will be well next to analyze it, and see if we can find out what was intended to be accomplished, and is in fact accomplished, by the phraseology of the statute, in order that we may ascertain whether the statute is in

contravention of any of the rights secured by the Constitution to the citizen. It will be observed, in the first place, that it does not prohibit the sale of tickets absolutely, nor does it limit to the particular transportation company over whose route he desires to be conveyed the right to sell tickets to the traveler. It may be said in passing, that the last assertion is in conflict with the position taken by the learned judge who wrote the opinion of the appellate division; for he assumes that, as only persons appointed agents can sell, the effect of the provision is that a corporation "shall only sell through its agents, and is merely a declaration that the corporation itself was to sell its tickets."

The 1st section and the first part of the 2d section do restrict the sale of passage tickets to agents specially authorized by transportation companies, and, if there was nothing else in the statute upon the subject, it would bear the construction put upon it, that its only effect is to confine the right to sell passage tickets of a corporation to that corporation itself, which can act only through agents, but between the opening and the closing sentences of the second section may be found the following: "Nothing in this section or chapter contained shall prevent the properly authorized agent of any transportation company from purchasing from the properly authorized agent of any other transportation company a ticket for a passenger to whom he may sell a ticket to travel over any part of the line for which he is the properly authorized agent, so as to enable such passenger to travel to the place or junction from which his ticket shall read." Thus we see that the moment a man becomes the agent of a transportation company he is by that designation authorized to buy tickets of any other transportation company in the United States or the world, and may sell such tickets to any person who applies for them. In the sale of tickets of the various transportation companies, other than those of the company of which he is an agent, he necessarily acts as a broker. He can buy the tickets and sell them again, making a profit that may perhaps depend more or less on the degree of competition between railroads in various parts of the country. Clearly, the agent of a transportation company, in the purchase and sale of tickets of foreign corporations, is not engaged in selling the passage tickets of the transportation company appointing him. It is not the sale of the tickets of his principal alone that the agent is thus engaged in; but when a transportation company appoints an agent to sell its tickets, then the state, by this statute, steps in and attempts to clothe him with the power which it takes from all other citizens to deal in the tickets of as many other transportation companies as he may be able to make satisfactory arrangements with.

This leads us to note another interesting feature of this remarkable statute. The buying and selling of passage tickets is not abolished; it is only condemned where the seller has not authority from some one of the transportation companies to act as its agent. It has happened before that for the

protection of the people the lawmaking power has provided for an examination for the purpose of ascertaining whether applicants possessed suitable qualifications as to character, intelligence, and financial responsibility to fill certain positions of trust, or to engage in a business which might prove dangerous to the people in the hands of a person either incompetent or of bad character; but in no instance has it conferred a general and unlimited power of appointment upon a class of persons or corporations wholly unconnected with the state government. It may possibly be that there was such a situation as would have justified an enactment placing some restrictions upon those engaged in the selling of passage tickets, and prescribing penalties by way of fine or imprisonment for those who should break over such restraints. Our excise legislation affords an illustration. By its provisions all are permitted to sell liquor, within certain limitations that apply to all citizens alike, and for the violation of the regulations of the traffic are provided certain penalties that are expected to assure to the public some measure of protection from non law-abiding citizens engaged in the business. But this act simply turns over to the transportation companies the selection of those who are hereafter to be permitted to sell tickets. It imposes no restraints whatever upon the appointing power, nor upon the agents selected, other than that, in the purchase of tickets, he must confine himself to the properly authorized agents of the transportation companies. The business of buying and selling tickets, as to such agents, continues to be a legitimate business, but to all citizens other than those who may be selected by the transportation companies the right to buy and sell tickets is denied, and an actual sale by them constitutes a felony. The act itself is silent as to the motive of its enactment by the legislature, and it contains no suggestion as to the public interests which its purpose is to subvert.

Ticket brokerage as a business has been in existence for many years. It is a matter of common knowledge that at great agencies, such as Cook's and Gaze's, tickets can be purchased over a great portion of the transportation routes of the world. Intending travelers in great numbers have gone to those agencies for advice as to choice of routes to be taken in contemplated journeys and to purchase the tickets for the trip, whether it should require days or weeks or months to make it. The traveling public in large numbers have come to make use of the facilities afforded by such agencies, of which there are now very many. And Cook's and Gaze's are among the agencies that must go out of business in this state if this statute can live, unless some transportation company shall deem it wise to clothe them with the authority to act as its agents.

It is asserted by counsel that the traveling public and the transportation companies have been so defrauded by the acts of the brokers in the selling of unused, or alleged to be unused, passage tickets, as to call for legislation of a protective character, of which

this statute is the outcome. The tendency of the times undoubtedly is to rush to the legislature for a cure for all the grievances of citizens, whether real or imaginary, and many novel experiments in legislation are the result. But usually, in case of wrongs, penalties have been provided. It is novel legislation, indeed, that attempts to take away from all the people the right to conduct a given business because there are wrongdoers in it, from whose conduct the people suffer. But where in the statute is to be found the evidence that its purpose is to prevent fraud? "In the title of the act," answers counsel, and with that answer he has to be content; for while the act is entitled "Frauds in the sale of passage tickets," the body of the statute does not contain any reference to forged, altered, used, or stolen tickets. The sale of such tickets is made a punishable offense under other sections of the Penal Code. The provisions of the act, therefore, have reference to the selling of valid tickets, regularly issued by a transportation company. Can the legislature declare such sales to be fraudulent, or prohibit them on the ground that it tends to prevent fraud? If the act prohibited is fraudulent, there can be no doubt that the legislature, under its police power, may provide for its punishment; but whether it may, under such power, interdict the sale of a valid ticket by one person to another, upon the pretext that fraud will thus be prevented, presents a very different question. I confess I am unable to see how such a sale defrauds a transportation company. If a transportation company sells a ticket from New York to San Francisco, it undertakes to carry the holder from one place to the other. It costs the company no more to carry one person than it does the other. How, then, can it be defrauded or in any way prejudiced by the transfer of such a ticket by the purchaser to another person? It is said that the prohibition of such a sale tends to protect the traveler from being defrauded. If it is a sale of a valid ticket, no fraud can possibly result; and if it is not a sale of a valid ticket, then the sale is fraudulent and is prohibited by other provisions of the Penal Code.

Only one prop remains which it is pretended can support the weight of this statute, and that is that the penal laws not having proved sufficiently efficacious to wholly prevent fraud, an emergency is presented which justifies the taking away from the general public the right to engage in the business of ticket selling. It is not contended that the business of ticket brokerage is in itself a fraudulent character. The business can be honestly conducted; it has been so conducted in the past by honest men engaged in it; and the most that is asserted is that there are some men engaged in the business who have imposed on the public. The same assertion can be made with equal truth of every business, trade, and profession. Because some coal dealers and vendors in sugar cheat in weight, and dealers in paints and oil in measurements, and in tobacco in quality, it has not hitherto, we 43 L. R. A.

venture to say, been thought the proper remedy to make it a felony for persons to hereafter engage in such business, unless they shall have been duly appointed as agents by the corporations manufacturing or producing the product.

Still another motive for this enactment is suggested, and that is that its real purpose is to enable transportation companies to compel others with which they may enter into pooling arrangements to preserve their agreement from secret violation, which is frequently the outcome under the present ticket-brokerage system, which offers an avenue by which the weaker corporation to such an agreement can dispose of its tickets at a price lower than that agreed upon.

This subject received judicial attention in *Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. Rep. 65, and *State v. Corbett*, 57 Minn. 345, 24 L. R. A. 498, 4 Inters. Com. Rep. 694, where statutes having apparently the same object in view as this one were under consideration, as will appear from the following extract from the opinion: "It was also commonly believed that, in order to evade statutes designed to secure uniformity of rates and to prevent discriminations, some carriers of passengers were in the habit of placing large blocks of their tickets with 'scalpers,' ostensibly not their agents, for sale at cut rates. To remedy these and similar abuses, real or supposed, this statute was passed. That all its provisions have some relation to, and tendency to accomplish, this end, is quite clear."

Counsel argue that the helpfulness of the ticket broker in securing to the traveling public the benefits of such competition was of such a fraudulent character as to wholly justify the legislation, and appeal to the decisions quoted from in support of such contention. But we pass for the present the subject of motive, to be again referred to when we come to consider whether, under the police power, the legislation can be justified. Whatever the legislature's motive, the fact is that it has passed an act which does not declare ticket brokerage unlawful, for it allows any person who may be fortunate enough to secure an appointment as agent for a transportation company to engage in ticket brokerage, but the act does declare that if any person, other than an agent of a transportation company, undertakes to engage in the passenger ticket brokerage business he shall be guilty of a felony; in other words, that it is unlawful for all citizens of New York to engage in the buying and selling of passage tickets unless empowered to do so by the written appointment of a transportation company.

Much has been said in argument with reference to this statute in a more agreeable vein, placing the statute in a somewhat more attractive form, but it is as well to go beneath the surface, and get at the truth, which is that the statute was intended to and does in fact vest the control of the sale of passage tickets within this state, not only of transportation companies doing business in this state, but throughout the world, exclusively in the hands of such companies.

The business of selling passage tickets continues, therefore, to be regarded as a lawful and legitimate business. Public policy is still declared to favor a business which recognizes the propriety of the middleman between the passenger and the transportation company, but the right to engage in it is denied to the general public. The question, then, is whether the organic law prohibits legislation of this character.

Before referring to the provisions of the Constitution that it is confidently asserted condemn such legislation, it may not be out of place to note that the granting of monopolies or exclusive privileges to corporations or persons has been regarded as an invasion of the rights of others to follow a lawful calling and an infringement of personal liberty, from the times of the reigns of Elizabeth and James. The statute of 21 Jac., abolishing monopolies, has been from the time of its enactment regarded as a statutory landmark of English liberty, and that nation has jealously preserved it. It was a part of that inheritance which our fathers brought with them and incorporated into the organic law, to the end that the lawmaking power should be restrained from interference with it.

In this connection, the language employed by Mr. Justice Field in *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 756, 757, 28 L. ed. 585, 590, 591, is most instructive: "As, in our intercourse with our fellow men, certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident,'—that is, so plain that their truth is recognized upon their mere statement,—'that all men are endowed'—not by edicts of emperors, or decrees of Parliament, or acts of Congress, but—'by their Creator with certain inalienable rights'—that is, rights which cannot be bartered away, or given away, or taken away, except in punishment of crime,—'and that among these are life, liberty, and the pursuit of happiness, and to secure these'—not grant them, but secure them—'governments are instituted among men, deriving their just powers from the consent of the governed.' Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them,

without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright. . . . In this country it has seldom been held, and never in so odious a form as is here claimed, that an entire trade and business could be taken from citizens and vested in a single corporation. Such legislation has been regarded everywhere else as inconsistent with civil liberty. That exists only where every individual has the power to pursue his own happiness according to his own views, unrestrained except by equal, just, and impartial laws."

From the opinion of Mr. Justice Matthews in *Yick Wo v. Hopkins*, 118 U. S. 356, 370, 30 L. ed. 220, 226, the following is taken: "But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not of men'—for the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

These principles have also been incorporated into the organic law of this state. Article 1, § 1, of the state Constitution reads as follows: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." Article 1, § 6, of the state Constitution provides that "no person shall . . . be deprived of life, liberty, or property without due process of law."

The word "liberty," as employed in the provision of the Constitution quoted, was considered by this Court in *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, in a masterful opinion by Judge Earl. He said (pp. 106, 107, 50 Am. Rep. 640): "So, too, one may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person. Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws

may be passed in the exercise by the legislature of the police power, which will be noticed later), are infringements upon his fundamental rights of liberty, which are under constitutional protection."

In *People v. Mara*, 99 N. Y. 377, 52 Am. Rep. 34, this court declared unconstitutional a statute that prohibited the manufacture and sale of any substitute for butter or cheese produced from pure unadulterated milk or cream. Judge Rapallo, speaking for the court, said: "Among these no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. . . . The term 'liberty,' as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare."

In *People v. Gillson*, 109 N. Y. 389, a statute was declared to be unconstitutional which prohibited the sale of any article of food, or offering or attempting to do so, upon any representation or inducement that anything else would be delivered as a prize, premium, or reward to the purchaser. Judge Peckham, in delivering the opinion of the court, after considering the statute, said (p. 399): "A liberty to adopt or follow for a livelihood a lawful industrial pursuit, and in a manner not injurious to the community, is certainly infringed upon, limited, perhaps weakened or destroyed, by such legislation."

Argument certainly is not needed, in the light of these decisions, to support the assertion that the "liberty" of this relator and other citizens of this state to engage in the business of brokerage in passage tickets is sought to be interfered with by the statute under consideration, for brokerage in such tickets has been a lawful business in this state for many years, and many persons have pursued it. It is still a lawful business, although the right to engage in it is limited to such persons as may be appointed by the transportation companies. The statute is therefore in contravention of the state Constitution, and is void unless its enactment by the legislature constituted a valid exercise of the police power. That power is very broad and comprehensive, and has not as yet been fully described, or its extent plainly limited, but it is exercised to promote the health, comfort, safety, and welfare of society. In each of the last three cases cited it was invoked by counsel to sustain a statute, and it received very careful consideration at the hands of this court. It was held that the power, however broad and extensive, is not above the Constitution, in obedience to the commands of which the courts will protect the rights of individuals from invasion under the guise of police regulations, when it is manifest that such is not the object and purpose of the regulation;

and, while it is the general province of the legislature to determine what laws and regulations are needed to protect the public health, comfort, and safety, courts must be able to say, upon a perusal of the enactment, that there is some fair and reasonable connection between it and the ends above mentioned. Unless such relation exists, an enactment cannot be upheld as an exercise of the police power.

The doctrine of these cases was very recently considered and reasserted by this court in *Colon v. Lisk*, 153 N. Y. 188, and its further discussion at this time would be a work of supererogation. Under the law of this state, therefore, it is the duty of the courts to examine legislation complained of as in violation of the rights secured to the citizens by the Constitution, for the purpose of ascertaining whether the health, morals, safety, or welfare of the public justifies its enactment. In passing, it may be observed that while it is undoubtedly the rule that railroads, steamboats, warehouses, and other associations of that nature, impressed with a public duty and intended to perform certain quasi public functions, may be the subject of legislative control and regulation so long as the legislature does not transcend the limit of state or Federal Constitution, still that rule is without application to the features of the statute before the court on this review. This inquiry involves such portion of the statute only as undertakes to prohibit citizens of the state from engaging in the brokerage business in passage tickets. That portion of the statute certainly places no burden upon transportation companies, nor does it in any way regulate the manner in which transportation companies shall conduct their business or any part of it. The legislature has no jurisdiction to regulate the methods of business of foreign transportation companies, nor can it prevent them from selling their passage tickets in this state, but by this act it does undertake to prevent any citizen of this state from purchasing the passage tickets of foreign companies for sale to others, unless such citizen shall have been regularly appointed an agent by some transportation company. The right hitherto exercised by citizens to deal in passage tickets over transportation routes without, as well as within, this state, is sought to be cut off.

Again, it may be conceded that it is within the power of the legislature to regulate the manner in which certain kinds of business may be conducted; that it may require one seeking to engage in a given pursuit to secure from the state, or one of its agents, a license; that it may require one pursuing any particular occupation to pay a tax for the privilege of conducting his business; and that, as a condition to the right of carrying on a business that, in the hands of incompetent persons, may be productive of injury to others, the legislature may require that before engaging therein one must satisfy the public authorities that he is competent and morally qualified to conduct it. But none of these methods was adopted. No attempt is made to exclude persons of bad

character from engaging in the business, nor are the public authorities given the right to determine, by examination or otherwise, the character of the person to be engaged in it; but the transportation companies alone are invested with the power to allow whosoever they will to engage in the business.

Nor can the contention be tolerated that because there have been, in times past, dishonest persons engaged in the ticket-brokerage business, with the result that frauds have been perpetrated on both travelers and transportation companies, therefore the legislature can deprive every citizen engaged therein of the "liberty" to further conduct such business. Stringent rules undoubtedly may be enacted to punish those who are guilty of dishonest practices in the conduct of such a business, and the machinery of the law put in motion for its rigorous enforcement; but to cut up, root and branch, a business that may be honestly conducted, to the convenience of the public and the profit of the persons engaged in it, is beyond legislative power.

If the law were otherwise, no trade, business, or profession could escape destruction at the hands of the legislature if a situation should arise that would stimulate it to exercise its power, for in every field of endeavor can be found men that seek profit by fraudulent processes. Transportation tickets have been forged, it is said; so have notes, checks, and bank bills. Railroad companies are no more bound to honor forged tickets than the alleged maker of a forged note is bound to pay it. An innocent person who suffers by parting with his money on a forged ticket has his remedy against the vendor just the same as has the bank that discounts a forged note. Such instances might be multiplied, but it would serve no good purpose, for it is well known that no business can be suggested through which innocent parties may not be occasionally victimized. But, because of that fact, honest men cannot be prevented from engaging in their chosen occupations.

Again it is said that ticket brokers enable the railroads to engage in unfair competition. This is accomplished by the sale to the broker by a competing railroad, at much less than the regular rates, of a block of tickets that the broker is enabled to sell to his customers, and this to a certain extent takes travel from its competitors. An opinion is cited in which the court in another jurisdiction denounces the ticket scalper for engaging in a business of this character, and pronounces such business fraudulent alike in its conception and operation; but we pass this opinion without other comment than to say that, whatever may be regarded as the law in other jurisdictions, in this one it is well established that the public welfare is best subserved by the encouragement of competition (*People v. Sheldon*, 139 N. Y. 263, 23 L. R. A. 221; *Judd v. Harrington*, 139 N. Y. 106); and hence this so-called reason furnishes no support to the claim that this legislation was for the public good.

I have now called attention to all the arguments that have been advanced in support

of the claim that the provisions of the statute under consideration are so evidently intended for the public good as to constitute a valid exercise of the police power by the legislature, and those arguments seem so wholly without merit as to suggest that they constitute a mere pretext put forward to uphold legislation hostile to the liberty of the citizen, as that word is used in the Constitution. If the views expressed be well founded, it follows that it is the duty of the court to declare that portion of the statute we have considered to be in contravention of the Constitution and void.

The order should be reversed, and the prisoner discharged.

O'Brien, Haight, and Vann, JJ., concur.

Bartlett, J., dissenting:

This appeal is based upon the alleged unconstitutionality of chapter 506 of the Laws of 1897, entitled "An Act to Amend the Penal Code, Relative to the Sale of Passenger Tickets." Chapter 12 of title 15 of the Penal Code, amended by this statute, is entitled "Frauds in the Sale of Passage Tickets." The relator insists that the act of 1897 violates article 1, § 1, of the state Constitution, which provides that no member of the state shall be disfranchised or deprived of his rights or privileges unless by the law of the land and the judgment of his peers; also article 1, § 6, of the state Constitution, providing that no person shall be deprived of life, liberty, or property without due process of law; also the 14th Amendment of the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; also article 3, § 1, of the state Constitution, vesting the legislative power of the state in a senate and assembly; also article 1, § 8, subd. 3, of the Constitution of the United States, providing that Congress shall have power to regulate commerce among the several states. The learned counsel for the relator and appellant asks us to consider, in the light of these constitutional prohibitions, the act of 1897, which makes, as he insists, the pursuit of a business which for forty years prior to September 1, 1897, was legitimate and lawful, a felony.

The business referred to is described in the relator's petition for the writ of habeas corpus as "selling and offering for sale, and procuring tickets, giving, and purporting to give, the right to a passage and conveyance on vessels and railway trains." It should be observed that the act of 1897 is merely an amendment of a chapter of the Penal Code containing some twelve sections, and inserts therein one new section and amends another. It is not, in a general sense, new legislation, but ingrafts some additional provisions upon statutory enactments that have existed, in one form or another, for forty years or more.

A short review of this legislation, which is not referred to in the briefs of counsel or the opinion below, may be profitable at this time.

Chapter 470, Laws 1857, is entitled "An Act to Prevent Frauds in the Sale of Tickets to Passengers upon Railroads, Steamboats, and Steamships," and provides that no person, other than the agents or employees of the carriers named, duly appointed by them for that purpose, by a proper authority in writing, shall offer for sale, or sell, within this state, any tickets, etc. A violation of this act is made a misdemeanor, punishable by a fine of not less than \$100, or by imprisonment not less than three months, or by both such fine and imprisonment.

Chapter 103, Laws 1860, is entitled "An Act to Prevent Frauds in the Sale of Tickets upon Steamboats, Steamships, and Other Vessels," and is confined to the sale of tickets upon various vessels, and, while longer and more comprehensive than the act of 1857, is similar in its restrictive provisions, and makes the penalty for violation imprisonment in a state prison for a term of not more than two years, or by imprisonment in a county jail not less than six months.

Chapter 820, Laws 1868, amends the act of 1857.

Chapter 201, Laws 1876, is entitled "An Act to Prevent Frauds in the Sale of State-rooms, Berths, and Tickets upon Steamboats, and Steamships, and Other Vessels," and is in harmony with the previous legislation upon the general subject.

While these laws remained upon the statute book, and in 1881, the Penal Code was adopted (Laws 1881, chap. 676), which in title 15, chap. 12, contained practically the same provisions as the laws of 1857 and 1860.

Chapter 384, Laws 1882, amended the Penal Code by repealing § 615, being the opening section of said chapter 12, but the remaining sections were retained, which forbade the sale of tickets by persons other than authorized agents of companies.

Chapter 593, Laws 1886, repealed chapter 470, Laws 1857; §§ 1-7, 9, 11, chap. 103, Laws 1860; and chapter 201, Laws 1876.

Chapter 662, Laws 1892, amended §§ 618 and 621 of the Penal Code, relating to this subject, by increasing the penalty for the violation of the statute to a maximum imprisonment of two years, and declaring that offices kept for the purpose of selling tickets in violation of any provisions of the chapter are to be deemed disorderly houses. This seems to have been the last legislation upon this general subject until chapter 506 of the Laws of 1897, the act now under consideration, which enacted a new section, 615 of the Penal Code, in place of the old section repealed by chapter 384 of the Laws of 1882, and also amended § 616.

While the argument based upon practical construction is not conclusive, it is entitled to great weight. When we are confronted, as in this case, by a declared public policy of the state which has existed for more than a generation, its illegality ought to be made very clearly to appear before the court holds

it to be in violation of constitutional provisions. It may be stated, in this connection, that similar legislation exists in several other states, and has been uniformly sustained by the courts. *Burdick v. People*, 149 Ill. 600, 24 L. R. A. 152; *State v. Corbett*, 57 Minn. 345, 24 L. R. A. 498, 4 Inters. Com. Rep. 694; *Com. v. Wilson*, 14 Phila. 384.

The only question presented for our decision at this time may be thus stated: Is it competent for the legislature, in the exercise of the police power and in regulating the sale of passage tickets by common carriers, to prohibit sales by ticket brokers, unless they are duly authorized to make such sales by the owners, or charterers of the vessel, or by the company running the railway train upon which passage tickets are offered for sale? We are not now called upon to determine the privileges enjoyed by, or obligations imposed upon, common carriers by this legislation; nor are we to decide whether the individual who has purchased a ticket in good faith, with the intention of using the same, has been deprived of his property without due process of law, when prohibited from selling his unused ticket, and compelled to resort to a more or less imperfect scheme of redemption by the individuals or corporations issuing it. The relator is in no way concerned with these questions, and his appeal must stand or fall upon the proper construction of the law relating to the sale of passage tickets by ticket brokers. The statute might be void as to the passenger holding an unused ticket, and valid as to the ticket broker. The court should express no opinion on this point. We are not only confined to the single question pointed out, but we have nothing to do with those questions of fact that were presented with great ability by the learned counsel for the appellant, as they have no place in the record. We have to deal with the legal question of legislative power only, and are not judicially informed as to the facts that induced the legislature to act, save as they may be inferred from that which appears upon the face of the legislation the validity of which is now challenged.

The acts prior to the Penal Code aver in their titles that they were enacted to prevent frauds in the sale of tickets to passengers upon railways and vessels, and the chapter of the Penal Code that has taken the place of these earlier statutes is entitled, "Fraud in the Sale of Tickets." It may therefore be fairly and reasonably inferred from these declarations on the face of the statutes that the legislature was moved to act in order to prevent frauds upon passengers and common carriers. As this record presents only the constitutionality of the act in question upon its face, we are not advised judicially of the evils which many years of legislation have sought to remedy. So we come to the question whether it is competent for the legislature, in the exercise of the police power, in order to prevent frauds in the sales of passage tickets by land and water, to confine their sale to the individuals and corporations issuing them, or their duly-authorized agents. In other words, has the relator such an inalienable right to deal in these

tickets by purchase and sale that to deprive him of it is to strip him of his liberty, rights, privileges, and property without the judgment of his peers and due process of law?

The appellant insists that to confine the sale of tickets to the common carriers, or their agents, not only works these results as to him, but is to discriminate against every citizen and build up a monopoly. We are cited in a learned brief to many cases in the Supreme Court of the United States, our own court, and other courts, to sustain this position. The reasonable limits of this discussion will not permit a review of these authorities, but I am of opinion they have no application to the case at bar. It has been often remarked by judicial writers that it is difficult and undesirable to define the limits of the police power. It has been said to be "the general power of a government to preserve and promote the public welfare, even at the expense of private rights." 18 Am. & Eng. Enc. Law, p. 740. Judge Cooley, in his Constitutional Limitations, 4th ed. p. 719, says: "The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety, or welfare of society." The supreme court of Illinois, in *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 194, 22 Am. Rep. 71, referring to the police power, said: "It may be assumed that it is a power co-extensive with self-protection, and is not inaptly termed 'the law of overruling necessity.'"

It may be said to be that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society." The Supreme Court of the United States. (*Re Rahrer*, 140 U. S. 554, 35 L. ed. 574) pointed out that it is within the power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity. It was, as it seems to me, a reasonable and proper exercise of the police power by the legislature, when seeking to put an end to frauds in the sale of passage tickets, to require carriers, who are usually created by legislation, to sell their own tickets either directly or through duly-authorized agents. It is always the fact that the exercise of the police power by the legislature leads to loss and inconvenience in the cases of many individuals. It is the inevitable result and must be endured, unless personal and property rights are invaded to such an extent that constitutional provisions are violated. The relator insists that he is deprived of his property without due process of law. We do not have here presented, as before intimated, the question which might arise in the case of the purchaser of a ticket in good faith, intending to use the same, who, being unexpectedly prevented from so doing, desires to sell it. This relator has no such special property in the ticket as the supposed case discloses, but is a mere dealer or speculator in these symbols or tokens. The relator claims the same right to traffic in passage tickets as he would have to buy and sell cotton, grain, or any other article of personal property that can be seen and handled.

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The nature of a passage ticket has been repeatedly considered by this court. In *Hibbard v. New York & E. R. Co.* 15 N. Y. 455, 466, the plaintiff was ejected from the train because he refused to show his ticket. The plaintiff recovered damages below, but this court reversed, and in its opinion said: "The ticket is the property of the railroad company, and is a part of the means by which it conducts its business. It is delivered to the passenger to be held by him, temporarily, for a special purpose, and who, to that extent, acquires a special property in it. When the journey is ended, or about to end, it is to be redelivered to the conductor. It serves a threefold purpose: It is evidence in the passenger's hands that he has paid his fare, and has a right within the cars; it insures the payment of the passage money by all who take seats; and when it is redelivered to the company it becomes a voucher, in its hands, against the office or agent who issued it, in the adjustment of its accounts." It thus appears that the original and legitimate function of the ticket is to carry out a transaction between the carrier and the passenger, the ticket being the property of the carrier, while the passenger is entitled to retain it in his possession until the completion of his journey. In *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469, this court held that passage tickets are generally to be regarded as tokens, rather than contracts, and are not within the rule excluding parol evidence to vary a written agreement. In *Rawson v. Pennsylvania R. Co.* 48 N. Y. 212, 8 Am. Rep. 543, the court held that a ticket does not generally contain any contract, and is not intended to. It is a mere token or voucher, adopted for convenience, to show that the passenger has paid his fare from one place to another.

I am of opinion that neither the act of 1897, nor the statute it amends, deprives the relator of his property without due process of law. The relator has no such vested right as a ticket broker to traffic in the purchase and sale of these symbols or tokens, which are the property of the carrier, as has the merchant dealing in goods, wares, and merchandise. If the legislature deemed this interference in the business of the common carrier relating to the sale of passage tickets as leading to great frauds and abuses, it was competent for that body to put an end to them, even if, as may be possible in the relator's case, ticket brokers were unfavorably affected who were in no way responsible for the evils sought to be remedied. This is not the case of the legislature saying to the merchant: "You shall no longer buy and sell and get gain; you must henceforth abstain from dealing in those articles of merchandise the handling of which, by land and sea, constitutes the commerce of the world." This is the case of the legislature saying to the citizen: "You must not interfere with the due and orderly conduct of business between the common carrier and the passenger in the sale and purchase of the symbol or token used for the purpose, as it leads to frauds upon, not only the common carrier and the first-class passenger, but the emigrant as well (see Penal Code, § 626); and, in the exercise of the

police power to protect the traveling public, we enact that the passage ticket of the common carrier shall be sold only by it or its agents." In sustaining this exercise of the police power, it is not necessary to refer in detail to the legislation regulating the conduct of business in various ways, in order to prevent fraud and promote the welfare of society, which has been uniformly sustained in this and other states.

It is further insisted on behalf of the relator that the act of 1897 is unconstitutional, because it amounts to a regulation of commerce among the several states by the legislature of this state. It is difficult to understand how any such result is accomplished by this legislation. It has often been said that legislation by a state may, in a great variety of ways, affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution of the United States. *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232; *Hall v. De Cuir*, 95 U. S. 485, 487, 488, 24 L. ed. 547, 548; *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. ed. 819, 820; *State Tax on Railway Gross Receipts*, 15 Wall. 284, 21 L. ed. 164; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525. The act of 1897 does, indeed, affect ticket brokers who were, in a sense, engaged in interstate commerce, but it cannot properly be said that it was an effort on the part of the legislature of this state to regulate commerce, within the meaning of the Federal Constitution. The traveling public is at liberty to freely come and go as heretofore, and the fact that they are prohibited from dealing with the unauthorized ticket broker offers no obstacle to interstate commerce. The act of 1897 deals with the ticket broker as a resident of this state, carrying on his business here, and there is no attempt to usurp the powers of Congress to regulate interstate commerce.

It is finally argued on behalf of relator that the legislation offends the Constitution of this state, because it is practically an abdication of governmental functions in favor of private individuals and corporations. The statement of the argument is that the legislature has left it to private agencies to determine who shall and who shall not be permitted to carry on the business of selling tickets. This argument refutes itself. The legislature, in the constitutional exercise of the police power, has said to the common carrier, "You must select and duly commission the agents who are to sell your passage tickets, and no one else can engage in that business." This is certainly not an abdication of governmental functions, but a wise and proper exercise of them, as I view the situation. I have carefully considered the elaborate argument presented in the appellant's brief, but see no reason to disagree with the conclusions reached by the learned appellate division. The order appealed from should be affirmed.

Martin, J., dissenting:

Recognizing the justice of recent criticisms
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upon the increase of long and argumentative dissenting opinions in this court, still the importance of the principle announced in the decision of this case demands a statement of the reasons which prevent my concurring with the majority. The case involves the validity of a statute which continues a protection to the public and to transportation companies against fraud in the sale of passage tickets which has existed in this state, in substantially the same form, for more than forty years. Therefore the present statute cannot be held unconstitutional without practically determining that for all that time the affairs of this state in that respect have been controlled by statutes which were invalid, as being in excess of the powers of the legislature to enact. The passage and continuance upon the statute books of this and similar statutes for so many years show that during that time a legislative policy has prevailed in this state which has been sanctioned by numerous legislative acts. It has never been questioned by the courts, and has been acquiesced in by the departments of the state government. This constitutes such a practical construction of the constitutional provisions invoked by the appellant as to justify this court in holding the statute to be within the police power of the state, especially as similar statutes had been in force for many years when the present Constitution was adopted. *People, Williams, v. Dayton*, 55 N. Y. 367, 378; *People v. Home Ins. Co.* 92 N. Y. 323, 337; *Re Washington Street Asylum & P. R. Co.* 115 N. Y. 442, 447; *People, Einsfeld, v. Murray*, 149 N. Y. 367, 376, 32 L. R. A. 344.

The real inquiry here presented is whether the legislature may provide that steamboat and railroad tickets shall not be sold by irresponsible or unknown persons, thus exposing travelers to fraud, and require them to be so sold that the companies issuing them shall be responsible to the traveler who purchases them. While the statute forbids persons other than the companies, or their duly-constituted agents, making such sales, still its purpose was to compel the companies to sell their own tickets, and thus become responsible. Manifestly, the method prescribed by this act was the only efficient one that could be adopted to secure the end sought. If the companies had merely been forbidden to permit such sales, their permission could never be established, and thus the purpose of the statute would be thwarted.

The single question presented is whether the legislature was authorized to enact a statute requiring railroad and steamboat companies, or, where the passage extends over more than one line, one of such companies, to sell the tickets for such passage by their duly constituted agents, and forbidding such sales by persons not sustaining that relation, under penalty of imprisonment. If this act is in conflict with the fundamental law, it is for the reason that it affects the liberty of the citizen to engage in a legitimate employment or business in a lawful way, or because it is destructive of some property right which he lawfully possesses.

It has been asserted by counsel that the

business of ticket brokerage has been a legitimate one in this state for more than forty years. With that statement I am unable to agree. During that entire time a law has existed making the sale of railroad and steamboat tickets, by others than the companies or their properly authorized agents, a crime.

Nor do I understand how it can be properly said that railroad or steamboat tickets are "property," within the common acceptation of that term, when in the hands of others than passengers, as during all those years the statute has continuously declared that passage tickets should not become property in the hands of others, at least so as to include the ordinary right of sale. Their right of sale was limited to the company over whose route the traveler desired to pass, or, where the route was over several lines, to one of the companies over whose line the passenger intended to travel. The manifest purpose of this statute was to prevent fraud in the sale of passage tickets, and thus protect the purchaser and companies as well. I do not see how it can be correctly said that the legislature was silent as to the motive of passing these various acts. In each the title of the act disclosed that its purpose was to prevent fraud in the sale of passage tickets. The title of an act affords means of determining the legislative intent, and its help cannot be rejected as being extrinsic and extra legislative, as it bears upon its meaning and purpose. *Sutherland, Stat. Constr.* § 211; *People, Cooke, v. Wood*, 71 N. Y. 374.

That the sale of tickets by brokers has long been a source of fraud, both upon the traveling public and the companies issuing them, is a matter of common knowledge, and of its existence there can be no doubt. Indeed, it is doubtful if the business would exist but for the profit derived from improper or fraudulent sales. The fraud of ticket brokers assumes various forms, such as changing tickets which are not transferable by the erasure of the name, the place of destination, or the date, and substituting others, and by otherwise changing the tickets, or by obliterating the dates so as to render their improper use possible. Moreover, the existence of such brokers incites the stealing of tickets, and encourages the employees of the companies in defrauding their employers by furnishing a market for stolen tickets and those not canceled by dishonest officers. That the sale of such tickets is a fraud upon both the carrier and the honest traveler cannot be successfully denied. Again, when a passenger loses his ticket, instead of its being restored to him, resort may at once be had to those agencies to realize upon it. Hardly a week passes when the public prints do not contain one or more accounts of the grossest fraud upon honest, but unwary, travelers, which would not occur but for their existence. Therefore the existence of ticket brokers is a continual menace to both passengers and carriers. It tends to encourage forgery, larceny, the receipt and sale of stolen and fraudulent tickets, the perpetration of frauds upon travelers, and is clearly a disadvantage to the honest traveler as well as to the car-

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rier. Hence the necessity for this statute is obvious, and I think the legislature was wise in adopting it.

While every person has a right to pursue, in a legitimate manner, any lawful calling he may select, and the state can neither compel him to adopt any particular calling nor prohibit his engaging in any legitimate business, still it, in the exercise of its police power, is authorized to subject all occupations to such restraint as may be necessary to prevent their becoming harmful to the public; and where an occupation threatens public injury, and its suppression is essential to the public welfare, the state may prevent its pursuit. *Wynehamer v. People*, 13 N. Y. 378, 487; *Metropolitan Bd. of Excise v. Barrie*, 34 N. Y. 657. The state has a right to reasonably control the manner in which public corporations shall transact their business, and to protect the public against fraud. This statute does nothing more. Its effect is to require railroad and steamboat companies to sell their own tickets in a manner that will render them responsible to the purchaser for any fraud or mistake that may be perpetrated or may occur. The property and business of these companies is clothed with a public interest which makes them of public consequence, affecting the community at large, and hence they may be controlled by any police regulation which is necessary to secure the public good. *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 550; *People, Kimball, v. Boston & A. R. Co.* 70 N. Y. 569; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77. It is therefore reasonable that the state may provide any preventive remedy necessary when the frequency of fraud or the difficulty in circumventing it is so great that no other means will prove efficacious. A regulation which is instituted for the purpose of preventing fraud or injury to the public, and which tends to furnish such protection, is clearly constitutional. This proposition is sustained by numerous authorities in this state and elsewhere, and is an important element of the police power, which is vested in the legislature.

It seems clear that the judgment in this case should be upheld upon the grounds:

(1) Railroad and steamboat tickets can in no proper sense be regarded as property in which third persons have any vested interest. They are mere tokens or evidences of a right to transportation, in which even the traveler who has purchased one has but a special interest, and to which the companies have title and the ultimate right of possession. *Hibbard v. New York & E. R. Co.* 15 N. Y. 455, 466; *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469; *Rauson v. Pennsylvania R. Co.* 48 N. Y. 212, 8 Am. Rep. 543.

(2) The sale of railroad and steamboat tickets by persons other than the companies or their agents, as a business, is not an employment in which they have any unqualified right to engage. A ticket is a mere incident to the business of the companies in transporting passengers. Like a baggage check, it is merely a method adopted by them for the transaction of their own business. The ticket itself possesses none of the ordinary

elements of property, and cannot, without the consent of the companies, form the basis of a legitimate independent business. At most, it is but an evidence of the arrangement between the companies and their passengers, in which others have no lawful interest. No right to transfer is given, and, generally, none is intended. To hold that every person has a constitutional right to interfere with the relations between passengers and carriers, which is superior to the control of the legislature, would result in extending the restraints imposed upon the lawmaking power much further than they have hitherto been supposed to exist, and would be an interference with the power vested in the legislative branch of the state government that is wholly unwarranted. Third persons have no constitutional right to interfere with the relations between the carrier and passenger by the purchase and sale, without its consent, of tickets issued by the former, and to establish such a right would be unauthorized by any existing principle of constitutional law. It is true the act recognizes the right of third persons to make sales of passage tickets, but that right is a limited one, and can be properly exercised only by an agent of one of the companies furnishing the traveler with the transportation for which the ticket is purchased. But it is to be observed that, as such sales are to be made by one of the companies furnishing the transportation, the company making it becomes responsible to the passengers and other carriers for any fraud perpetrated by its agent, and is in harmony with the general purpose of the act.

(3) In the exercise of its police power the state was authorized to prevent the pursuit of the occupation of ticket brokers upon the ground that it was harmful to the public, and the difficulty in circumventing the fraud which attended it was so great that no other efficient means could be found.

(4) As railroad and steamboat companies are public corporations, or at least their business is of such public interest as makes it of public consequence, the legislature had power to control their business by any regulation which was necessary to secure the public good. *People v. King*, 110 N. Y. 418, 1 L. R. A. 293; *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559; *People v. Ever*, 141 N. Y. 129, 25 L. R. A. 794; *People, Nechamcus, v. Warden of City Prison*, 144 N. Y. 529, 27 L. R. A. 718; *People v. Havnor*, 149 N. Y. 195, 31 L. R. A. 689; *Grannan v. Westchester Racing Assn.*, 153 N. Y. 461. The regulation instituted by this statute was for the purpose of preventing fraud, and consequent injury to the public. It tends to furnish such protection, and is clearly within the police power of the state. For these reasons I am of the opinion that the act under consideration is constitutional, and should be upheld.

Moreover, if this act is unconstitutional, many other statutes which have hitherto been regarded as valid and a part of the existing law of the state are also unconstitutional. This may be illustrated by reference to a few of the many statutes which fall within the principle of this decision. The taking of any conveyance of lands from

any person not being in the possession thereof, while they are the subject of controversy or suit, is a crime. Penal Code, § 129. It is a crime to buy or sell any title to lands, real or pretended, unless the grantor or his predecessors in title have been in possession for the space of a year before such sale. Id. § 130. It is a crime to solicit life insurance without a certificate of authority, to issue a policy after a certificate to do business within the state has been revoked, to act for a foreign insurance company which has not designated the superintendent of insurance as an attorney upon whom process may be served, or to act for any foreign corporation not authorized to do business in this state. Id. §§ 577c, 577i, 577j, 593. It is also made a crime to manufacture or sell oleomargarine made in imitation of dairy butter (Laws 1885, chap. 183); to exhibit a female child as a dancer or in a theatrical exhibition, or to consent thereto (Penal Code, § 292); to exclude citizens, by reason of race, color, etc., from the equal enjoyment of any privilege furnished by owners of places of amusement (Id. § 383); to charge for elevating grain a price greater than that fixed by law (Laws 1888, chap. 581); to engage in the trade or business of plumbing without registration (Laws 1892, chap. 602); not to furnish water at one or more places on each floor in tenement houses in the city of New York occupied by families (Laws 1882, chap. 410, as amended by chapter 84, Laws 1887); to sell milk which does not reach a prescribed standard, whether adulterated or pure (Laws 1884, chap. 202); to sell vinegar which contains any artificial coloring, whether wholesome or otherwise (Laws 1889, chap. 515); and for barbers to work on Sunday, except in the city of New York and the village of Saratoga Springs (Laws 1895, chap. 823). If the statute under consideration invades the liberty or property of the individual, it is obvious that the statutes to which we have adverted are subject to the same criticism, and yet most, if not all, of them have been held to be constitutional, and their enactment to be within the police power of the state, as will be seen by examining the following, which are a few of the many cases bearing upon the subject: *Danziger v. Boyd*, 120 N. Y. 628; *Dawley v. Brown*, 79 N. Y. 390; *People v. Cipperly*, 101 N. Y. 634; *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483; *People v. King*, 110 N. Y. 418, 1 L. R. A. 293; *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559; *People v. Ever*, 141 N. Y. 129, 25 L. R. A. 794; *People, Nechamcus, v. Warden of City Prison*, 144 N. Y. 529, 27 L. R. A. 718; *New York Health Dept. v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710; *People v. Girard*, 145 N. Y. 105; *People v. Havnor*, 149 N. Y. 195, 31 L. R. A. 689. Indeed, if the principle of this decision is to be regarded as the established law of this state, it renders invalid many, if not all, of the statutes creating offenses where the act made a crime was not such at common law. No such principle has any proper place in the jurisprudence of this state. In the language of Andrews, J.: "It is not a good objection to a statute prohibiting a particular act and

making its commission a public offense that the prohibited act was before the statute lawful, or even innocent, and without any element of moral turpitude. It is the province of the legislature to determine in the interest of the public what shall be permitted or forbidden, and the statutes contain very many instances of acts prohibited, the criminality of which consists solely in the fact that they are prohibited, and not at all in their intrinsic quality." *People v. West*, 106 N. Y. 293, 296, 60 Am. Rep. 452.

In considering this case, it should be remembered that a statute cannot be declared unconstitutional, unless it can be shown, beyond reasonable doubt, that it is in conflict with some particular provision of the organic law, nor until every reasonable mode of reconciliation with the Constitution has been resorted to, and reconciliation has been found impossible. The presumption of constitutionality attaches to every statute passed by the legislature, and the burden of establishing its unconstitutionality rests upon, and must be borne by, the party asserting it. *People, Henderson, v. Westchester County Supers.* 147 N. Y. 1, 30 L. R. A. 74. It is for the legislature to determine what laws and regulations are needed for the protection of the public, and, if its measures are calculated and appropriate to accomplish that end, the exercise of its discretion is not the subject of judicial review.

Applying to this case the principles already stated, it is obvious that the statute in question was within the police power of the state. Its necessity to the public welfare was for the legislature to determine,

and, as it has a clear relation to that end, its propriety is not subject to review by this court. To hold that this act is unconstitutional would establish a principle which would impair or destroy nearly every statute that has for its purpose the prevention of fraud. It would practically annihilate the police power of the legislature, and make the courts administrators of that power instead of the body in which it is vested by the Constitution. Besides, if the cases passing upon the validity of the statutes, to which we have called attention, were correctly decided, they establish a principle which, if applied in this case, requires us to hold that this act was a proper exercise of the police power by the legislature, and that it is consequently valid.

The result of this action is of slight importance in comparison with the principles promulgated as the law of this state. An arbitrary and unauthorized interference by the judiciary with the administrative affairs of the state is fraught with quite as much danger as would follow legislative interference with judicial affairs. Neither can occur without affecting the stability and efficiency of our state government. The legislative power of the state is vested in the senate and assembly. When courts seek to control the action of the legislature, or, in effect, to repeal its statutes, by holding them in conflict with some nonexistent or doubtful constitutional limitation, their action ceases to be judicial, and becomes mere usurpation. I think the order should be affirmed.

Gray, J., concurs.

MICHIGAN SUPREME COURT.

Rufus M. CHOATE
v.

Frederick D. STEVENS *et al.*, *Plffs. in Err.*

(.....Mich.....)

The negotiability of a note is not destroyed by a clause stating that it is given for certain property the title to which shall not pass until the note is paid, and which is

subject to be retaken in case of nonpayment of the note.

(March 1, 1898.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to enforce payment of a promissory note. *Affirmed.*
The facts are stated in the opinion.

NOTE.—Reservation of title to property as affecting negotiability of note for purchase price.

The general rule.

So far as the rule can be regarded as settled by the authorities it seems to be that if there is nothing more in the transaction than a retention of title to the property as security, so that the absolute liability on the note is not affected, the note is negotiable.

The negotiability of a series of notes given for the purchase price of cars is not destroyed by a clause that the "title to said cars shall remain in the said payee until all the notes of said series, both principal and interest, are fully paid, all said notes being equally and ratably secured on said cars." The court says the notes show upon their face that they were given for the purchase price of the cars. The transaction is in legal effect a chattel mortgage. The 43 L. R. A.

agreement by which the vendor retains the title and by which the notes are secured on the cars is collateral to the notes and does not affect their negotiability. It does not qualify the agreement to pay at the time fixed any more than would be done by an agreement of the same kind embodied in a separate instrument in the form of a mortgage. The marks on the cars showed that they were to go into possession of the purchasers, to be used. *Chicago R. Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 34 L. ed. 340.

In the lower court the judge said, the construction I should place on the provision of the notes retaining title in the vendor is not that it is a recital of the consideration for which the note is given, and of the fact that the payee was to retain a lien upon the property sold as security for the payment of the notes. The inference which a purchaser of the notes would naturally draw would be that the cars had been sold, and that the payee retained a lien and se-

Messrs. Corliss, Andrus, & Leete, for plaintiffs in error:

This court has held that such paper is non-negotiable, and has stated several times that the modern tendency to interpolate into such instruments (notes) engagements and stipulations not recognized by the law merchant, affecting the certainty as to the amount due and payable thereon or the time of maturity, or superadding duties to be performed by

the maker, or additional obligations other than the payment of a sum certain at maturity, should be discountenanced and held to destroy their negotiability and deprive them of the character of promissory notes, and they should be relegated to the domain of ordinary contracts.

Cayuga County Nat. Bank v. Purdy, 56 Mich. 6; *Altman v. Rittershofer*, 68 Mich. 287; *Wright v. Traver*, 73 Mich. 492, 3 L. R.

curity upon them in the way of a mortgage for the payment of the purchase price. If this is so, then the contract was an executed one, the consideration for the amount of the notes had already passed, and the payment of the notes could not be dependent on any condition whatever. *Merchants' Nat. Bank v. Chicago R. Equipment Co.* 25 Fed. Rep. 809.

The incorporation into the note of the clause "said promise made for a colt this day taken; said colt holden for the payment of said amount," does not render the note non-negotiable. *Collins v. Bradbury*, 64 Me. 37. The court stated the fact that the note states the consideration for which it was given, and that it might operate as a mortgage does not render it any the less a promissory note.

A note reciting that it was given for property which should be and remain the property of the owner of this note until the amount hereby secured is fully paid, is negotiable. The court said this note contained all the requisites of a negotiable note, and the addition of the statement of the consideration, with the statement that it was to remain the property of the owner until the note was paid, did not render it non-negotiable. *Mott v. Havana Nat. Bank*, 22 Hun, 354.

A note given on express condition that the title and ownership of the property are to remain in the name and subject to the order of the payee until the note is paid, is negotiable. *W. W. Kimball Co. v. Mellon*, 80 Wis. 133. The court says the agreement reserving title does not affect or change the notes in the least, nor make the time of payment or the amount to be paid at all uncertain.

The mere fact that the title is said to be retained in the payee will not defeat the negotiability of the note. *Mansfield Sav. Bank v. Miller*, 2 Ohio C. C. 96; *Mansfield Sav. Bank v. Flowers*, 11 Ohio L. J. 141; *National Bank v. Davis*, 6 Mont. Co. L. Rep. 99; *Merchants' Bank v. Dunlop*, 9 Manitoba L. Rep. 623; *First Nat. Bank v. Slaughter*, 98 Ala. 602.

The destruction of the property before the maturity of the note will not prevent the enforcement of the note by the payee. *Burnley v. Tufts*, 66 Miss. 48.

Modifications of the rule.

But slight additions to the provisions of the note have been held to make the duty to pay uncertain so as to defeat negotiability. There is some slight conflict as to what will make the promise uncertain, so the cases are not fully in accord.

A recital in a note that the property for which it is given shall remain in the payee, and that he shall have the right to take possession of it whenever he may deem himself insecure, even before maturity of the note, will render it non-negotiable. *Third Nat. Bank v. Armstrong*, 25 Minn. 530. The court said defendant's obligation was not such an independent, absolute, and unconditional one for the payment of a precise and definite sum of money at all events and without any contingency as is essential to the 43 L. R. A.

validity of commercial paper. The maker's promise depended upon the contingency of an observance by the payee of the sole condition on which it rested that an absolute transfer of the property with good title would be made whenever the promise was performed. The promise to pay, and the implied obligation to transfer the title, were mutual, and as each was the sole consideration for the other, and both were to be performed at the same time, they were concurrent conditions of the same agreement in the nature of mutual conditions precedent, so that inability or refusal to perform the one would excuse performance of the other. If the payee had rendered himself unable to fulfil his obligation, then no action could be maintained against the payor on his promise. An obligation of this character is altogether too uncertain to serve the purpose of commercial paper as the representative of money in business transactions.

And that case was followed in *Deering v. Thom*, 29 Minn. 120; *Edwards v. Ramsey*, 30 Minn. 91; *Stevens v. Johnson*, 28 Minn. 172.

But if the title to the property is recognised in the maker of the note by a chattel mortgage given as part of the same transaction as that in the note is given, a recital that the title shall remain in the vendor until the note is paid will not defeat the negotiability of the note. *Beer v. Aultman-Taylor Co.* 32 Minn. 91.

An instrument agreeing to pay money for the recited consideration of a horse, said property to remain the absolute property of the vendor until paid for, and not to be disposed of by the vendee, to be paid for if it died, but if it should be returned to or taken back by the vendor then all the payments made should be retained by the vendor for the use of the property. Is not a negotiable note, since payment of it may be defeated by the return of the property. *First Nat. Bank v. Alton*, 60 Conn. 402.

If an instrument after duly reciting a promise to pay continues: It is hereby agreed that the property for which the note is given shall remain the property of the payee, and in default of payment of the note the property shall be returned to the payee,—it is not a negotiable note. The court says the contract stated in this instrument is not simply a promise to pay money, but a stipulation concerning the title to property, and a promise in reference to the future disposition of the property. You may not incorporate with the promise to pay stipulations and agreements as to other matters, and then say the absolute promise to pay money lifts the contract into the region of negotiable paper. *Killam v. Schoeps*, 26 Kan. 310, 40 Am. Rep. 313.

So, an agreement in a note that if it is not paid, the payee may take possession of and sell the property for which it is given, will render it non-negotiable. *South Bend Iron Works v. Paddock*, 37 Kan. 510; *Smith v. Marland*, 59 Iowa, 645.

On the other hand, in New York it has been held that where the note recited that it is understood that the title does not pass to me, and

A. 50; *Lamb v. Story*, 45 Mich. 489; *Altman v. Fowler*, 70 Mich. 57; *Second Nat. Bank v. Wheeler*, 75 Mich. 546.

Messrs. Bowen, Douglas, & Whiting, for defendant in error:

The test of negotiability is as to whether or not the instrument in question is payable in a certain fixed amount, at a certain time, and to a certain person. These requisites being present, the instrument should be deemed negotiable.

Beardlee v. Horton, 3 Mich. 560; *Little-*

field v. Hodge, 6 Mich. 326; *Preston v. Whitney*, 23 Mich. 200; *Mattison v. Marks*, 31 Mich. 421, 18 Am. Rep. 197; *Wright v. Irwin*, 33 Mich. 32; *Howry v. Eppinger*, 34 Mich. 29; *Hudson v. Emmons*, 107 Mich. 549; *Markey v. Corey*, 108 Mich. 184, 36 L. R. A. 117; *DeHaas v. Roberts*, 59 Fed. Rep. 855; *Chicago R. Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 34 L. ed. 349; *First Nat. Bank v. Slaughter*, 98 Ala. 602; *Mott v. Havana Nat. Bank*, 22 Hun, 354; *Collins v. Bradbury*, 64 Me. 37; *Burnley v. Tufts*, 66

that until the notes are paid the title shall remain in the vendor, who should have the right in case of nonpayment of the notes to retake immediate possession, the court said there is no provision to abridge the rights of the payee of the notes or to limit their operation; on the contrary, their payment is contemplated, and that event is to determine the time when the title to the property becomes absolute in the purchaser. *Beaudrias v. Walck*, 45 N. Y. S. R. 7.

So, in Nebraska the mere fact that the payee retains title to the property, and is given full power to declare the note due and take possession of the property at any time he may deem himself insecure, even before maturity of the note, will not defeat the negotiability of the note. *Heard v. Dubuque County Bank*, 8 Neb. 10, 30 Am. Rep. 811.

Reservation of the right of possession has been in some cases held to be a sufficient circumstance to defeat the negotiability of the note.

An instrument in the form of a promissory note given for the price of an article and containing the condition "that the title and right to the possession of the property shall remain in the vendor until this note is paid," is not a negotiable instrument. The court says that the purchaser is not compellable to pay when the day for payment arrives, unless at the same time he gets the property with a good title, and the payment to be made is not, therefore, an absolute, unconditional payment, at all events such as is required to constitute a good promissory note. *Domlnon Bank v. Wiggins*, 21 Ont. App. 275.

Where the note was given for machinery, and stated that the express condition of the purchase and sale of the property for which the note was given are such that the title, ownership, or right of possession does not pass from the vendor until the note is paid in full, it was held that the note was non-negotiable. The court says if the sale be conditional, and if the title to the property remains in the vendor, must it not follow that it so remains at his risk in the absence of an agreement to the contrary? And if this be true, can it be said there is an absolute and unconditional promise to pay for it, a promise to pay at all events? Would not the vendee be exonerated from liability to pay for the property who purchased before the maturity of the note without his fault or in the event it should be recovered by a title paramount to that of the vendor, he being notified of action brought, and required to defend it? It seems to me these queries admit only an affirmative response. *E. M. Birdsall & Co. v. Guill*, 3 Va. Law Reg. 895.

In view of the tendency to depart from the old simple form of negotiable notes, it is perhaps a little difficult to determine just how far analogy requires notes reserving title to be held negotiable. The certainty of the contract does not seem to be materially impaired by a mere

reservation of title, but the incorporation into the note of the machinery for its enforcement, which to be available must be assignable with the note, or the insertion of a promise to pay in what is a mere conditional contract of sale, would seem to be too great a departure from the rules governing negotiable paper to find a place under that branch of the law.

The effect of statutes.

A note reciting a promise to pay a certain sum to a person or his order for property "this day delivered to me upon the distinct understanding that the title was not to pass to me until paid for in full, and he is authorized to take possession of the same at any time until fully paid for," is negotiable so as to permit the indorsee to maintain a suit in his own name. But the question of negotiability so as to cut off defenses was not passed upon. *Howard v. Walker*, 69 Ga. 778.

In a subsequent decision, however, the note was held to be negotiable so as to cut off defenses. But the ruling is placed upon the Georgia statute making all contracts in writing for the payment of money negotiable. *Howard v. Simpkins*, 70 Ga. 323.

See, however, the later cases of *Craig v. Hering*, 80 Ga. 709, and *Brewster v. Hamilton*, 87 Ga. 547, where it was held that the retention of title with the right to sell the property on default did not affect negotiability, and no reference is made to the statute.

The Michigan decisions.

Michigan seems to have changed its rule by *CHOATE V. STEVENS*. Prior to that decision it had been held that, if the note recites that the conditions are that if not paid "when due the property for which it was given shall be the property of the payee, the recital will defeat its character as a negotiable note." *Wright v. Traver*, 78 Mich. 493, 3 L. R. A. 50. The court says the clause has the effect to render the instrument a contract and not a promissory note. No one can tell from the reading of this instrument whether the payment therein meant is certain and unconditional or not. The instrument is uncertain and capable of two constructions as to its terms.

And so the instrument is non-negotiable if the option is given to the payee to retake the property or collect the money. *Bannister v. Rouse*, 44 Mich. 428.

But an instrument in the form of a promissory note, which recites that the property for which it is given shall remain the property of the payee, and that upon default in payment he may take possession of the property and retain what has been paid as rent, will sustain an action in the name of an assignee whether it is a negotiable note or not. *Soper v. Mills*, 50 Mich. 75.

H. P. F.

Miss. 48; *Brewster v. Hamilton*, 87 Ga. 547; *Bank of Carroll v. Taylor*, 67 Iowa, 572; *W. W. Kimball Co. v. Mellon*, 80 Wis. 133.

Hooker, J., delivered the opinion of the court:

The defendants have appealed from a judgment upon three written instruments, substantially alike, of one of which the following is a copy:

\$115.00

Detroit, July 25, 1893.

For value received March 16, 1895, after date, I promise to pay to the order of Low's Art Tile Soda Fountain Company one hundred and fifteen dollars, with interest six per cent.

The consideration of this and other notes is the Soda Draught apparatus described in contract of same date as this and other notes, which Soda Draught apparatus the undersigned has received of said Low's Art Soda Fountain Company. Nevertheless, it is understood and agreed by and between the undersigned and the said Low's Art Tile Soda Fountain Company, that the title to the above-mentioned property does not pass to the undersigned, and that, until all said notes are paid, the title to the aforesaid shall remain in the said Low's Art Tile Fountain Company, who shall have the right, in case of nonpayment at maturity of either of said notes, without process of law, to enter and retain immediate possession of said property, wherever it may be, and remove the same. Payable at the Preston National Bank.

Each bears as an indorsement, the name of the payee.

The defendants say that they were improperly admitted in evidence, for the reason that they are not promissory notes, and if the indorsements are to be treated as an assignment of the chose in action, it should have been alleged in the declaration, and further, that there was no evidence that the plaintiff was the owner of the notes sued upon. Both briefs indicate that the question considered most important, if not decisive of the case, is that of the negotiability of the notes. The instruments—to the end of the fourth line—are in form promissory notes. If there were nothing more, they would be as perfect and complete promissory notes as it is possible to make. The writing proceeds to state the consideration for said notes, which, though not essential, was harmless. *Wright v. Irwin*, 33 Mich. 32.

This is followed by the statement that the parties agree that the title to the property for which the notes were given shall remain in the payee, who, in case of nonpayment at maturity of either of said notes, may "enter and retain immediate possession of the property, without process of law, wherever it may be, and remove the same." If it can be said that this writing shows a sale of the soda fountain, as contradistinguished from a contract to sell, the provisions as to title amount to no more than a chattel mortgage. Mr. Justice Harlan said in the case of *Chicago R. Equipment Co. v. Merchants' Bank*, 136 43 L. R. A.

U. S. 286, 34 L. ed. 349. "The fact that by agreement the title is to remain in the vendor of personal property, until the notes for the purchase price are paid, does not necessarily import that the transaction was a conditional sale." In that case the court was able to find from the evidence that the parties intended to effect a sale, and that the title reserved was merely the title of a mortgagee. The distinguished jurist added that "each case must depend upon its special circumstances," which proposition is emphasized by the case of *Harkness v. Russell*, 118 U. S. 663, 30 L. ed. 285, where the facts were held to show a conditional, and not an absolute, sale. If we can place this construction on the transaction, i. e., that it was a sale, there is no difficulty in sustaining the negotiability of this note under our own decisions. See *Brooke v. Struthers*, 110 Mich. 562, 35 L. R. A. 536; *Wilson v. Campbell*, 110 Mich. 680, 35 L. R. A. 544.

The record shows that the soda fountain was furnished under a written contract, and that these notes were given some days later after delivery, in accordance with its terms. If we were to consider the provisions of this contract, we should not hesitate to say that this was a sale with a reservation of title by way of security. As said in *Brooke v. Struthers*, 110 Mich. 562, 35 L. R. A. 536, there are cases which hold that a contemporaneous writing may be examined to determine the negotiability or non-negotiability of a note. See cases cited.

While perhaps this contract is not strictly a contemporaneous writing, it was one of the surrounding circumstances under which the notes were made. But we find it unnecessary to pass upon that question, as we think the same is implied by the notes. These being negotiable notes, a declaration upon the common counts was sufficient, under our well-settled rule. The judge allowed the jury to consider defendants' right to damage by way of recoupment, and, apparently, such damages were allowed. We think the ownership established. No question appears to have been raised at the trial over the genuineness of the indorsement.

We find no error in the record, and the judgment is affirmed.

The other Justices concur.

John E. CARLAND

v.

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*

(.....Mich.)

1. The abandonment of common counts makes the failure to elect between them and others immaterial.

2. An action for breach of the contract of a telegraph company may be brought in assumpsit, and need not be *ex delicto*.

NOTE.—As to delivery of telegraph messages to company by telephone, see also *People, Cairo Teleph. Co. v. Western U. Teleg. Co.* (111.) 36 L. R. A. 637.

3. The sender of a telephone message to the agent in charge of a telegraph office, with directions to send it by telegraph, does not make such agent his agent, although the telegraph company requires all messages to be given to the agent in writing, unless that fact is known to the sender.
4. The meaning of a cipher telegram may be proved by the person who sent it.
5. A statement by a telegraph agent to the sender of a message, that it has not been delivered, made as a report of his efforts to trace the telegram, is admissible as against the telegraph company to show the fact of nondelivery.
6. Testimony as to the price of wheat at a certain market, by one who testifies that he knew what it was, is sufficient to go to the jury.

(October 18, 1898.)

ERROR to the Circuit Court for Shiawassee County to review a judgment in favor of plaintiff in an action brought to recover damages for neglect to promptly transmit and deliver a telegram. *Affirmed.*

The facts are stated in the opinion.

Mr. John T. McCurdy, for plaintiff in error:

Suits against telegraph companies can be maintained only on the grounds of negligence.

Negligence must not only be alleged.

Western U. Teleg. Co. v. Carew, 15 Mich. 525; *Birkett v. Western U. Teleg. Co.* 103 Mich. 367, 33 L. R. A. 404.

But such negligence must be proved by the party asserting it.

Marquette, H. & O. R. Co. v. Kirkwood, 45 Mich. 51, 40 Am. Rep. 453; *Smith v. American Exp. Co.* 108 Mich. 573.

The declaration failed to state a cause of action. Such objection was properly made at the trial of the cause.

Devereaux v. Hubbard (Mich.) 5 Det. L. N. 165.

If the declaration states a cause of action, it can only be upon the theory that it contains two counts: (1) A count in assumpsit, and (2) a count on the case. If this be so, the two counts cannot properly be joined.

Friend v. Dunks, 37 Mich. 25, 39 Mich. 733; *Schafer v. Boyce*, 41 Mich. 256; *Kehrig v. Peters*, 41 Mich. 475.

The misjoinder should have been disposed of at the outset of the trial, and plaintiff made to choose between them, instead of being allowed to go over the whole range of testimony without doing so.

Ives v. Williams, 53 Mich. 636.

Young acted without any authority from the company, and not as its agent, but as the agent of the plaintiff, and with a desire to accommodate him.

Young's actions and statements in carrying out plaintiff's instructions are in no wise binding upon the defendant company, for a principal cannot be held liable for the acts of an agent performed outside the scope of his authority.

Mechern, Agency, §§ 740, 741; *Haggerty v. Flint & P. M. R. Co.* 59 Mich. 366, 60 Am. Rep. 301; *Taylor v. Downey*, 104 Mich. 534, 43 L. R. A.

29 L. R. A. 92; *Western U. Teleg. Co. v. Foster*, 64 Tex. 220, 53 Am. Rep. 754.

The wording of the telegram in question is ambiguous, and capable of being variously construed.

Plaintiff's testimony that it instructed the G. W. Wylie Company to buy 3,000 bushels of wheat for May delivery is inadmissible.

Palmer v. Marquette & P. Rolling Mill Co. 32 Mich. 274; *McElroy v. Buck*, 35 Mich. 434; *Hall v. Soule*, 11 Mich. 494.

The agent of the telegraph company who at the request of the sender of the message, or under and by his direction, writes it out, acts in that capacity (of writing the message) as the agent of the sender.

Western U. Teleg. Co. v. Edsall, 63 Tex. 668; *Western U. Teleg. Co. v. Foster*, 64 Tex. 220, 53 Am. Rep. 754; *Gulf, C. & S. F. R. Co. v. Geer*, 5 Tex. Civ. App. 349; *Western U. Teleg. Co. v. Phillips*, 2 Tex. Civ. App. 608; *Giren v. Western U. Teleg. Co.* 24 Fed. Rep. 119; *Western U. Teleg. Co. v. Harding*, 103 Ind. 505; *Western U. Teleg. Co. v. Terrell*, 10 Tex. Civ. App. 60; *Stamey v. Western U. Teleg. Co.* 92 Ga. 613; *Beasley v. Western U. Teleg. Co.* 39 Fed. Rep. 181; *Carroll v. Southern Exp. Co.* 37 S. C. 452.

The conditions contained in the contract or agreement, on the back of the blank, as to delay and failure to deliver, are valid.

Western U. Teleg. Co. v. Carew, 15 Mich. 525; *Birkett v. Western U. Teleg. Co.* 103 Mich. 361, 33 L. R. A. 404.

The courts have held that a telegraph company has the right to stipulate that all claims on account of faults in its service shall be presented within a reasonable time after the service is performed.

Western U. Teleg. Co. v. Way, 83 Ala. 542; *Western U. Teleg. Co. v. Dougherty*, 54 Ark. 221, 11 L. R. A. 102; *Western U. Teleg. Co. v. Dunfield*, 11 Colo. 335; *Western U. Teleg. Co. v. James*, 90 Ga. 254; *Western U. Teleg. Co. v. Yopst*, 118 Ind. 248, 3 L. R. A. 224; *Western U. Teleg. Co. v. Trumbull*, 1 Ind. App. 121; *Young v. Western U. Teleg. Co.* 65 N. Y. 165; *Sherrill v. Western U. Teleg. Co.* 109 N. C. 527; *Southern Exp. Co. v. Caldwell*, 21 Wall. 260, 22 L. ed. 558; *Webbe v. Western U. Teleg. Co.* 64 Ill. App. 331; *Western U. Teleg. Co. v. Beck*, 58 Ill. App. 564; *Lester v. Western U. Teleg. Co.* 84 Tex. 313.

Messrs. Watson & Chapman, for defendant in error:

This is an action upon a simple contract, and is therefore properly an action in assumpsit.

1 Green, Pr. 67.

There is a special assumpsit upon which actions may be brought for the recovery of a mutual promise, either oral or written, expressed or implied.

1 Chitty, Pl. *111.

The agent is in the office for the transaction of that business, and the information that he gives a customer as to whether the message has been delivered or not is certainly just as binding upon the company as it is when he informs him of the price of the message, or undertakes to send the same; the company cannot escape its liability by

saying that its agent had some secret instructions.

1 Am. & Eng. Enc. Law, p. 350.

The question as to whether or not this was a gambling contract was properly submitted to the jury.

Gregory v. Wendell, 39 Mich. 337, 33 Am. Rep. 390, 40 Mich. 432.

Hooker, J., delivered the opinion of the court:

The plaintiff's action was brought to recover damages from the defendant for its failure to promptly transmit and deliver a telegram, whereby the plaintiff is said to have suffered a loss. The record contains testimony tending to show that the plaintiff, a merchant, residing at Corunna, called the office of the defendant at that place by telephone. Mr. Young, defendant's agent, responded, whereupon the plaintiff asked him to take a message, which he did. The message was as follows, viz.:

Corunna, Mich., Jan. 25, 1898.
To G. W. Wylie Company, 145 Van Buren Street, Chicago, Ill.
Buy three May. John E. Carland.

It was intended to be understood to mean "Buy three thousand bushels of May wheat." After waiting twenty-four hours without response to his message, the plaintiff called the defendant's office by telephone, and was answered by Mr. Read, Young's assistant, who, in response to his inquiry, assured him that the message was sent. Twenty-four hours later the plaintiff called upon Young, who said he would trace the message, and he reported later that the message was never received at the Chicago office, and a duplicate of the message was sent on January 28. The testimony tended to prove further that the price of wheat advanced meantime, and plaintiff's agent was obliged to pay a higher price than would have been necessary had the first message been sent promptly. A verdict was rendered in favor of the plaintiff, and the defendant has brought the case to this court by writ of error.

The action was commenced before a justice of the peace. The docket shows that:

"Plaintiff declared orally on all matters provable under the common counts in assumpsit, and especially on a contract with said defendant, and files a written memorandum of said contract, and claims damages three hundred dollars or under.

"Written Memoranda of Plaintiff's Declaration Herein: Plaintiff says that heretofore, to wit, on the 25th day of January, A. D. 1898, said defendant was, and still is, a telegraph company and corporation engaged in the telegraph business, and were common carriers of telegraph messages. And on, to wit, the 25th day of January, 1898, said defendant undertook, for a valuable consideration, to wit, 40 cents, to convey and deliver for said plaintiff a telegraph message to G. 43 L. R. A.

W. Wylie & Co., No. 145 Van Buren street, Chicago, Ill., which message was as follows:

Corunna, Mich., Jan. 25th, 1898.
To G. W. Wylie & Co., 145 Van Buren Street, Chicago, Ill.
Buy three May. J. E. Carland.

— which message instructed G. W. Wylie to purchase for said plaintiff three thousand bushels of wheat, to be delivered to said plaintiff on May first. And said defendant, by its contract with said plaintiff, owed said plaintiff a duty to deliver said telegram promptly, and without unnecessary delay. But, notwithstanding such contract and duty, said defendant wholly failed to deliver said telegram in any manner, and wholly failed and neglected so to do, and on account of such failure and neglect of said defendant said plaintiff was deprived of and lost large gain and profits on said wheat which the said George W. Wylie would have purchased for this plaintiff, and said plaintiff was deprived of the opportunity of purchasing said wheat on said 25th day of January, 1898, and on account of which said plaintiff has been damaged in the sum of \$300, for the recovery of which this suit is brought. J. E. Carland."

Several assignments of error relate to the declaration, it being claimed that it does not state a cause of action; that there is a misjoinder of counts; that the *addamnum* clause being \$300, was fatal to the jurisdiction of the justice; and that, if none of these points are valid, the court should have compelled an election of counts.

It is manifest from the record that the plaintiff did not recover upon the common counts, and that there being nothing in the case that tended to support them they were practically abandoned, and an election would have been an empty form. The special count appears to have been intended as a count in assumpsit for the breach of a contract, and not a count in case for a negligent injury in the nature of a tort. See *Tiffany, Justice's Guide*, 183. It follows that, being a count in assumpsit, it was properly joined with the common counts, as "all causes of actions enforceable in assumpsit may be joined." 1 Enc. Pl. & Pr. p. 169.

But it is contended that there can be no recovery in assumpsit in such cases, and that the action must be case for a breach of duty, and not assumpsit for breach of contract. Counsel say that the "gist of these actions is negligence," quoting the language of Mr. Justice Grant in *Birkett v. Western U. Teleg. Co.* 103 Mich. 367, 33 L. R. A. 404. We think counsel has misinterpreted this language, and that there is nothing in that case which compels one having contract relations with a telegraph company to forego an action of assumpsit upon breach of the contract, and resort to an action *ex delicto*. It was true that negligence was the gist of that action, because the conditions which were made a part of the contract made it es-

essential to recovery. In this case the plaintiff's claim is that the usual conditions are not a part of the contract. "Where the sender can show that through the negligence of the company in transmitting or delivering a message he has suffered a legal injury, there can be no question as to his right to sue for damages, and this whether the right of action be regarded as resting in contract, or in tort for the breach of public duty." Gray, *Telegraphs*, § 64; [*Playford v. United Kingdom Electric Teleg. Co.*] L. R. 4 Q. B. 706, 10 Best & S. 759; 25 Am. & Eng. Enc. Law, p. 824. Again: "The action is properly one *ex contractu*, and based on the contract of sending." 25 Am. & Eng. Enc. Law, p. 830. In the case of *Western U. Teleg. Co. v. Carew*, 15 Mich. 525, cited by counsel, the action was assumpsit, and, though the case was reversed, the court seems to have recognized the propriety of the form of action by ordering a new trial. There may be cases where an action upon contract would not be appropriate, as where the plaintiff was not a party to the contract. In actions brought by a person to whom the message is addressed, some of the courts so hold. This is so in England, where the rule is strictly enforced, but in this country there is a want of harmony upon the subject. See 25 Am. & Eng. Enc. Law, p. 824.

This also disposes of the jurisdictional question, as the statute (2 How. Anno. Stat. § 6814) confers concurrent jurisdiction upon justices of the peace in all civil actions upon contract where the debt or damages do not exceed \$300. The declaration was entitled to the liberal treatment which the courts accord to pleadings in justice court, and sufficiently set forth the alleged contract, and its breach, to apprise the defendant of the plaintiff's claim. This also disposes of the objection made to the introduction of the depositions.

A number of questions relate to the alleged contract. It is contended that the contract to send the message was subject to the conditions which the defendant usually imposes upon its patrons; that Young was, by the plaintiff, made his agent to write the telegram upon the blank containing the conditions; and that receiving a message upon any other terms than such conditions would be outside of the scope of Young's authority. Young, being the person in charge of the defendant's business, and authorized to receive telegrams, was acting within the general scope of his authority in so doing, and the plaintiff was not bound, at his peril, to ascertain the secret instructions that the defendant had given in relation thereto. In Maryland some recognition has been given to the defendant's contention by cases which hold that the sender of a message must be supposed to be informed in regard to the rules and regulations of the telegraph company, but the weight of authority is to the contrary. See Thompson, *Electricity*, §§ 211, 212, for a discussion of this subject; also, 25 Am. & Eng. Enc. Law, p. 804; *Beasley v. Western U. Teleg. Co.* 39 Fed. Rep. 181. But, while this is true, if the plaintiff had knowl-

edge of the rules and regulations under which the defendant did business, he would be bound by them so far as they were valid and binding upon others, and it was a question for a jury to determine whether he had such knowledge or not, if a question in the case. Should it be said that Young, in receiving by telephone and writing such message, was the agent of the plaintiff? We are cited to several cases holding that the operator is such agent, under somewhat similar circumstances. Thus, in the case of *Western U. Teleg. Co. v. Edsall*, 63 Tex. 677, where, at the request of the sender of the message, it was written by the operator upon a blank of the company, which the sender signed, it was held that the operator was, as to that message and its preparation, the agent of the sender. The court said: "Evidently the operator, in the preparation of messages, was acting for the appellee, and not the company. True, he was the agent of the company to receive and forward messages, but not to write messages for others." This case was followed in the case of *Western U. Teleg. Co. v. Foster*, 64 Tex. 220, 53 Am. Rep. 754. In that case the sender wrote the message, and, upon its being read over by the clerk, he (the sender) detected a mistake in it, and the clerk undertook to correct it by an interlineation, which he made in a wrong place. The court held that he was not acting within the scope of his authority, and was the agent of the sender. In a still later case the Texas court of civil appeals has sustained this doctrine. See *Gulf, C. & S. F. R. Co. v. Geer*, 5 Tex. Civ. App. 349. The original message, written upon a piece of brown paper, was rejected by the operator, as unintelligible, and by him handed back to the person sent by the plaintiff to deliver the same. Plaintiff's messenger stated to the operator that he was hot and nervous, and asked the operator to write down the message. He wrote it, on a telegraphic blank, as dictated, and sent it. It was held that the operator, in the preparation of the message, was acting for the sender, and not the company, and that the plaintiff could not, therefore, complain of his act in writing the message upon the form commonly used for the purpose, and that the conditions upon the blank were binding upon the sender. It seems to us that in the cases cited the Texas court went too far if it took judicial notice that the scope of the agent's authority did not permit him to write messages for those desiring to send them, who, from infirmity, were incapacitated from writing the same, or were, from ignorance, unable to do so. The law does not forbid such authority, nor does it make it the duty of the sender to write the message. If the rules of the company forbade it, there is nothing in the case to show that the fact was brought home to the knowledge of the patron, and the rule would have no greater force than any other of which he was ignorant. We cannot conclude, in the absence of proof, that the telegraph companies expect their operators to turn away patrons who cannot write, or that they keep telephones in

their office, but do not permit their use in their business by their patrons who send and receive messages. And we are of the opinion that such use should not be altogether at the peril of the patron, or that he should suffer for mistakes made at either end of the line, merely because such are the instructions to the operator, or made the subject of a rule of which the patron has no knowledge. It would seem more reasonable to hold such acts to be within the general scope of his authority, or, at least, hold it to be a question for a jury. There is sufficient justification for the decisions in the *Edsall Case* without invoking such a rule, for the sender signed the message upon the blank, thus making it his own, under the current weight of authority that so holds, although the conditions be not read. 25 Am. & Eng. Enc. Law, 805, and cases cited in note 1. So, in the case of *Gulf, C. & S. F. R. Co. v. Geer*, the message was written upon the blank by request. The *Foster Case* more nearly sustains plaintiff's contention. We are cited to no authorities in support of the Texas cases. We are of the opinion, therefore, that the court committed no error in holding that Mr. Young acted as agent for the defendant, under the proofs contained in the record; and might properly have instructed the jury that he was not shown to have acted as agent for the plaintiff.

It is urged that the court erred in permitting the plaintiff to testify to the meaning of the words used in the despatch, viz.: "Buy three May." Counsel cite some authorities supporting the doctrine that such evidence is not admissible where the statute of frauds has application, but no such question is raised here. There was no contract with the Wylie Company; merely a request to purchase something. If the language had a secret meaning, it was proper to show the fact. Ciphers play an important part in business affairs, and we see no reason why they are not as proper subjects for translation as foreign languages.

The defendant asserts further that there was no competent evidence that the telegram was not delivered. Young stated such fact to the plaintiff before sending the duplicate message, and we think this was an act with-

in the scope of his authority, and a part of this transaction. As it is not in any way contradicted, it is unnecessary to inquire whether the testimony of the Chicago witnesses upon the same subject was admissible or not. We are of the opinion that the court did not err in leaving the question of the price of wheat at Chicago to the jury. The plaintiff testified that he knew what it was, and his cross-examination did not show that he had no knowledge upon the subject.

It is contended further that this telegram was sent in furtherance of a gambling contract, which would have been void under the statute, and that damages for a failure to deliver it cannot be recovered. 3 How. Anno. Stat. § 9354f, prohibits the purchase and sale of grain, etc., on margins for future or optional delivery, without any intention of receiving or paying for the property so bought or sold. If this claim were conclusively proved, so that we could find the fact as alleged, we should have no doubt that the plaintiff's action must fail; but this is a disputed fact. The plaintiff testified that such an arrangement was not contemplated, and that he expected to pay for and receive the grain. We have no occasion to express our opinion of the matter. There was evidence for the jury, and the responsibility of justly determining this fact was theirs. Every contract for a future delivery of grain is not a gambling contract. It is only when the parties mutually understand it to be such and no actual sale or purchase or contemplated delivery is involved, and where the one is to pay and the other receive the amount of fluctuations in the market, that this statute applies. It is the pretended, and not the actual, buying and selling of grain, etc., that is prohibited. An extended discussion of this subject will be found in 8 Am. & Eng. Enc. Law, pp. 1006 *et seq.* The subject is also fully discussed by Mr. Justice Marston in *Gregory v. Wendell*, 39 Mich. 338, 33 Am. Rep. 390, and later, upon another review of the same case, by Mr. Justice Cooley. See 40 Mich. 435.

The judgment is affirmed.

The other Justices concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Elmer RUNYAN, *Plff. in Err.*,
v.

CENTRAL RAILROAD COMPANY of New
Jersey.

(.....N. J.....)

1. Upon a ticket delivered by a common carrier of passengers to one of

*Headnotes by MCGILL, C.

NOTE.—As to the right of a passenger to carry packages into a passenger car, see also *Bullock v. Delaware, L. & W. R. Co.* (N. J.) 87 L. R. A. 417.

• 43 L. R. A.

its passengers, upon the payment of his fare, was printed: "Good for one continuous passage in either direction between New York and Elizabeth, N. J." "No stop-off allowed." "Free transportation allowed for 150 lbs. baggage (wearing apparel) only, and company's liability expressly limited to \$1 per lb." *Held*, that the reference to baggage was notice of the limit of accommodation and responsibility, upon the part of the carrier, the passenger might have with respect to baggage committed to the custody of the carrier, and did not restrict or in any way affect the common-law right of the passenger to carry personal baggage with him.

2. The common-law right of such a

passenger is to take with him his personal baggage appropriate to the journey and its object: that is, not only wearing apparel for use and ornament, but other articles, all within reasonable limit, the use of which is personal to him during his journey and in accomplishing its purposes.

3. If a common carrier of passengers for a long time acquiesces in and makes accommodation for the carriage of small packages of merchandise of its passengers in its passenger cars as personal baggage, so as to lead the passengers to accept and rely upon its attitude in that respect as one of its regulations, it can resume its rights under the law only after reasonable notice of its rescission of the regulation so made.
4. A passenger, refused admission to such a carrier's cars because he proposes to take with him a small package of merchandise, may put in evidence the regulation aforesaid as a step in his proofs, upon suit brought on account of such refusal of admission.

(*Deque, Gummere, Hendrickson, and Nison, JJ., dissent.*)

(September 28, 1898.)

ERROR to the Circuit Court for Union County to review a judgment in favor of defendant in an action brought to recover damages for alleged breach of contract to carry plaintiff on defendant's train. *Reversed.*

Statement by McGill, C.:

The plaintiff in error was the plaintiff below. He was nonsuited in the circuit court, and now assigns error in that nonsuit, and in the overruling of two questions at the trial, to which reference will presently be made. The facts in proof are as follows: Elmer Runyan, a resident of the city of Elizabeth, and the president and treasurer of a nursery company there, on the 30th of December, 1896, went to New York City on the railway of the defendant, a common carrier of passengers. He paid the fare demanded by the defendant's ticket agent for an excursion trip to New York and return, and received from that agent a ticket in two parts. The part concerned in this inquiry was denominated the "Return Coupon," and contained these announcements: "Good for one continuous passage in either direction between New York and Elizabeth, N. J." "No stop-off allowed." "Free transportation allowed for 150 lbs. baggage (wearing apparel) only, and company's liability expressly limited to \$1 per lb. When he started on his journey, it was wet, and he wore a pair of rubber shoes. It does not appear whether or not he took any baggage with him from Elizabeth. In New York he purchased 10 pounds of nails. The purpose of this purchase does not appear. Between 5 and 6 o'clock in the evening he had with him a satchel containing a pair of gloves and some catalogues and papers pertaining to his business, which had been in use by him, and also two small packages, one of which contained the nails he had purchased, and the other a letter file and the rubber shoes he had worn from Elizabeth in the morning. At the ferry

house he exhibited to the gate keeper his "Return Coupon." It does not appear that the gate keeper saw the satchel and bundles. The coupon was punched by the gate keeper, and he was permitted to pass upon the ferryboat, and cross the river on it, without interference, to the defendant's train shed, where, as he was about to pass through a gate to the cars for Elizabeth, the defendant's agents refused to permit him to enter with his satchel and packages. Retaining the bundles, after some delay, he walked along the defendant's tracks a mile or more, to another station of defendant, called Communipaw, followed by the defendant's agents, and there paid the proper fare to the defendant's ticket agent for his transportation from Communipaw to Newark, and received a ticket containing these notices: "Good for one passage from Communipaw, N. J., to Newark, N. J., on a continuous train. Only 150 lbs. baggage (wearing apparel) allowed each passenger. Company's responsibility for baggage limited to \$1 per lb. unless special agreement be made." Shortly thereafter he attempted to enter a proper train from Communipaw to Newark, and, because he still retained his satchel and packages, was refused admission, and forced, by the defendant's agents, from the steps of the car. He then paid another fare to the defendant's ticket agent for his transportation from Communipaw to Elizabeth, and received a ticket containing these announcements: "Good for one continuous passage in either direction between Communipaw, N. J., and Elizabeth, N. J." "No stop-off allowed." "Only 150 lbs baggage (wearing apparel) allowed each passenger. Company's responsibility for baggage limited to \$1 per lb., unless special agreement be made." Thereupon he offered his satchel to the defendant's baggage master at Communipaw, and asked that it be checked as baggage to Elizabeth. He was asked to tell what it contained, but refused to do so. The satchel, however, was duly checked, and taken in charge by the defendant, and ultimately carried by it to Elizabeth. The plaintiff retained the two packages, and attempted to enter a proper train of cars for Elizabeth, but was prevented by the defendant's agents from so doing because he had the packages with him. The plaintiff declares, in several counts, upon the contracts for transportation evidenced by the three tickets above mentioned, and alleges, as the breaches of the contracts, refusal to transport him with baggage. His insistence is that it was his right, under the circumstances of the case, to be transported together with the satchel and packages he had, which he kept in his possession and proposed to retain during his journey. During his examination at the trial, he was asked by his counsel these questions, which were objected to by the defendant's counsel, and overruled by the trial court: "Q. Had you been accustomed to travel between Elizabeth and New York?" "Q. Do you know whether or not the cars—passenger cars—on the Central Railroad, running between New York and Elizabeth, have any provision for small packages in connection with the seats?"

circuit courts if in some counties the two courts have concurrent jurisdiction in a large class of cases and the Constitution provides that laws relating to courts shall have general and uniform operation throughout the state, and that the practice of all courts of the same class or grade so far as regulated by law shall be uniform.

- d. County and circuit courts are, so far as their jurisdiction is concurrent, courts of the same grade or class within the meaning of a constitutional provision requiring laws relating to such courts and regulating their practice to be general and uniform throughout the state.

(November 26, 1897.)

ON MOTION to dismiss an appeal by defendant from a judgment of the Circuit Court for Hutchinson County in favor of plaintiff in an action brought to recover possession of certain property. *Motion denied.*

The facts are stated in the opinion.

Mr. W. J. Hooper for appellant.

Mr. Wellington Brown for respondent.

Corson, P. J., delivered the opinion of the court:

This case comes before us on a motion to dismiss the appeal. The action was one in claim and delivery, brought in a justice's court, and appealed to the circuit court, in which latter court a judgment was rendered in favor of the plaintiff, and from which the defendant appealed. The jury in the circuit court found the value of the personal property described in plaintiff's complaint to be \$18, and a judgment was thereupon entered "that plaintiff recover of the defendant possession of the property or the value thereof, to wit, \$18, in case a recovery cannot be had," and costs, taxed at \$86.80. The motion to dismiss the appeal is made upon the ground that under the provisions of chapter 55, Laws 1897, no appeal lies to this court from the circuit court in this class of cases, and hence, since the passage of said act, this court has no jurisdiction of the appeal. The appellant resists the motion on two grounds:

(1) That the law of 1897 is void, for the reason that it is in conflict with the provisions of the Constitution of this state; (2) that it does not appear from the appellant's abstract when the appeal was taken, and, there being no additional abstract, the court cannot presume that the appeal was taken since the act of 1897 took effect, and that, if taken before, this court has jurisdiction.

The 1st section of the act of 1897 provides that § 5213, Comp. Laws, shall be amended so as to read as follows: "No appeal shall be allowed or be taken from any judgment rendered by the circuit courts of this state either upon a verdict of a jury or by the court, to the supreme court in any action for the recovery of money where the amount recovered shall be seventy-five dollars (\$75) or less, or in any action for the recovery of personal property when the personal property sought to be recovered is of the value of seventy-five dollars (\$75) or less." Section 3 provides that all "judgments" rendered in the cases specified in § 43 L. R. A.

2 "shall be final, and no appeal shall be allowed from said judgment or judgments to the supreme court." Section 4 repeals all acts and parts of acts in conflict with the provisions of that act. And § 5 contains an emergency clause, and provides that the act shall take effect from and after its passage and approval. The act was approved February 4, 1897. The only sections of the Constitution bearing upon this subject are §§ 2 and 18 of article 5, which read as follows:

"Sec. 2. The supreme court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law."

"Sec. 18. Writs of error and appeals may be allowed from the decisions of the circuit courts to the supreme court under such regulations as may be prescribed by law."

Whether the qualifying clause "under such regulations and limitations as may be prescribed by law" applies to the first clause relating to appellate jurisdiction, as well as to the clause relating to the general superintending control of inferior courts, as contended by counsel for respondent, we do not deem it necessary to decide, for the reason that that section does not attempt to define or prescribe in what cases an appeal may be taken to the supreme court. The object and purpose of the section seems to be to define and limit the jurisdiction of the supreme court, and not in any manner define the class of cases in which an appeal might be taken. The language of the section, defining and limiting the jurisdiction of the supreme court, cannot, by any fair construction, be held to confer upon parties the right of appeal in all cases of which the supreme court has been given jurisdiction. This construction of § 2 is much strengthened by the provisions of § 18, above quoted. That section is important because the framers of the Constitution were in that section treating specially of circuit courts. By it they provided that "writs of error and appeals may be allowed . . . under such regulation as may be prescribed by law." The word "may" is evidently used in that section in its proper sense, as permissive, and not in the sense of must or shall. Again, by § 20 of the same article it is provided that "writs of error and appeals may be allowed from county to circuit courts, or to the supreme court, in such cases and in such manner as may be prescribed by law." If the contention of respondent is correct, that by § 2 appellate jurisdiction is given in all cases to the supreme court, neither § 18 nor § 20 would be necessary, except so far as they might provide for the manner in which an appeal should be taken. The authority to allow appeals would be nugatory. It is quite clear from the provisions of §§ 18 and 20 that the framers of the fundamental law intended to leave the power over the subject of appeals to the legislature, to be exercised in such manner as public policy and the best interests of the people might require. The con-

stitutional policy seems to have been not to specify or fix absolutely the class of cases in which appeals should be allowed, but to leave to the legislature discretion over the subject. The provisions of § 20 of article 6 in the Bill of Rights that "all courts shall be open, and every man, for an injury done him in his property, person, or reputation, shall have remedy by due course of law, and right and justice administered without denial or delay," are satisfied by a trial in a court of competent jurisdiction, in which the right to trial by jury, in proper cases, is afforded, as provided in § 6 of article 6. None of the provisions of the Constitution prohibit the legislature from limiting appeals to a defined class of cases, and prescribing at what stage and in what court ordinary litigation shall end. The right to an appeal is not a common-law right, but depends upon the statute, when not specially granted by the Constitution. 2 Enc. Pl. & Pr. p. 16; *Black Hills Flume & Min. Co. v. Grand Island & W. C. R. Co.* 2 S. D. 546.

One further consideration may be added, and that is that a court only regards itself authorized to declare an act of the legislature unconstitutional when it is satisfied that it is clearly so, or, as some courts have expressed it, when its unconstitutionality is beyond a reasonable doubt,—language used by this court in some of its decisions. Our conclusion, therefore, is that the act of 1897 is constitutional and valid.

This brings us to a consideration of the second question. The act of 1897, it will be observed, contains no reservations or exceptions as to appeals previously taken or pending at the time the act took effect, and hence it is not material whether the appeal was taken before or after the law was approved. It seems to be well settled that, if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law, and, of course, where the law conferring the right of appeal is partially repealed. *Baltimore & P. R. Co. v. Grant*, 98 U. S. 398, 25 L. ed. 231; *Ex parte McCordle*, 7 Wall. 514, 19 L. ed. 205; *United States v. Roisdore*, 8 How. 113, 12 L. ed. 1009; *McNulty v. Batty*, 10 How. 72, 13 L. ed. 533; *Norris v. Crocker*, 13 How. 429, 14 L. ed. 210; *The Assessors v. Osborne*, 9 Wall. 567, 19 L. ed. 748; *United States v. Tynen*, 11 Wall. 88, 20 L. ed. 153; *Callahan v. Jennings*, 16 Colo. 471; *Cooley*, Const. Lim. p. 474. This appeal appearing from appellant's abstract to have been taken from a judgment "in an action for the recovery of personal property when the personal property sought to be recovered is of the value" of less than \$75, this court has no jurisdiction of the appeal. That the appeal is still pending in this court, undisposed of, is a fact of which the court will take judicial notice. *Searls v. Knapp*, 5 S. D. 325.

The appeal is dismissed.

A petition for rehearing having been filed, **CORSON**, P. J., on May 21, 1898, handed down the following response:

Respondent moved to dismiss the appeal in this case upon the ground that, under the 43 L. R. A.

provisions of chapter 55, Laws 1897, no appeal lies from the judgment appealed from. The motion was granted, and the opinion on the motion is reported in 10 S. D. 332. A petition for a rehearing was filed, calling the attention of the court to section 34, art. 5, of the state Constitution, which was not considered by the court on the motion to dismiss. A rehearing was granted, and the question of the constitutionality of the act of 1897, in view of the provisions of § 34, will now be considered. The section reads as follows: "All laws relating to courts shall be general and of uniform operation throughout the state, and the organization, jurisdiction, power, proceedings and practice of all of the courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments and decrees of such courts severally shall be uniform; provided, however, that the legislature may classify the county courts according to the population of the respective counties and fix the jurisdiction and salary of the judges thereof, accordingly." Appellant contends that the act of 1897, being expressly limited to appeals from judgments of the circuit court and not including county courts, which in two counties—Minnehaha and Lawrence—have concurrent jurisdiction with the circuit court in a large class of cases, is clearly in conflict with the provisions of § 34, above quoted. He argues that parties living in the two counties named still have the right to appeal from any judgment rendered in the county courts of those counties, without regard to amount of judgment or value of property claimed, while in the same class of cases, tried and determined in the circuit court of those and other counties of the state, parties are denied the right of appeal unless the judgment or value of the property exceeds a fixed sum. He further contends that circuit and county courts, so far as their jurisdiction is concurrent, are, within the meaning of the Constitution, courts of the same class or grade, and that all laws relating to such courts must be general and uniform throughout the state. The respondent insists that the term, "courts of the same class or grade," should be construed as applicable only to each class of courts provided by the Constitution, and not to two or more classes named.

We are inclined to the view presented by appellant. By § 6, chap. 78, Laws 1890, county courts had conferred upon them concurrent jurisdiction with the circuit courts in a large class of cases therein specified, limited to the amount therein specified; and by § 11 of the same act concurrent jurisdiction with the circuit courts, in all appeals from justice courts, was conferred upon them. These sections are still in force in the two counties named, and hence, in a large class of cases, both the county and circuit courts have concurrent jurisdiction in those two counties. It would seem clear, therefore, that, in so far as they have such concurrent jurisdiction, they are "courts of the same class or grade." It would be a too restricted construction of the Constitution to hold that § 34 only applies to some one class

of the courts named in the Constitution; that is, either circuit courts, county courts, justices' courts, or supreme courts. It is not by the name, but by the jurisdiction, that we are to determine whether or not courts are of the same class or grade. If, then, to the extent that circuit and county courts have concurrent jurisdiction, they are courts of the same class or grade, it is manifest that the provisions of § 34, art. 5, of the Constitution, have not been complied with in the enactment of the law of 1897. As before stated, parties whose cases have been tried in the county courts of the two counties specified may still appeal to this court in all cases, while parties in those counties or other counties of the state are denied the right of appeal in the same class of cases, unless the judgment exceeds the amount specified, or the property claimed is of a specified value. The law of 1897 is therefore not general or uniform, and bears unequally on different classes of citizens in the same county. Furthermore, the law of 1897 discriminates between citizens of different counties, denying the citizens of other counties of the state rights of appeal that are conferred upon the citizens of Minnehaha and Lawrence counties, in a similar class of cases. Such a law cannot be deemed general or uniform. The constitutionality of a similar law to that of 1897 was recently before the supreme court of Illinois in the case

of *Dawson v. Eustice*, 148 Ill. 346. It would appeal from the decision that county courts in that state generally, as here, have jurisdiction of estate matters, with the right of appeal to the circuit courts; but a law was enacted creating probate courts in counties containing 100,000 population or over, conferring jurisdiction in estate matters, and providing that appeals might be taken directly to the supreme court of the state. That learned court held that the two courts were of "the same class or grade," and that so much of the probate act as conferred a right of appeal directly to the supreme court was unconstitutional, and the appeal was therefore dismissed. *Kingsbury v. Sperry*, 119 Ill. 279. The constitutional provision of that state seems to be the one from which § 34, art. 5, was copied, except that the proviso was added to our section. The county courts of Minnehaha and Lawrence counties, to the extent that their jurisdiction is concurrent with circuit courts, must be regarded as courts of the same class or grade, and laws relating thereto must be general and uniform. Chapter 55, Laws 1897, being in conflict with the provisions of § 34, art. 5, of the state Constitution, we are compelled to hold the provisions of that act null and void.

The decision of the court granting the motion to dismiss the appeal is disaffirmed, and the motion to dismiss the appeal is denied.

VERMONT SUPREME COURT.

STATE of Vermont
v.

William N. THERIAULT.

(.....Vt.....)

The owner of land over which a brook flows is not deprived of property without compensation by Stat. § 4568, allowing fish and game commissioners to place fish in the stream to prohibit fishing therein for not more than three years, and by other provisions that make the waters public for at least five years longer, but such provisions are justified by Const. art. 5, chap. 1, as a regulation of the internal police, and chap. 2, § 40, giving the inhabitants of the state the right to fish "in all boatable and other waters (not private property) under proper regulations to be hereafter made and provided by the general assembly."

(Thompson, J., dissents.)

(July 20, 1898.)

EXCEPTIONS by defendant to a ruling of the Montpelier City Court holding sufficient a complaint charging defendant with fishing in Hale brook in which fishing had been prohibited in accordance with the statutes upon that subject. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to governmental control of right of fishery, see also *People v. Truckee Lumber Co.* (Cal.) 39 L. R. A. 581.
43 L. R. A.

Mr. John H. Senter, for defendant:

This statute empowers the fish commissioners to take possession of any man's private streams of water that are not boatable and without his consent stock them with the various kinds of fish mentioned in § 4565, Vt. Stat. and to post them and to advertise in some newspaper that such streams of water are closed to fishing for the term of three years, and then that such streams of water shall become public, and not private, waters for five years.

They thus take the property of the land-owners and change it from private ownership and make it by this statute subject to the public jurisdiction, and give the public the same rights by thus stocking and posting such streams after the expiration of three years as they have in boatable and public waters elsewhere in the state.

Simply because Mr. Hale in this case has given his license or consent to the posting of this stream, will not make an unconstitutional statute a constitutional one.

New England Trout & S. Club v. Mather, 68 Vt. 338, 33 L. R. A. 569.

Messrs. F. A. Howland and F. L. Fish, for the State:

By virtue of the police power of the state, the legislature had the authority to make the law in question, and it may be enforced against all parties in cases like this, the owners of such streams included.

This stream is private property.

Lewis, Em. Dom. § 60; Angell, Watercourses, §§ 10, 11; Gould, Watercourses, § 46.

Where each proprietor's rights are connected with those of every other and the waters flow into boatable water, the right becomes semi-public.

1 Bishop, New Crim. L. § 1130.

The fish in streams or bodies of water are not the private property of anyone until caught.

People v. Bridges, 142 Ill. 30, 16 L. R. A. 684; *State v. Lewis*, 134 Ind. 250, 20 L. R. A. 52; *Gentile v. State*, 29 Ind. 409.

The right to regulate the times and manner of taking fish from private as well as public waters has long been recognized. This right arises under the police power of the states.

Phelps v. Racey, 60 N. Y. 10, 19 Am. Rep. 140; *State v. Randolph*, 1 Mo. App. 15; *People v. Collison*, 85 Mich. 105; *Com. v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386; *Gentile v. State*, 29 Ind. 409; Angell, Watercourses, § 65a, p. 71, and notes; *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199; *Ohase v. Baker*, 59 N. H. 347; *Randolph*, Em. Dom. § 430; *Stuttsman v. State*, 57 Ind. 119; *State v. Boone*, 30 Ind. 225; *Com. v. Look*, 108 Mass. 452; *Com. v. Vincent*, 108 Mass. 441; *Vinton v. Welsh*, 9 Pick. 87; *State v. Blount*, 85 Mo. 543; *State v. Beal*, 75 Me. 289; *Maney v. State*, 6 Lea, 218; *State v. Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 513; *Magner v. People*, 97 Ill. 320; *Com. v. Gilbert*, 160 Mass. 157, 22 L. R. A. 439; *Com. v. Essex County*, 13 Gray, 247; *State, Weller, v. Snover*, 42 N. J. L. 341; *Inland Fisheries Comrs. v. Holyoke Water-Power Co.* 104 Mass. 446; *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *Lawton v. Steel*, 152 U. S. 133, 38 L. ed. 385; *Tiedeman*, Pol. Power, p. 451.

This regulation or law is within the general scope and meaning of that authority.

The state having an interest in the fish of all waters of the kind specified in the case, its officers may go upon all premises where such fish are for their protection and preservation.

State, Weller, v. Snover, 42 N. J. L. 341.

Whether the rights of the proprietor in his private stream in respect to fishing exist by virtue of § 40 of art. 2 of the Constitution of Vermont by any other provision of the Constitution, or by virtue of the common law, in no case can they be said to be infringed by the provisions of the act in question.

State v. Norton, 45 Vt. 258; *Drew v. Hilliker*, 56 Vt. 641.

One is not deprived of his property by laws which fix the periods within which fish may be taken.

Randolph, Em. Dom. § 430; *Com. v. Alger*, 7 Cush. 84; *License Cases*, 5 How. 583, 12 L. ed. 291; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Cooley*, Const. Lim. p. 717; *Gentile v. State*, 29 Ind. 409; *State v. Mrozinski*, 59 Minn. 465, 27 L. R. A. 76.

When a subject is within a police power of the state, the question as to what regulations are proper and needful is the one for legislative consideration and decision, and courts 43 L. R. A.

will not presume that the legislature has usurped powers or disregarded the organic law.

Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 12 L. R. A. 652, 3 Inters. Com. Rep. 613; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *State, Terre Haute, v. Kolsem*, 130 Ind. 434, 14 L. R. A. 566; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *State v. Mrozinski*, 59 Minn. 465, 27 L. R. A. 76; *Bancroft v. Cambridge*, 126 Mass. 438; *Pine Grove Twp. v. Talcott*, 86 U. S. 666, 22 L. ed. 227.

If there is any doubt as to the constitutionality of the act in question as against every person, the proprietor included, there can be no question as to the validity of the act where the proprietor has given his license and consent to the stocking of his stream, the posting of notices, and the prohibition of fishing therein.

An action must be brought in the name of the party whose legal right has been affected or by his legal representatives.

1 Chitty, Pl. p. 1.

A defense must be made by one interested.

Flint v. Craig, 59 Barb. 319; *Campbell v. Erie R. Co.* 46 Barb. 540; *City Bank v. Perkins*, 29 N. Y. 554, 86 Am. Dec. 332; 1 Wait, Act. & Def. 157.

A party may waive any right which the law gives him, even a constitutional one.

1 Bishop, Crim. L. §§ 995, 996; 1 Bishop, Crim. Proc. § 117; 1 Bishop, Mar. Div. & Sep. § 1436.

One with no interest can complain of no statute as unconstitutional.

1 Bishop, Mar. Div. & Sep. § 1436; *State, Potter, v. Snow*, 3 R. I. 64; *Sinclair v. Jackson, Field*, 8 Cow. 543; *Coleman v. Carr, Walk.* (Miss.) 258; *Dejarnett v. Haynes*, 23 Miss. 600; *New Orleans Canal & Nav. Co. v. New Orleans*, 12 La. Ann. 364.

Ross, Ch. J., delivered the opinion of the court:

The respondent excepted to the judgment of the city court of the city of Montpelier, holding, on demurrer, the complaint of the state's attorney sufficient. The complaint is in three counts. They all charge him with illegally fishing in a stream known as "Hale's Brook," on land owned by George Hale, in the county of Washington, which brook flows into the Winooski river, a boatable stream. Each count alleges that the brook had been stocked with trout by the fish and game commissioners, and duly posted and advertised, agreeably to Vt. Stat. § 4568. The first count alleges that this was done with the consent of George Hale, the owner of the land over which the brook flows. The other two counts do not allege any such consent. Vt. Stat. § 4568, reads: "When the fish and game commissioners place fish in a pond or stream, they may prohibit fishing therein, or in specified portions thereof, for a period not exceeding three years, by posting notices to that effect conspicuously upon the banks thereof, and publishing such notice three weeks successively in a newspaper published in the county where such waters are located; if a person fishes, or attempts to fish, in such

waters within the time specified, he shall be fined \$50, if prosecution is commenced within six months after the offense is committed." Vt. Stat. § 4567, reads: "Waters stocked by the fish and game commissioners shall thereafter be treated as public waters, but any person who might otherwise make the same a private preserve or posted waters, may do so at the expiration of five years from the date of filing, with the fish and game commissioners, a written notice of his intention so to do." By Vt. Stat. § 4565, the fish and game commissioners are authorized, at the expense of the state, among other things, to introduce trout, shad, salmon, and other good varieties of fish into such streams, lakes, and ponds within the state, not private preserves or posted waters, as they deem suitable to the successful cultivation of fish. Vt. Stat. § 4562, defines "private preserve," "posted waters," and "public waters," as follows: "Private preserve; a natural pond, of not more than twenty acres, belonging to a common owner, or any artificial pond made solely for the purpose of fish culture." "Posted waters; all waters on lands posted as provided in this chapter." "Public waters; all waters of which the state has jurisdiction, except private preserves and posted waters." Elsewhere in the same chapter it is provided that the owner or occupant of inclosed or cultivated land may, by posting notices as thereby required, prohibit shooting, trapping, or fishing thereon, under a prescribed penalty. These are the main provisions of the statute bearing upon the section brought under consideration. There are provisions establishing a "close season" for hunting and fishing, or a time in the year when all persons are prohibited from hunting and fishing, and also regulating the manner and means by which hunting and fishing shall be prosecuted in the open season. These statutes express the legislative will regulating the rights of riparian owners in regard to taking fish from a common stream, and make the fish and game commissioners officers to carry that will into execution. This is shown by the decision hereinafter cited, and by all authorities. The respondent does not contend otherwise.

The respondent contends that Vt. Stat. § 4568, is unconstitutional, in that it deprives the owner of the land over which the brook flows of his exclusive right to catch fish therein for the period of three years, and then makes them public waters for at least five years longer, without compensation. This is his only contention. Without considering whether the respondent, being a stranger to the right to fish in this brook, can raise this question, we will pass to the consideration of the broader question, which alone has been argued, whether the statute is unconstitutional as regards the owner of the soil, to whom the right to fish attaches. There can be no doubt that if this deprivation of the owner of the soil over which the brook flows of the right to fish in it, for the time specified, is the taking of private property for public use, the law must, as to him, be held unconstitutional. Article 2, chap. 1, of the Constitution of Vermont provides "that private

property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money." If the act infringes this constitutional provision, the legislature had no authority to enact it, and it is without legal validity. But this provision of the Constitution must be read in connection with its other provisions, and especially must be considered with article 5, chap. 1, of the Constitution of Vermont, which declares "that the people of this state by their legal representatives have the sole, inherent, and exclusive right of governing and regulating the internal police of the same;" and § 40 of chapter 2 of the Constitution of Vermont, reading: "The inhabitants of this state shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed; and in like manner to fish in all boatable and other water- (not private property) under proper regulations to be hereafter made and provided by the general assembly." Hence the question for consideration is whether the act of the fish and game commissioners, definitely and specifically authorized and performed by and under Vt. Stat. § 4568, is a taking of a right belonging to the owner of the land over which the brook flows, for the use of the public; or whether it is a regulation of his use of that right, under § 40 of chapter 2 of the Constitution of Vermont, and an exercise of the right of governing and regulating the internal police of the people of the state, reserved to their representatives by article 5, chapter 1, of the Constitution of Vermont.

In considering this question, it is necessary to keep in mind the nature of the right and of the property out of which it arises. The right to take fish from flowing waters, not boatable, in this state, pertains solely to the owner of the land through which such waters flow. It pertains to such owner personally, and is his private right; but he does not own such flowing water, and only has the right properly to use it while on its passage. He can use it in a reasonable manner for domestic purposes, for creating power, and for taking fish therefrom. He must not divert it from its course, nor pollute it, but leave it so that the landowners on the stream above and below him can enjoy their full like use of the water, and, among these, the right to take fish from the stream. This right implies and carries with it the common right to have fish inhabit and spawn in the stream. For this purpose, they must have a common passageway to and from their spawning and feeding grounds. Fish themselves are *feræ naturæ*—the common property of the public, or of the state—in this country. From this common property, the owner of the soil over which the nonboatable stream flows has the right to appropriate such as he may capture and retain; but this right of capture and appropriation is subject to regulation and control by the representatives of the people, so that there shall continue to be a common property. The preservation of the common property, and its increase by

the introduction of new and better species of fish, is not a taking away of the right of the owner of land on the stream to appropriate therefrom, but a preservation or enlargement of such right. The state—the representative of the people, the common owner of all things *feræ naturæ*—not only has the right, but is under a duty, to preserve and increase such common property. Such is declared to be the duty of the representatives of the people in the articles and sections of the Constitution of Vermont referred to. Such, also, was the common-law view of the nature of the rights of persons in streams and in animals *feræ naturæ*. Says Mr. Justice Blackstone, in his Commentaries (bk. 2, p. 14): "But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences. Such, also, are the generally of those animals which are said to be *feræ naturæ*, or of a wild and untamable disposition, which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance, but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards." The same writer treats more fully of this class of common property, and of the rights of individuals therein, in chapter 25 of the same book, and there lays down the principle that an individual may acquire or have a qualified property in such animals, among which fish are classed, either because of his industry in capturing and retaining them, or on account of their inability, for the time being, to escape from his premises or control, like young game birds while in the nest, or on account of his special right or privilege of capturing and killing them, in exclusion of other persons. This latter right does not exist in this country, except as limited by ownership of the place from which they are taken, and the right to exclude others therefrom.

Not a decision in this country, state or national, has been brought to our attention by the respondent, nor by quite an extensive examination of such cases, which holds that such acts of the state legislature, in regard to this class of property, and in restraint of the right of the riparian owner to take and appropriate fish therefrom, are unconstitutional. They have uniformly been held to be, not a taking of private property or private rights for public use, for which compensation must be made, but an exercise of the police power of the state to preserve or increase a common property, and to regulate the right to capture and appropriate there-

from, so as to preserve and increase the common property, or, at least, to prevent its diminution or destruction. Many cases might be cited in support of what has thus far been said. I quote from but a few. In *Peters v. State*, 90 Tenn. 682, 33 L. R. A. 114, the plaintiff in error owned a tract of land covered by water, from which he alone had the right to take fish. The water was not a stream through which other riparian owners had the right to have fish pass to and from their feeding and spawning grounds. An act limiting his right to take fish therefrom only with rod or line was held constitutional, the court saying: "Fish in streams or bodies of water have always been classed by the common law as *feræ naturæ*, in which the riparian proprietor or owner of the soil covered by the water, even though he may have the sole and exclusive right of fishing in said waters, has, at best, but a qualified property, which can be rendered absolute only by their actual capture, and which is wholly divested the moment the fish escape to other waters. 2 Bl. Com. 392; *People v. Bridges*, 142 Ill. 30, 16 L. R. A. 684. But, in addition, the power of the legislature to enact laws for the protection and preservation of game in the forests, and fish in the waters, of the state, has been so frequently exercised, and, when challenged on constitutional grounds, has been so uniformly maintained, that the question has now passed beyond the realm of debate. . . . *Mancy v. State*, 6 Lea, 218; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385; *Magner v. People*, 97 Ill. 320; *People v. Bridges*, 142 Ill. 30, 16 L. R. A. 684; *Tiedeman, Pol. Powers*, §§ 125, 127." See also *State v. Mrozinski*, 59 Minn. 405, 27 L. R. A. 76; *State v. Lewis*, 134 Ind. 250, 20 L. R. A. 52; *Ex parte Maier*, 42 Am. St. Rep. 129, and note (103 Cal. 476); *Fish and Fisheries*, 7 Am. & Eng. Enc. Law, p. 23; *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199; *New England Trout & S. Club v. Mather*, 68 Vt. 338, 33 L. R. A. 569; *Dreie v. Hilliker*, 56 Vt. 641. *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, establishes the attitude of the Supreme Court of the United States in regard to the constitutionality of such laws, and that they are but police regulations within the powers of the states to exercise. *Townsend v. State*, 147 Ind. 624, 37 L. R. A. 294, is an interesting case upon the right of a state to enact a law regulating the use of natural gas. It treats it as common property, from which those who strike a vein upon their own lands have a right to draw, but subject to such statutory regulations as the lawmaking power of the state might enact in the exercise of its police power.

The police power extends to almost all kinds of property and rights, and its exercise by the legislative branch is almost unlimited, except where taken away or limited by the state or national Constitution. Courts and law writers have not attempted to define it with precision. It is the general power of the legislative branch to enact laws for the common good of all the people. All property and all rights are held in subjection to the exercise of this power, because all individual property and individual rights in every organ-

ized community are connected with, and related more or less intimately to, the individual property and individual rights of others. In the exercise of this power, criminal laws are enacted, laws relating to the support of the poor, to the education of the young people, to build and maintain highways; and, to accomplish these ends, the individual is often compelled to surrender a portion of his rights to property, and sometimes his liberty. In *Livermore v. Jamaica*, 23 Vt. 361, this court held that the taking of one's land for a public highway was not such a taking as required money compensation to be made therefor under the Constitution, but that the benefit which he derived from the establishment of the highway might be offset to the damage he sustained from the taking. The court says: "The Constitution is the paramount law of the land; and every statute which is in contravention of the Constitution must be held inoperative and void. Whether the statute, or that section of it by which the commissioners were governed in making their appraisal, is repugnant to the Constitution, must, we think, depend upon whether the taking of land for a highway is such an appropriation of the property to public use as is contemplated by the Constitution. The taking of land for a highway does not divest the owner of his title in fee. The public only acquire an easement; and the right of the owner to use, occupy, and control the land in any manner which is not inconsistent with the public enjoyment of the easement still remains. Upon a discontinuance of the highway, the possession of the land reverts to the owner in as full and ample manner as he originally held it. In the opinion of the court, this is not such a taking of property for public use, in the sense of the Constitution, as necessarily requires compensation for the same to be made in money. But to bring a case within this provision of the Constitution it should be such a taking as divests the owner of all title to or control over the property taken, and is an unqualified appropriation of it to the public." In *Com. v. Tewksbury*, 11 Met. 55, the owner of the fee of a portion of the beach which helps form Boston Harbor was prosecuted for taking sand and gravel therefrom, under a statute which made such taking a penal offense. He defended, and one ground was that the statute was unconstitutional, because it was a taking of his property for public use, without making compensation. The court, in an opinion by Shaw, Ch. J., held that, although the statute prohibited such taking of sand and gravel with no limitation in regard to time, it was not such a taking of his property as required compensation under the Constitution, but a regulation of his use of his own property, necessary in the interest of the state, to protect the harbor of Boston, and therefore constitutional, and that the respondent was guilty. The same power which may tax the people to establish and maintain good roads for the common benefit of the public may tax them and take measures to preserve and increase the common fund of game and fish, from which all can take, subject to regulations prescribed by the legislature, in the 43 L. R. A.

exercise of this power. In *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625, and note, this court held that a law passed subsequently to the granting of the charter of the defendant (which this court held to be a contract), compelling the defendant to maintain, for all time, at a considerable expense, suitable fences on the sides of its railroad track, was a proper exercise of this power. That decision has been generally approved and followed. This power has been exercised in regard to almost every species of property, and all kinds of rights. It is very elastic, and adjustable to new circumstances and new situations,—as flexible and adjustable as the maxim, *Sic utere tuo ut alienum non laedas*, in which it has its origin.

In addition to the cases already cited, the following (which could be added to at pleasure) are good illustrations of the extent and application of this power: *Champer v. Greencastle*, 138 Ind. 339, 24 L. R. A. 768, 46 Am. St. Rep. 390, and note, in which it is said: "The police power of the state extends in the direction of so regulating the use of private property, or of so restraining personal action, as manifestly to secure or tend to the comfort, prosperity, or protection of the community." *People v. Wagner*, 86 Mich. 504, 13 L. R. A. 286, 24 Am. St. Rep. 141, and note; *People v. Ewer*, 141 N. Y. 129, 25 L. R. A. 794, 38 Am. St. Rep. 788, and note; *Butler v. Chambers*, 36 Minn. 69, 1 Am. St. Rep. 638, and note; *State v. Heinemann*, 80 Wis. 253, 27 Am. St. Rep. 34, and note, in which the police power is defined as the power of "the state . . . vested in the legislature to enact such wholesome and reasonable laws not in conflict with the state or Federal Constitution, as may be conducive to the public good." *New York Health Department v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710, 45 Am. St. Rep. 579, and note. The opinion in the last case is carefully prepared. Among other things, it says: "Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for a compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing the general benefits which the regulations are intended and calculated to secure. 1 Dill. Mun. Corp. 4th ed. § 141, and note 2; *Com. v. Alger*, 7 Cush. 83, 84, 86; *Baker v. Boston*, 12 Pick. 184, 193, 22 Am. Dec. 421; *Clark v. Syracuse*, 13 Barb. 32, 36." This was said in upholding a law which compelled the owner of a tenement block erected and in use before the passage of the law to introduce water at quite an expense, so it could be drawn from a faucet on every floor of the block. *Com. v. Kimball*, 24 Pick. 359, 35 Am. Dec. 326, and quite extensive note; *People v. Arensberg*, 103 N. Y. 388, 57 Am. Rep. 741, and note.

The framers of the state Constitution early began to regulate the right to kill deer, and take fish and muskrats, for their protection

and preservation, for the common benefit of the people, and to destroy noxious wild animals, wolves, and panthers, by the payment of bounties with money raised by enforced taxation. These were done by acts passed in March, 1797. 2 Tolman's Comp. Stat. 19-24. The Constitution in its present form was adopted in 1793. The act for the preservation of fish makes the erection of any dam, hedge, seine, fish garth, or other stoppage, in any watercourse, whereby navigation or the passage of fish may be obstructed, a nuisance, and punishes the person erecting the same with a fine. It also establishes a "close season" when trout cannot be taken.

The definition of "public waters" apparently excludes from the jurisdiction of the state private preserves and posted waters. This is not true. Both are subject to the police power of the state. Any man can be punished if he injures the rights of their owners. Posted waters obtain additional protection by an exercise of the police power. At common law the owner could only recover for a trespass upon his land and the invasion of his right of fishery,—generally a very ineffectual remedy. Hence, the right of the riparian owner was rarely regarded or enforced before the legislature, to protect his right, allowed him, if he complied with the law in regard to posting his premises, to recover of every violator substantial damages. Where the owner availed himself of this law, the legislature evidently considered that the unreasonable destruction of the natural supply of fish in the trout brooks and streams would be stayed, and that such streams would need no further protection. Hence such brooks are excluded from the jurisdiction of the fish and game commissioners. But it reasonably judged that a nonboatable stream, which the riparian owner would not be at the expense of posting, was already depleted of the natural supply of this valuable kind of food, and needed to be replenished. It therefore allowed the fish and game commissioners to re-

stock it at the expense of the people; and, to make that expense profitable to such riparian owner, and to the people of the state, the fish must be protected from destruction until they began to reproduce, and then the community should not be burdened, to protect his right beyond what the common law furnished, for five years longer. By providing that such waters should be waters over which the state has jurisdiction, it did not take away such riparian owner's right to maintain trespass against everyone who should enter without his license upon his premises, and catch fish from the nonboatable stream thereon. The action of the fish and game commissioners in stocking the stream and posting it presumably would inure to the benefit of such riparian owner, and all other riparian owners on that and other connected streams. Whether it would or not, the Constitution clearly empowered the legislature to pass such laws as, in its discretion, it might judge would be for the common benefit of the people of the state.

Someone has suggested that the state had no right to send the fish and game commissioners upon Mr. Hale's land to stock the stream. The law is paramount to his property and rights, within the inhibitions of the state and national Constitutions. As well might he contend that the law could not send its officer upon his land to arrest him for a criminal act, or to attach his property at the suit of a creditor. On any view, even if the owner of the land over which the stream flows had been the violator of the law, and was under prosecution, this statute must be held constitutional and enforceable; and much more against this respondent, who clearly had no right upon Mr. Hale's premises, nor the right to take fish from the stream of water flowing thereon.

Judgment affirmed, and cause remanded to the city court.

Thompson, J., dissents.

WEST VIRGINIA SUPREME COURT OF APPEALS.

R. B. BARTLETT, *Plff. in Err.*,
v.

Town of CLARKSBURG.

(.....W. Va.....)

- *1. An incorporated town is not liable for personal injuries occasioned by the firing of squibs, rockets, fireworks, and firearms on the streets by a crowd of citizens, although such acts be done with the knowledge and consent of the mayor, council, police, and other officers of such corporation.
- *2. As to the powers and functions of an incorporated town, of a public govern-

*Headnotes by McWHORTER, J.

NOTE.—As to the liability of a municipal corporation for fire works, see *note* to *Scanlon v. Wedger* (Mass.) 16 L. R. A. 395; *Fifield v. Phoenix* (Ariz.) 24 L. R. A. 430; *Speir v. Brooklyn* (N. Y.) 21 L. R. A. 641; *Love v. Raleigh* (N. C.) 28 L. R. A. 192; and *Aron v. Wausau* (Wis.) 40 L. R. A. 733.
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mental character, it is not liable for damages caused by the wrongful acts or negligence of its officers or agents therein.

(November 30, 1898.)

ERROR to the Circuit court for Harrison County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by the discharge of fireworks in defendant's streets. *Affirmed.*

The facts are stated in the opinion.

Mr. W. Scott for plaintiff in error.

Messrs. John Bassel and M. M. Thompson, for defendant in error:

Upon well-settled principles this action could not be maintained, and the judgment of the court below was correct.

Mendel v. Wheeling, 28 W. Va. 245, 57 Am. Rep. 665; *Brown v. Guyandotte*, 34 W. Va. 299, 11 L. R. A. 121; *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857;

Richmond v. Long, 17 Gratt. 375, 94 Am. Dec. 461; *Cooley, Torts*, pp. 739, 740; *Norristown v. Fitzpatrick*, 94 Pa. 121, 39 Am. Rep. 771.

McWhorter, J., delivered the opinion of the court:

R. B. Bartlett brought his action on the case in the circuit court of Harrison county, to recover damages against the town of Clarksburg for personal injuries sustained by plaintiff by reason of the discharge by private persons of firearms, squibs, rockets, and fireworks at a narrow place in one of the streets of said town, on the ground that the said fireworks were discharged by the consent and written permission of the mayor, and with the knowledge and consent of the council and police and other officers of said town, and that the said discharge of firearms, fireworks, etc., was of such a nature as to be a public nuisance, whereby the team of horses of plaintiff attached to his buggy became frightened and unmanageable, and beyond the control of plaintiff, and ran away, throwing plaintiff from his buggy seat, and badly injuring him, for which injuries plaintiff alleges said town is liable to him for damages. The declaration contains two counts. Defendant demurred to the declaration and each count, which being argued and considered, the court sustained said demurrers; and, plaintiff not desiring to amend his declaration, the same was dismissed, and judgment rendered in favor of defendant for costs. No ground of demurrer is contended for, except that the town is not liable, and that an action cannot be maintained against the town for the wrong complained of. The appellant cites *Speir v. Brooklyn*, 139 N. Y. 6, 21 L. R. A. 641, which is, as he claims, on all fours with the case at bar, where it is held that "a city is liable for injury to property by an explosion of fireworks constituting a dangerous public nuisance, when the display was made under a permit given by the mayor of the city acting under authority of a city ordinance." In the case under consideration, it is not alleged in the declaration that the written permit was granted by the mayor acting by virtue or under authority of an ordinance of the town. This is about the only particular in which the two cases differ. In *Speir v. Brooklyn* the judge says: "It is the settled doctrine of the courts that a municipality is not bound merely by the assent of its executive officers to wrongful acts of third persons, nor could the mayor bind the city by a permit, for the granting of which he had no color of authority from the common council, and which was not within the general scope of his authority." The case of *Speir v. Brooklyn* is supported by some other authorities; and I confess I am largely in sympathy with the decision in that case, and agree with Judge Okey as to the nuisance in the case of *Robinson v. Greenville*, 42 Ohio St. 630, 51 Am. Rep. 857, where he says: "That firing cannon in a public street of a municipal corporation, except in case of imperative and urgent necessity, is an intolerable nuisance, and that all persons engaged in such unlaw-

ful act are personally liable for all damages caused thereby, are propositions concerning which there is no room for difference of opinion. But a very different question is presented when it is attempted to fasten liability for such injuries on a municipal corporation."

In the case at bar the acts complained of are equally as great a nuisance as the firing of cannon as stated in above case. Appellee contends that "the law in this state has been settled in at least two cases upon all fours with this case," viz., *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665, and *Brown v. Guyandotte*, 34 W. Va. 299, 11 L. R. A. 121. *Cooley on Torts* (pp. 738, 739) says: "Municipal corporations are to be considered, First, as parts of the governmental machinery of the state, legislating for their corporations, and planning and providing for the customary local conveniences of their people; second, as corporate bodies, through proper agencies putting into execution their plans, and discharging such duties as they have imposed upon themselves, or as the state has imposed upon them; and, third, as artificial persons owning and managing property. In this last capacity they are chargeable with all the duties and obligations of other owners of property, and must respond for creating or suffering nuisances, under the same rules which govern the responsibility of natural persons. . . . For taking or neglecting to take strictly governmental action, municipal corporations are under no responsibility whatever, except the political responsibility to their corporations and to the state. The reason is that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes, to be exercised within prescribed limits, at discretion for the public good: and there can be no appeal from the judgment of the proper municipal authorities to the judgment of courts and juries. Therefore one shows no ground of action whatever when he complains that he has suffered damage because the city he resides in has made insufficient provision for protection against fire, or because cattle are not prohibited from running at large, or because 'coasting' in the highways is not prevented, or because the operation of an ordinance which prohibits the explosion of fireworks within the city is temporarily suspended, or because provision is not made for lighting the streets. . . . Neither is a municipal corporation responsible for the failure of its officers to discharge properly and effectually their official duties; for in respect to these the officers are not properly the servants or agents of the corporation, but act upon their own official responsibility, except as they may be specially directed by the corporate authority." In *Robinson v. Greenville*, 42 Ohio St. 630 (Syl. point 4); "An assemblage of disorderly persons, after having been engaged for several hours in discharging a cannon in a public street of a municipal corporation, seriously injured a resident of the corporation, himself without fault, by one

of such discharges. Held, that such corporation is not liable for the injury, although the statute provides that the council shall have the care, supervision, and control of the streets, 'and shall cause the same to be kept open and in repair, and free from nuisance' (Ohio Rev. Stat. § 2640), and it will make no difference that the authorities of such corporation, with knowledge of such firing, took no steps to prevent the same." Also *Norristown v. Fitzpatrick*, 94 Pa. 121 (Syl. points 1 and 2): "(1) N. was injured, while crossing a street in a borough, by the firing of a cannon by a crowd of citizens. In an action against the borough to recover damages for the injury, the jury, in a special verdict, found that the cannon had been fired at short intervals, for several hours, at various points in the borough; that it was not fired at any public or authorized celebration; that a policeman was standing by and made no effort to stop the firing. A special act of assembly authorized the borough to appoint policemen, remove nuisances, etc. Held, that the borough was not liable. (2) Admitting that such an assemblage was a nuisance, and that of the worst kind, it is one that a municipal corporation cannot abate by the use of ordinary appliances, such as suffice for the removal of natural or material obstructions in or near a highway, and resort therefor must be had to the police, but for the doings or misdoings of those who compose this force, the municipality is not liable." *Campbell v. Montgomery*, 53 Ala. 527, 25 Am. Rep. 656: "The city is not liable for injuries resulting from violence, which the police, by diligent discharge of duty, might have prevented. Although appointed by the city, the police are quasi civil officers, for whose misfeasance, or nonfeasance in office, the city is not responsible, though they are personally answerable." *Lafayette v. Timberlake*, 88 Ind. 330: "A municipal corporation is not liable for a personal injury occasioned on its streets by persons making an unlawful use of its streets, as by 'coasting.' A municipal corporation is not liable for failure to exercise governmental powers, as for failure to enforce the state laws or its own ordinances. A municipal corporation is not liable for the negligence of its police officers; they are not its agents, but are public officers." *Faulkner v. Aurora*, 85 Ind. 130,

44 Am. Rep. 1: "A city, after having adopted an ordinance prohibiting, upon its streets, sports tending to produce personal injury, is not liable for a collision occurring upon a street, whereby a traveler was injured, as the result of coasting for sport, though the sport was carried on by crowds, publicly, in the presence of its officers and police, to the obvious danger of persons using the streets." *Ball v. Woodbine*, 61 Iowa 83, 47 Am. Rep. 805: "Where fireworks are discharged within the limits of an incorporated town, in violation of the ordinances of the town, whereby one is injured, the town is not liable for such injury, notwithstanding the town council and officers of the town and a majority of the citizens actively participate in the discharge of the fireworks, and the town, by its officers, makes no attempt to stop the unlawful proceeding." *Hill v. Charlotte*, 72 N. C. 55: "A municipal corporation having power, under its charter, to make ordinances for the safety of its property in the city, suspended for a short time the operation of an ordinance forbidding the use of fireworks within the city. During such time, plaintiff's building was set on fire, and destroyed, by fireworks negligently used by boys. Held, that the corporation was not liable for such destruction. *Dill. Mun. Corp. § 753*: "A municipal corporation is not impliedly liable to an action for damage, either for the nonexercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character." *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368; *Forsyth v. Atlanta*, 45 Ga. 152, 12 Am. Rep. 576; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196.

Authorities might be multiplied indefinitely. While the decisions are not all on one side, yet the great weight of the authorities, including those of our own state, is with the action of the circuit court in this case. In *Brown v. Guyandotte*, 34 W. Va. 299, (Syl. point 1), 11 L. R. A. 121, it is held that, "as to the powers and functions of a town of a public governmental character, it is not liable for damages caused by the wrongful acts or negligence of its officers or agents therein." *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665.

The judgment will have to be affirmed.

ALABAMA SUPREME COURT.

William R. WATKINS, *Appt.*,
r.

BIRMINGHAM RAILWAY & ELECTRIC
COMPANY.

(.....Ala.....)

1. A passenger who leaves his seat in a car on a dummy railroad and goes down on the lower step of the back platform as the train slows up for a street crossing at

which he is to stop, and while it is passing over the street at a speed of about 3 miles an hour, is not guilty of negligence, as matter of law, which will preclude his recovering for injuries caused by the sudden increase of speed, which throws him to the ground.

2. It is a question for the jury whether a man is guilty of negligence in stepping from a car, or preparing to do so, when it is going about 3 miles an hour.

3. Proof that placards were nailed up in cars and over platforms is not equivalent

NOTE.—For negligence in getting on or off a moving train, see *note* to *Carr v. Eel River & E. R. Co.* (Cal.) 21 L. R. A. 354; *Distler v. 43 L. R. A.*

Long Island R. Co. (N. Y.) 35 L. R. A. 762, and other cases cited in *footnote* thereto; also *Graham v. McNeill* (Wash.) *post*, 300.

to proof that they were on a particular car on which a passenger was riding.

4. A passenger who gets on the step of a car for the purpose of alighting, when the car is slowing down at a stopping place, is not riding on the platform, within the meaning of the carrier's regulations, but is merely using it as a means of egress.

(November 7, 1898.)

A PPEAL by plaintiff from a judgment of the Birmingham City Court in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. Bowman & Harsh, for appellant:

It is not contributory negligence in all cases to alight from a moving street car.

Beach, Contrib. Neg. § 291; *Birmingham Electric R. Co. v. Clay*, 108 Ala. 233; *Central R. & Bkg. Co. v. Mills*, 88 Ala. 262; *Munroe v. Third Ave. R. Co.* 18 Jones & S. 114; *Mowrey v. Central City R. Co.* 66 Barb. 43; *Murphy v. St. Louis, I. M. & S. R. Co.* 43 Mo. App. 342; *Davis v. Louisville, N. O. & T. R. Co.* 69 Miss. 136; *Filer v. New York C. R. Co.* 68 N. Y. 124; *Bowie v. Greenville Street R. Co.* 69 Miss. 196; *Leslie v. Wabash, St. L. & P. R. Co.* 88 Mo. 50; *Cincinnati, H. & I. R. Co. v. Revaloe*, 17 Ind. App. 657; *East Omaha Street R. Co. v. Godola*, 50 Neb. 906; *Consolidated Traction Co. v. Thalheimer*, 59 N. J. L. 474; *Booth, Street Railways*, § 345.

Messrs. Walker, Porter, & Walker, for appellee, cited—

Central R. & Bkg. Co. v. Letcher, 69 Ala. 106, 44 Am. Rep. 505; *Alabama G. S. R. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403; *Thompson v. Duncan*, 76 Ala. 334; *Ricketts v. Birmingham Street R. Co.* 85 Ala. 600; *Central R. & Bkg. Co. v. Miles*, 88 Ala. 256; *Hill v. Birmingham Union R. Co.* 100 Ala. 447; *McCauley v. Tennessee Coal, I. & R. Co.* 93 Ala. 356.

On rehearing.

There is no evidence that there was any necessity for appellant to be riding upon the platform and steps.

A passenger must keep his seat in the car until it stops before he gets out on the steps, unless there is some urgent necessity to the contrary.

Alabama G. S. R. Co. v. Hawk, 72 Ala. 112, 47 Am. Rep. 403; *Central R. & Bkg. Co. v. Miles*, 88 Ala. 256; *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, 37 L. ed. 285; *Ricketts v. Birmingham Street R. Co.* 85 Ala. 600.

Surely a passenger can't indulge a whim of desiring to leave a running train. The evidence tended very strongly to show that appellant was trying to alight from the train when he was injured, and he would not have been injured had he not been trying to do so.

Central R. & Bkg. Co. v. Letcher, 69 Ala. 106, 44 Am. Rep. 505.

Brickell, Ch. J., delivered the opinion of the court:

Appellant was a passenger on a train operated by appellee on its "East Lake Dummy

Line," between East Lake and Birmingham, having boarded the train at Woodlawn to ride to Twenty-Fourth street, in Birmingham. At the time he paid his fare he told the conductor he desired to get off at Twenty-Fourth street, and when the train was between Twenty-Fifth and Twenty-Fourth streets, he left his seat in the rear car, and went out to the back platform; and as the train slowed up for the west crossing, which was the proper side of the street on which to stop, and after the engine and front car had passed over the crossing, and while the rear car was passing over it, at a speed of about three miles an hour, he got on the lower step on the south side of the platform preparatory to stepping off, when the speed of the train was suddenly increased, and he fell to the ground, sustaining the injuries complained of and for which he seeks to recover in this action. There are two tendencies of the evidence with respect both to the position of the plaintiff on the step and the manner in which he fell therefrom. Plaintiff testifies that he "got down on the step with his face to the south, with his right hand hold of the guard, ready to get off," and that while "in that position, and ready to get off, when the car should stop, the car, instead of stopping, jerked forward suddenly, and threw plaintiff down;" and the inference from this testimony is that plaintiff's position on the step was the position ordinarily assumed by one about to step off a car, with his back to the car and his right hand grasping the front guard, and that he was not in the act of stepping off when the car suddenly "jerked forward." One of the inferences deducible from the testimony of the only other witness in the case was that plaintiff was standing on the step with his back to the street, his right hand grasping the rear guard, and his left hand the front guard, and that he was in the act of stepping off backwards, when the speed of the car was suddenly increased. The witness testified: "Plaintiff was standing on the lower step of the platform, and as soon as it started up he stepped off. I could not tell positively whether he stepped off or was jerked off. He was standing in a position to step off, and I could not say he was jerked off. He was standing with his right hand hold of the rear guard, and his left hand hold of the front guard, at the time the train started up, and the next instant he was off. When he touched the ground he was in a falling position, and took two or three steps and fell. As his feet struck the ground, his left hand became disengaged from the car." The instructions to the jury, given at the request of the defendant, assume that the conduct of the plaintiff, as shown by the above statement of facts, constituted negligence *per se*, and the correctness of this proposition is the principal question presented for consideration. The trial court charged, upon request of the respective parties, that each was guilty of negligence, and the only question left to the jury was, therefore, whether the plaintiff's negligence contributed proximately to his injury.

While there are some cases which hold that the act of a passenger in voluntarily leaving a car while it is in motion constitutes contributory negligence, the better doctrine, and that sustained by the great weight of authority, is that such conduct on the part of the passenger is not negligence *per se*. There may be, it is true, exceptional circumstances attending the attempt thus to alight, such as the great speed of the train, the age or infirmity of the passenger, or his being encumbered with bundles or children, or other facts which render the attempt so obviously dangerous that the court may, where the testimony is undisputed, declare as matter of law that the passenger's conduct was reckless and negligent. But ordinarily it is for the jury to say whether he acted as a reasonably cautious and prudent man would act under like circumstances. Booth, *Street Railways*, § 345; Beach, *Contrib. Neg.* 1st ed. § 90; 2 Wood, *Railway Law*, 1st ed. p. 1129, §§ 305 *et seq.*; 5 Am. & Eng. Enc. Law, 2d ed. p. 664; Bishop, *Noncont. L.* § 1101; *Eppendorff v. Brooklyn City & N. R. Co.* 69 N. Y. 195, 25 Am. Rep. 171; *Medler v. Atlantic Ave. R. Co.* 36 N. Y. S. R. 89, Affirmed in 126 N. Y. 669; *Morrison v. Erie R. Co.* 56 N. Y. 302; *Nichols v. Sixth Ave. R. Co.* 38 N. Y. 131, 97 Am. Dec. 780; *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, 37 L. ed. 284; *Fleck v. Union R. Co.* 134 Mass. 480; *Doss v. Missouri, K. & T. R. Co.* 59 Mo. 27, 21 Am. Rep. 371; *Schachert v. St. Paul City R. Co.* 42 Minn. 42; *Nance v. Carolina C. R. Co.* 94 N. C. 619; *Bovie v. Greenville Street R. Co.* 69 Miss. 196. This doctrine is not in conflict with any of the previous adjudications of this court. In *Ricketts v. Birmingham Street R. Co.* 35 Ala. 604, the proposition is stated in general terms that "stepping from a moving car without necessity, when injury is caused thereby, which could have been avoided by remaining on the car,—by the exercise of ordinary care,—is negligence, which will defeat a recovery because of prior negligence of the agents or servants of the company." But in a subsequent case it was said: "This general observation had reference to a charge which instructed the jury that plaintiff was not entitled to recover, if he was standing on the steps in front of the car, with a keg of lead in his hands, and undertook to step off while it was in motion, and such act was not that of an ordinarily prudent man." *Central R. & Bkg. Co. v. Miles*, 88 Ala. 260. It was further said in this last-mentioned case: "When the material facts are disputed, or, if clearly established, different inferences may be reasonably drawn therefrom, contributory negligence is a question of fact, exclusively within the province of the jury. This general rule is as applicable to the act of getting off a car in motion as to other cases, unless the court is prepared to lay down an inexorable rule that except in the well-settled instance of leaping under the impulse of alarm, excited by sudden exposure to great peril, to alight from a moving car is negligence in law in all cases, and under any circumstances." This case expressly recognizes the doctrine that it is not negligence in law for a passenger to attempt

to alight from a train moving so slowly that to alight therefrom would not appear dangerous to a man of ordinary prudence, but that ordinarily the question of negligence *vel non* should be submitted to the jury. 88 Ala. 263. And the doctrine was again recognized in a still later case, in which it was held that a request to charge the jury that "it is negligence for a person to attempt to board a moving train, and if he be injured by such attempt, he cannot recover," was properly refused, the court saying: "We would not say, as a matter of law, that it is contributory negligence, under all circumstances and conditions, to attempt to board a train, if moving." *Birmingham Electric R. Co. v. Clay*, 108 Ala. 233. To board a moving car cannot be said to be more dangerous than to alight from one.

There were no exceptional circumstances attendant upon appellant's attempt to alight from the car, or upon his taking a position on the step preparatory to alighting, that rendered his conduct so obviously dangerous as to justify the court in declaring it negligent as matter of law, and withdrawing from the jury the issue of negligence on the part of the plaintiff. He had notified the conductor that he desired to get off at Twenty-Fourth street, and, when the train slowed up on approaching the crossing he had a right to assume that it was being slowed up for the purpose of enabling him to get off, and that its speed would be gradually lessened until it stopped at the crossing, rather than increased with a sudden jerk. He assumed, of course, the risk of the ordinary movement of the train slowing up at a street crossing to let off a passenger, but not the risk of a sudden negligent movement at the very place where, and moment when, it should have stopped, and where, in view of the commonly-known custom of passengers on street cars, permitted, if not actually encouraged, by the companies, those in charge of the train, after having been notified to stop, should have known of the position of plaintiff. As was said in *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, 37 L. ed. 284: "It may be said that he placed himself where he was in risk of falling off, but that was a risk he could not have anticipated as a result of a sudden start before he had got off, because he had a right to assume that the car would actually stop to allow him to get off, and if it had, as it should have done, . . . no accident would have happened." So far as anything in the record indicates to the contrary, plaintiff was an active, vigorous man, in full possession of his faculties, and unencumbered in any manner, and, under one tendency of the evidence, his position on the step was that ordinarily assumed by one about to step from a car, and he exercised ordinary diligence and care while in that position, and the speed of the car was at the rate of 3 miles an hour or less. Thousands of ordinarily prudent and cautious men, under like circumstances, act in the manner in which, as the jury might have inferred from the evidence, plaintiff acted. Whether or not plaintiff was guilty of negligence in thus acting was therefore a

question that should have been submitted to the jury. As was said in *Central R. & Bkg. Co. v. Miles*, 88 Ala. 200, if it was not negligence to attempt to alight under the circumstances, it was not negligence to take, with ordinary care, a position on the step preparatory to alighting.

It results from what has been said that charges 1, 4, 5, and 7, given at the request of the defendant, were improperly given, and should have been refused. Charges 3 and 6 are predicated on the hypothesis that plaintiff attempted to leave the car in a negligent manner, and were properly given, because, as we have seen, the jury might have inferred from the testimony of Peacock that plaintiff attempted to step from the car backwards, and found that such attempt was negligence, and contributed proximately to his injuries. Charge 1, requested by plaintiff and refused, is in conformity with the law applicable to the facts in the case as declared above, and should have been given. Charge 2, requested by plaintiff, predicates his right to recover upon the hypothesis that "the sole cause of the plaintiff's injury was a sudden jerk of the train," and that he acted in attempting to alight as an ordinarily prudent man would have acted. The negligence of plaintiff, in order to bar recovery, must not only have amounted to a want of ordinary care, but must also have co-operat-

ed with the negligent act of defendant to cause the injury complained of. It is manifest that, if the sudden jerking of the train was the sole cause of the injury, there was no causal connection between the plaintiff's act and the injury, and therefore no contributory negligence on his part.

The evidence as presented in the record does not show that, at the time of the injury, there was in this particular car any placards forbidding passengers to ride on the platform. The testimony is, "There were placards nailed up in defendant's cars and over the platforms of its cars," etc., which is not equivalent to proof that such placards were in this particular car at this particular time.

The testimony offered by plaintiff as to "the custom and practice of passengers to resort to, and ride on, the platforms of defendant's dummy cars, to smoke," was, we think, properly excluded. It was not contended that plaintiff was riding on the platform when injured, but that he was on the step, for the purpose of alighting, and the evidence shows that he was not riding on the platform, within the meaning of the defendant's regulations, but was merely using it as a means of egress. *Central R. & Bkg. Co. v. Miles*, 88 Ala. 263.

Reversed and remanded.

WASHINGTON SUPREME COURT.

John H. GRAHAM, *Respt.*,

v.

E. McNEILL, Receiver of the Oregon Railroad & Navigation Company, *Appt.*

(.....Wash.....)

1. The failure of a railroad company to furnish accommodations for its passengers on a train, so that a large number of them are compelled to stand in the aisles and upon the platforms of the cars, constitutes negligence.
2. A passenger is not guilty of negligence in standing on the platform of a car when there are no vacant seats in the car and the platform is the most comfortable and convenient place for him to occupy on the trip.
3. Mere standing place on the inside of a car is not ordinarily such proper accommodation for a passenger as will make it negligence for him to stand on the car platform.
4. The rule of a railroad company that passengers must not stand on platforms is waived by receiving passengers for whom it fails to provide suitable accommodations inside its coaches.
5. The question of the negligence of a carrier and the contributory negligence of a passenger who is injured while riding on a car platform is for the jury.

(January 6, 1899.)

APPEAL by defendant from a judgment of the Superior Court for Whitman County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Cotton, Teal, & Minor, for appellant:

It is negligence *per se* for a passenger to stand on the platform of a steam railway car while it is in motion.

Bailey v. Tacoma Traction Co. 16 Wash. 48; *Thirteenth & F. Street Pass. R. Co. v. Boudrou*, 92 Pa. 475, 37 Am. Rep. 707; *Camden & A. R. Co. v. Hoosey*, 99 Pa. 492, 44 Am. Rep. 120.

An overcrowded condition of the cars preventing the passenger from obtaining a seat therein does not justify him taking a position of known danger upon the platform.

Saunders v. Chicago & N. W. R. Co. 6 S. D. 40; *Elson v. Ft. Wayne & B. I. R. Co.* 110 Mich. 494; *Bemis v. New Orleans City & Lake R. Co.* 47 La. Am. 1671; *St. Louis S. W. R. Co. v. Rice*, 9 Tex. Civ. App. 509; *Waterbury v. New York C. & H. R. R. Co.* 17 Fed. Rep. 685; *Texas & P. R. Co. v. Boyd*, 6 Tex. Civ. App. 205; *Hickey v. Boston & L. R. Co.* 14 Allen, 431; *Aufdenberg v. St. Louis, I. M. & S. R. Co.* 132 Mo. 565; *Hutchinson*, Carr. 2d ed. § 665; 2 Wood, Railroads, §§ 303, 304; *Higgins v. Hannibal & St. J. R.*

NOTE.—For negligence in riding on platform of a railroad car, see also *Mitchell v. Southern P. R. Co.* (Cal.) 11 L. R. A. 130, and *note*; 43 L. R. A.

also *Cleveland, C. C. & St. L. R. Co. v. Moneyhun* (Ind.) 34 L. R. A. 141; and *Watkins v. Birmingham R. & Electric Co.* (Ala.) *ante*, 297.

Co. 36 Mo. 418; *Tulcy v. Chicago, B. & Q. R. Co.* 41 Mo. App. 432; *Worthington v. Central Vermont R. Co.* 64 Vt. 107, 15 L. R. A. 326; *Goodwin v. Boston & M. R. Co.* 84 Me. 203; *Cleveland, C. C. & St. L. R. Co. v. Moneyhun*, 146 Ind. 147, 34 L. R. A. 141; *Camden & A. R. Co. v. Hoosey*, 99 Pa. 492, 44 Am. Rep. 120; *Jackson v. Crilly*, 16 Colo. 103; *Pennsylvania R. Co. v. Langdon*, 92 Pa. 21.

Where the plaintiff in an action for personal damages is guilty of contributory negligence he cannot recover, and where the testimony is not sufficient to sustain a verdict it is the duty of the court to grant a nonsuit.

Bailey v. Tacoma Traction Co. 16 Wash. 50.

Mr. M. O. Reed, for respondent:

Generally it is only in rare cases that the court is justified in withdrawing the question of contributory negligence from the jury.

McQuillan v. Seattle, 10 Wash. 465.

It is the duty of a railroad company to furnish each passenger with a seat; and if it fails to do so, and the passenger is required to stand up, it is liable for any injury sustained by him in consequence thereof, so long as he is, himself, in the exercise of due care.

2 Wood, Railroads, § 309.

It is not negligent *per se* for a passenger to ride upon the platform of a railway car; nor is it negligence to stand upon the platform of a car in motion when there are no vacant seats inside.

Beach, Contrib. Neg. 2d ed. § 149; *Hutchinson*, Carr. § 652; *Chicago & A. R. Co. v. Fisher*, 141 Ill. 614; *Marquette v. Chicago & N. W. R. Co.* 33 Iowa, 564; *Choate v. Missouri P. R. Co.* 67 Mo. App. 105; *Cotchett v. Savannah & T. R. Co.* 84 Ga. 687; 2 Redf. Railways, 5th ed. 257; *Zemp v. Wilmington & M. R. Co.* 9 Rich. L. 84, 64 Am. Dec. 765; *Dickinson v. Port Huron & N. W. R. Co.* 53 Mich. 44; *Willis v. Long Island R. Co.* 34 N. Y. 670; *Nolan v. Brooklyn City & N. R. Co.* 87 N. Y. 67, 41 Am. Rep. 345; *Werle v. Long Island R. Co.* 98 N. Y. 650.

If the trainmen considered it a dangerous place, it was their duty to have warned them of their danger, and if they failed so to do, the company is not absolved from liability.

Kentucky C. R. Co. v. Thomas, 79 Ky. 160, 42 Am. Rep. 208; *Zemp v. Wilmington & M. R. Co.* 9 Rich. L. 84, 64 Am. Dec. 765; *Dickinson v. Port Huron & N. W. R. Co.* 53 Mich. 44; *Louiseville, N. O. & T. R. Co. v. Patterson*, 69 Miss. 421, 22 L. R. A. 259.

Reavis, J., delivered the opinion of the court:

Action to recover damages for personal injuries sustained by plaintiff while a passenger on a railway train operated by defendant. The complaint alleges that on the 7th of October, 1895, at the town of Oakesdale, plaintiff purchased from an agent of defendant an excursion ticket which entitled plaintiff to be transported as a passenger from Oakesdale, in the state of Washington, to the city of Spokane and return, on or before the 9th day of October, 1895; that plaintiff was transported according to the terms of the ticket to Spokane, 43 L. R. A.

and on the 9th of October, 1895, while returning home, at the instance and request of defendant, and pursuant to the terms of the ticket, plaintiff entered one of the coaches of defendant's train carrying passengers from Spokane to Oakesdale, and by reason of the very crowded condition of the cars was unable to obtain a seat or room in any one of defendant's coaches, and was compelled to ride, and did ride, upon the platform of one of the cars of the train, and while so riding the conductor permitted, compelled, and allowed the plaintiff to occupy such position upon the platform without objection or protest, well knowing at the time the overcrowded condition of each and every one of the coaches in said train, and while the plaintiff was standing as aforesaid on the platform, by reason of the negligent, irregular, improper, overcrowded, overloaded, and careless manner in which the said train was being run by the defendant, and the dangerous position which the plaintiff was forced to occupy by reason of the overcrowded condition of the cars, he was, by a sudden careless and unnecessary lurch of the train, caused by the carelessness of the defendant, its servants and employees, in the management and operation of said train, thrown from the platform to the ground in a violent manner, and sustained serious injuries. The answer denies all of the allegations of negligence and damage contained in the complaint, and sets up an affirmative defense, and, in substance, states contributory negligence, by allegations that the plaintiff was drinking when he left Spokane, and continued to drink, and was so far under the influence of liquor as to be intoxicated, and that such intoxication was not known to the defendant; that, after the train left, the plaintiff was standing upon the platform, in a position where, if he had exercised care in preserving his balance, he would not have been injured; that while so standing on the platform the plaintiff's hat was blown off by the wind, and the plaintiff negligently and carelessly released his hold upon the railing of the car, and with his right hand undertook to catch his hat, and in so doing lost his balance, fell from the platform to the ground and was thereby injured, and that the plaintiff was not thrown from the platform by a careless or unnecessary, or any, lurch of the train; that while so standing and exercising care the plaintiff was in a safe position, where he could not have received the injuries complained of. The answer also affirmatively contains the following allegation: That the fact that the plaintiff was occupying the platform was not known to any of the defendant's agents or servants, and that the position occupied by the plaintiff upon the platform was not dangerous to any person occupying the same and exercising reasonable care and prudence. The plaintiff's reply merely denies each and every allegation of new matter contained in the separate defense of the answer. Evidence was submitted by both parties upon the issue of contributory negligence tendered by the defendant,—upon the part of plaintiff, that he exercised due care while

standing on the platform; and by defendant, some evidence tending to show that plaintiff attempted to catch his falling hat, and thereby fell. No evidence was directly introduced as to whether the platform, under the circumstances, was in itself a dangerous place, or otherwise. The evidence showed that an excursion train was advertised, and passengers invited to procure tickets therefor from Oakesdale to Spokane, to visit the fruit fair in the latter city; and the advertisement also requested the passengers to notify the agent, so that necessary equipments could be ordered. A large number of passengers were carried to Spokane between Monday, the 7th, and the 9th of October. On the 9th the railroad company carried a crowd of people home on twelve coaches, drawn by one engine. The evidence tends to show that all the seats were occupied, and that the aisles were very much crowded, in the respective coaches, and that people were riding on all the platforms of the train. The plaintiff got on the train at Spokane on the 9th, and passed through six crowded coaches, looking for a seat. The aisles were crowded with people standing along between the seats and leaning over upon them. The plaintiff then took a position on the platform at the rear end of the coach, where he stood. There were six other passengers standing between the two coaches, one or two of them being ladies; and there were ladies generally, as well as men, carried on a number of the platforms of the coaches. The conductor took up the ticket of plaintiff while he was standing upon the platform, and said nothing about the position which plaintiff or anyone else occupied on the platform. While the train was going at considerable speed, and on rather an incline, use of the air brake caused the coach on the platform of which plaintiff was standing to jolt or lurch, and plaintiff was thrown from the train and injured. After the introduction of testimony on the part of the plaintiff had been concluded, defendant moved for a nonsuit, which was overruled; and thereafter, at the conclusion of the case, defendant asked for an instruction for a verdict for itself, which was refused. A verdict was returned for plaintiff, and judgment entered thereon.

A number of objections were taken to the instructions of the court by the counsel for the defendant, and also objections to refusal by the court to give instructions tendered by counsel for defendant. Instructions which are deemed material here were given as follows: "Now, gentlemen of the jury, if you find from the evidence in this case that the plaintiff was a passenger upon this train at the time alleged, and that he fell or was thrown from the train or from the platform—as alleged in both the complaint and answer, I believe—of one of the coaches, it is for you to determine from the evidence in this case, first, as to whether or not the plaintiff was on that platform from his own choice, or whether or not the cars of the defendant upon that occasion were crowded in such a condition that it necessitated him to take up a position upon the platform in question in order to ride from Spokane to 43 L. R. A.

Tekoa." "Now, you are further instructed by the court that if you find from the evidence in this case that there was no room inside of the cars for the plaintiff to either sit or stand, or that there was any other reason justifying the plaintiff in remaining upon the platform, I charge you that it was, even under such circumstances, necessary for the plaintiff, while he was standing upon the platform, to take reasonable precaution to prevent being thrown from the train, by the motion thereof, from where he was; and if you find from the evidence that the plaintiff failed to take such precaution, and by reason of such failure was thrown from the train, by the motion thereof, which could reasonably be expected when running, then I charge you that the plaintiff cannot recover, and you must find for the defendant." "The jury are further instructed that it is the duty and obligation of a common carrier of passengers for hire to furnish passengers with seats for their accommodation; and, if you find from the testimony in this case that the defendant in this case received the plaintiff as a passenger, the plaintiff thereby became entitled to a seat in one of the cars of the defendant's train, and it is not the duty of the plaintiff to go from car to car while the train is in motion to find a seat; and if the defendant received the plaintiff as a passenger, and failed to furnish plaintiff with a seat, then the court instructs you that it was not negligence for the plaintiff to take a position upon the platform of one of the defendant's cars, provided that said position was one where a person exercising ordinary care and prudence would be safe from injury if the train of the defendant were run in a careful manner. The jury are further instructed that if you find from the evidence in this case that the defendant failed to furnish accommodations for the passengers on the train mentioned, so that a large number of passengers upon that train were compelled to stand in the aisles and upon the platforms of those cars, then you must find that the defendant was guilty of negligence; and, if you find that the defendant was guilty of negligence, you cannot find that the defendant is liable to the plaintiff in this action, unless you find the plaintiff himself was free from negligence upon his part." "The jury are instructed that, if there were no vacant seats in the car of defendant, the plaintiff is not chargeable with negligence in standing on the platform of the car of the defendant, providing that you find that was the most comfortable and convenient place for the plaintiff to occupy on the trip; and the defendant is not absolved from liability for injury to a passenger while riding on the platform of a car, unless the defendant provided room inside of the car for the proper accommodation of the passengers, and that a mere space on the inside, in which to stand between the seats, is not ordinarily such proper accommodation. If the jury find from the evidence in this case that there were in fact no vacant seats in the car of the defendant, it is for you to determine whether it was negligence on the part of the

plaintiff to stand on the platform, even if there was room to stand in the inner gangway. And you are further instructed that in no case can you find for the plaintiff, unless you find that the defendant was guilty of some negligence, by himself or some of his agents or servants." "If the defendant was guilty of negligence in furnishing seats for the passengers, including the plaintiff, but the plaintiff, through his own carelessness and negligence, caused the injury, then you should find for the defendant." The court, at the request of defendant, gave the following instruction: "If you find from the evidence that there was no room inside the car for the plaintiff to either sit or stand, or that there was any other reason [to] justify the plaintiff in remaining upon the platform, I charge you that it was, even under such circumstances, necessary for the plaintiff, while he was standing upon the platform, to take reasonable precaution to prevent from being thrown from the train, by the motion thereof, while running; and if you find from the evidence that the plaintiff failed to take such precaution, and by reason of such failure was thrown from the train, by the motion thereof, reasonably to be expected when running, then I charge you that the plaintiff cannot recover, and you must find for the defendant."

The testimony discloses that notices were posted on the coaches of defendant's train that passengers must not stand on the platform, and that passengers were not allowed to go upon the platform of the car while the train was in motion. It will be observed that the complaint charged that, while the plaintiff was standing on the platform, by reason of the careless manner in which the train was being run, and the dangerous position which the plaintiff was forced to occupy by reason of the overcrowded condition of the cars, he was, by a sudden, careless, and unnecessary lurch of the train, caused by carelessness of the defendant in the operation of the train, thrown from the platform to the ground in a violent manner. And the answer, after denying the negligent acts charged in the complaint, alleges that the position occupied by plaintiff upon the platform was not dangerous to any person occupying the same and exercising reasonable care and prudence, and that plaintiff was standing upon the platform in a position where, if he had exercised care in preserving his balance he would not have been injured. An inspection of the record at the trial indicates that the theory upon which the defense was conducted was that the plaintiff contributed to the falling from the train by his own carelessness in balancing and standing upon the platform. The question of the occupation of the platform by plaintiff in itself being dangerous was not particularly brought to the attention of the court or jury until instructions were requested. It was insisted by the defendant, however, during the trial, that it was not negligence contributory to the accident, on the part of the defendant, to fail to have the necessary cars and provide the necessary accommodations for its passengers returning

from Spokane on the 9th of October. Counsel for defendant now urge that it is prima facie negligence, or negligence *per se*, as a matter of law, for a passenger to stand upon the platform of a railway train in motion, and that, where such position is plainly the cause of the passenger's injury, he is guilty of negligence, as a matter of law, and that, where such position is not plainly the cause of the injury, the question of contributory negligence should be left to the jury as a fact. And the familiar rule is stated that every man in the possession of his faculties is responsible for the consequences reasonably to be anticipated from his own acts, and it is contended that reasonably prudent men do not, under ordinary circumstances, stand upon the platforms of trains in motion, and, when the passenger is thrown from the platform by some sudden lurch or jerk, then his standing upon the platform is plainly the cause of his injury; and many cases are cited by counsel, some of which sustain their contention, but some of which are upon facts essentially different from those in the case at bar. For illustration, in the case of *Cleveland, C. O. & St. L. R. Co. v. Moneyhun*, 148 Ind. 147, 34 L. R. A. 141, the plaintiff went out, not upon the platform, but upon the lower steps of the platform, and leaned over, and by a lurch of the train was thrown therefrom. A number of cases are also cited upon the presumption of negligence from the happening of the accident, and the presumptions arising therefrom, and also other cases where proper accommodations were provided for the passenger inside the coach, and he left and went out, and stood on the platform. But none of the cases examined are exactly in point with the facts under consideration here. In *Hutchinson*, Carr. 2d ed. § 652, it is stated: "Whether standing upon the platform of a railway car voluntarily, and without any necessity for so doing, would be evidence of the want of such due and reasonable care on the part of the passenger as would exonerate the company from liability in case of an accident resulting in his injury, would, of course, depend upon all the circumstances, and would be the proper subject of inquiry by a jury." See *Willis v. Long Island R. Co.* 34 N. Y. 670; *Werle v. Long Island R. Co.* 98 N. Y. 650; *Graham v. Manhattan R. Co.* 149 N. Y. 336; *Merwin v. Manhattan R. Co.* 113 N. Y. 659. *Beach*, Contrib. Neg. 2d ed. § 149, says: "It is not negligence *per se* for a passenger to ride upon the platform of a railway car; nor is it negligence to stand upon the platform of cars in motion when there are no vacant seats inside the car." In *Willis v. Long Island R. Co.* 34 N. Y. 670, it was said: "There is no rule of the common law which makes it the duty of the passenger to the carrier to select a position in the vehicle least exposed to danger through the wrongful act of the proprietor. A seat on the outside of a stage coach may be more hazardous than an inside seat if the driver negligently overturns it on a pavement or a hillside; but the selection of that position is neither negligence *per se*, nor tributary, in a legal sense, to the in-

jury." Mr. Justice Miller, in *Marquette v. Chicago & N. W. R. Co.* 33 Iowa, 564, said: "It is not, at common law, necessarily negligence in a passenger to ride on the platform of a car. *Meesel v. Lynn & B. R. Co.* 8 Allen, 234. It certainly is not improper for him to do so, if he cannot get a seat inside. *Shearm. & Redf. Neg.* § 284. Nor is it negligence in passengers, unable to find seats in a car, to pass into another, by direction of the conductor, while the train is in motion. *McIntyre v. New York C. R. Co.* 43 Barb. 532. For while moving from one car to another, without cause, while a train is in motion, may be negligence, yet, if a passenger does so in obedience to a direction or request of the officer in charge of the train, the act may be deemed consistent with proper care, since passengers have a right to rely on the judgment of the officers of the train in respect to such matters, and are bound to obey the reasonable directions of such officers. *Shearm. & Redf. Neg.* § 285. In judging of what is negligence in a particular case, regard is to be had to the growth of science and the improvement of the arts which take place from time to time; for many acts or omissions which are now evidence of gross negligence were but a few years ago consistent with great care and skill, and, on the other hand, many things, which a few years since would have been considered negligence, are now consistent with proper care and skill. *Shearm. & Redf. Neg.* § 7. And especially is this true in respect to railroad carriages, which within a few years have been transformed from crude and clumsy cars into magnificent traveling palaces, supplied in many cases with the comforts, conveniences, and even luxuries of elegant dwellings, in which the public may travel at a speed and with a degree of safety which thirty years ago would have been in the highest degree perilous to life and limb. And within a very short period there have been such wonderful improvements in the platforms and couplings of railway passenger coaches as that passengers may, with comparative safety, pass from the other cars of a train to the sleeping and dining coaches, on some of the fastest trains of this country, while in motion. Daily, ladies, with and without gentlemen, by hundreds, pass from car to car, and especially to sleeping and dining coaches, while the train is moving at a rate of speed much above 20 miles an hour, and yet accidents from this practice seldom occur. It cannot be true, therefore, as a matter of fact, that to pass from one car to another while the train is in motion at the usual rate of speed is so necessarily dangerous that it may not be justified under any circumstances; nor can it be true, as a fact, that the removal of a passenger from one car to another while the train is moving at its regular speed is so necessarily dangerous as that it cannot lawfully be done by the officer in charge of the train, under any circumstances, or for any cause. But if the fact were otherwise, it should be left to the jury to find upon the evidence, and it is not the province of the court to pronounce it so as

43 L. R. A.

matter of law." 2 Wood, *Railway Law*, § 308, declares the rule: "A railroad company is bound to furnish its passengers reasonable and proper accommodations for traveling, and if it has an insufficient number of cars, so that passengers are compelled to ride upon the platform, it is liable for injuries received by them while riding there." See also § 308, as to the duty of the railroad company to furnish each passenger with a seat. It cannot be successfully maintained now that the platform of a railway train is necessarily such a position of danger that no ordinarily prudent person would go upon it while the train was in motion. Such contention would be false to common experience in railway travel. Prudent and careful persons do frequently go across platforms of moving trains, and do stand upon them; and the conductors of trains do collect fare from passengers upon platforms, and frequently on ordinary roadways, and in first-class passenger coaches do not take any notice of such position of travelers. As observed by some of the courts, the modern improvements for safety in coaches, platforms, train appliances, and roadways have largely modified the risk of standing on the platform. But the defendant in this instance had a notice to the passengers to keep off the platform. Companies may make reasonable rules, and the passenger must obey them. Such a rule could doubtless be enforced, but such rules may also be waived by the acts of the company. *Hutchinson, Carr. supra*, very fairly states the rule. But the defendant in this case waived its notice against standing on the platform when it failed to provide suitable accommodations for the plaintiff inside its coaches, and yet received him on its train. In the case of *McQuillan v. Seattle*, 10 Wash. 465, it was said: "Generally the question of contributory negligence is for the jury to determine from all the facts and circumstances of the particular case, and it is only in rare cases that the court is justified in withdrawing it from the jury."

The evidence discloses clearly that defendant was negligent in its duty to the passenger when the train left Spokane in its overcrowded condition. Not only did it not furnish seats for the passengers, but the passageways inside the coaches were crowded by standing passengers, and the platforms had men and women standing thereon who could not be accommodated inside the coaches; and, as has been observed by some of the authorities, it is the duty of the conductor to seat passengers. The instructions given by the superior court are not phrased in happy terms, perhaps; but, taken altogether, the question of contributory negligence, and also of the principal negligence, was fairly submitted to the jury, and the case cannot be reversed because the language used in the instructions was not aptly chosen, and may be open to criticism.

The judgment is affirmed.

Anders, Dunbar, and Gordon, JJ.,
concur.

CONNECTICUT SUPREME COURT OF ERRORS.

Mary J. NOLAN, Admr., etc., of Jerry Nolan, Deceased,
v.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, Appt.

(70 Conn. 159.)

1. Failure of the superior court to determine the facts correctly cannot be considered in the supreme court of errors.
2. An erroneous conclusion drawn by the trial court from facts found by it from the evidence offered may be corrected on appeal.
3. Findings by a trial court that a railroad did not sufficiently provide for the operation of two trains which came into collision; that it was negligent in

NOTE.—Duties of master and servant with regard to rules promulgated for the safe conduct of a business.

- I. General principles.
- II. Limits of the duty to promulgate rules.
 - a. In general.
 - b. Extent of employer's duty tested by the usage of other persons engaged in the same business.
 - c. Rules prescribed must be definite and intelligible.
 - d. Necessity for rules,—whether for court or jury to decide.
- III. Habitual practice of employees, how far a legal substitute for a rule.
- IV. The master's duty to promulgate his rules.
- V. The master's duty to enforce his rules.
- VI. No recovery by servant unless omission to promulgate rules was proximate cause of the injury.
- VII. Construction and meaning of rules.
- VIII. Illustrative decisions as to the sufficiency of rules framed for the protection of railroad servants.
 - a. Rules for the protection of car repairers, and other railroad employees doing work on side tracks.
 - b. Rules to prevent the automatic or unauthorized movements of engines or cars.
 - c. Rules to obviate injury from the sudden starting of railway cars.
 - d. Rules regulating the switching of cars.
 - e. Rules as to the manner of loading railway cars.
 - f. Rules as to the operation of trains by schedules or special orders.
 1. Duty as to trainmen.
 2. Duty as to employees working on or near tracks.
 - g. Rules prescribing means for warning employees of the proximity of moving trains or cars.
- IX. Illustrative decisions as to the sufficiency of rules framed for the protection of servants in miscellaneous employments.
- X. Relation between the doctrine of common employment and the duty of a master to promulgate rules.
 - a. Duty of making rules, assignability of.
 - b. Duty to publish the rules, assignability of.
 - c. Position of employees vested with power to suspend general rules by special directions.

falling so to provide by special order in addition to the general rules; that an injury resulted from this negligence; and that the railroad did not exercise ordinary care in the movements of trains,—although called findings of fact are reviewable by the appellate court as conclusions of law.

4. The legal duty of a railroad company operating a single-track road to its employees is not violated by failure to provide in its rules for giving those in charge of trains moving in the same direction telegraphic information of the relative position of the trains.
5. A railroad company operating a single-track road is not negligent in failing to give those in charge of trains moving in the same direction telegraphic information of the relative position of the trains.
6. A finding that conditions attending

XI. Duty of the servant in regard to the rules promulgated by his employer.

- a. Generally.
- b. Violation of rule by plaintiff not a bar to recovery, unless shown to be proximate cause of injury.
- c. Servant not bound by rules not known to him.
 1. General principles stated.
 2. When a servant is deemed to have knowledge of a rule.
- d. Validity of rules as regards employees.
 1. Public policy.
 2. Reasonableness.
- e. Illustrative cases with regard to the violation of rules by the servant.
 1. Disobedience to rules respecting signals.
 2. Disobedience to rules regulating the work of coupling cars.
 3. Disobedience to rules regulating the operation of trains.
 4. Disobedience to rules in regard to switching.
 5. Disobedience to rules regulating the manner of getting on or off railway cars.
 6. Rules directing employees to be or not to be in particular places.
 7. Disobedience to rules prescribing that appliances shall be inspected.
 8. Disobedience to rules requiring servant to report dangers.
 9. Disobedience to rules regulating the manipulation of machinery.
 10. Disobedience to rules regulating personal habits of servants.
- f. Waiver of rules habitually disregarded.
 1. Doctrine of waiver stated.
 2. Acquiescence in violation, when implied from employer's knowledge.
 3. Rationale of doctrine.
 4. Express agreement to obey rules, effect of.
- g. Obligation of rules and other duties, effect of conflict between.
- h. Injuries caused by co-servants' violation of rules, liability for.
 1. Under common-law principles.
 2. Under statutes modifying the common law.

two trains moving in the same direction on a single-track road created an emergency for which the rules governing the operation of trains did not provide, requiring the exercise of ordinary prudence in giving special instructions, is a finding of law reviewable by the appellate court.

7. An emergency requiring telegraphic communications to those in charge of trains moving in the same direction, of their relative position is not shown by the fact that the rear train is an engine pushing a snow plow running faster than the forward train and throwing snow, which interferes with the lookout, while the forward train is behind schedule time and required to stop for cars at a siding where trains stop only occasionally and at irregular intervals.
8. The meaning of the word "negligent" is a question of law where the law declares that the other conditions being present a person is liable for the injury caused by his conduct if it is negligent in the sense denoting

the conception of moral blame or fault imputed to a person legally liable for the consequences of an unintentional act.

9. A finding of negligence cannot be reviewed for error in law if a separate statement of the facts ascertained and the application of the law thereto is impracticable, so that the case cannot serve as a precedent.
10. The mere fact that rules of a railroad company for the regulation of the movement of trains on the road are sometimes violated by employees to the knowledge of conductors does not charge the company with liability for injury to an employee for failure to enforce its rules.
11. The rule exempting an employee from liability for injury to one servant through the negligence of a fellow servant is too firmly established to be reversed or seriously modified by any power vested in courts.

(January 5, 1898.)

I. General principles.

As to the duty to adopt a safe system in so far as it relates to the duty of inspection, see, note "*Knowledge as an element of the employer's liability to an injured servant.*" Walkowski v. Penokee & Gogebic Consol. Mines, 41 L. R. A. 33.

It has been judicially recognized that rules for the conduct of a business are prescribed both for the purpose of increasing the economic efficiency of the various instrumentalities which are brought into use, and for the purpose of lessening the risks which the servants will have to incur. *Sutherland v. Troy & B. R. Co.* (1891) 125 N. Y. 737.

The law, however, takes no account of the financial aspects of an employer's arrangements. From a juridical standpoint those arrangements are material only in so far as they may affect the safety of others. The persons who are most directly and vitally interested in the manner in which an industrial concern is carried on by its proprietor are necessarily those who assist him in his enterprise, and the rationale of the obligations which arise out of the situation is not far to seek.

However experienced and careful servants may be, a master is clearly not justified in conducting a complicated business on a system which assumes them to be capable of selecting, upon each and every occasion, that particular course of action which is the safest both for themselves and for their fellow employees. In the very nature of the case, many of the elements of the problems involved in the process of making a choice between alternative methods of work at any given time and place must be unknown to persons whose range of view is necessarily limited to their own immediate environment. Some of the perils produced by unavoidable ignorance may doubtless be obviated by properly instructing the servants. But even after the very fullest information of which the circumstances admit has been imparted to them, there will, in many lines of business, remain a residuum of situations which can be rendered safe for them only by the issuance of peremptory directions which leave nothing to their own discretion, and require them to do certain work in a specified manner. Wherever, therefore, the master should, as a reasonably prudent man, see that there is a probability of injury to some individual servant or to some class of servants, if they and their fellow employees are left to regulate their actions according to their own ideas of what is proper, he is charged with the

obligation of protecting them, as far as possible, both by prescribing the lines upon which the ordinary routine of their work shall be conducted, and by declaring what precautions shall be taken by them to minimize the danger arising from special emergencies.

It has accordingly been recognized from a very early period in the evolution of the law relating to the employer's liability for injuries to his servants that he is, to use the language of an eminent English judge in a noted case, "no less responsible to his workman for personal injuries occasioned by a defective system of using machinery, than for injuries caused by a defect in the machinery itself," or, in other words, that "a master is responsible in point of law, not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used." Per Lord Watson in *Smith v. Baker* [1891] A. C. 325, 353, referring to the opinions of Lord Chelmsford in *Barton's Hill Coal Co. v. McGuire* (1858) 3 Macq. H. L. Cas. 310, and of Lord Wensleydale in *Weems v. Mathieson* (1859) 4 Macq. H. L. Cas. 226.

About the same time as these last-cited cases were decided the court of exchequer applied a like principle in *Vose v. Lancashire & Y. R. Co.* (1858) 2 Hurlst. & N. 728, 27 L. J. Exch. N. S. 249, 4 Jur. N. S. 364. (See VIII. a, *infra*, for the facts.)

The duty upon which this responsibility is predicated is therefore one particular branch of the general duty of the master not to expose his servants to extraordinary dangers. *Reagan v. St. Louis, K. & N. W. R. Co.* (1897) 93 Mo. 348.

Thus, in a case in which the absence of regulations was held to raise for the jury the question whether the master was guilty of negligence, the court remarked, *arguendo*: "It is the duty of the master having control of the times, places, and conditions under which the servant is required to labor, to guard him against probable danger in all cases in which that may be done by the exercise of reasonable caution." *McGovern v. Central Vermont R. Co.* (1890) 123 N. Y. 280.

Sometimes the courts have apparently failed to realize completely the distinction between the master's responsibility for the safety of his system in so far as it depends on the permanent arrangements of the instrumentalities, and his responsibility for that safety, in so far as it depends upon general directions designed to guide the servants in respect to the use of those instrumentalities. See, for example, *Richlands*

A PPEAL by defendant from a judgment of the Superior Court for Fairfield County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence in which defendant suffered default and the contested question was as to the amount of damages. *Reversed.*

The material facts on which the plaintiff relied for a recovery were that the defendant sent out a snow plow and locomotive following a freight train, and that it conducted itself negligently in the management and equipment of the train by failing to give proper telegraphic information to those in charge of them as to their relative position; by failing to give proper orders as to their running; by running the snow plow at a dangerous rate of speed; by failing to notify the snow plow when the freight train was

left standing on the track; by failing to have a sufficient crew on the freight train; by failing to have sufficient brakes on the snow plow; by improper construction of the snow plow so as to prevent a proper lookout along the track; by failing to have the proper means of signaling from the snow plow to the locomotive; and by failing to exercise proper supervision of the running of the trains.

The facts found by the trial judge were as follows:

"(1) On March 12, 1896, the defendant was a duly organized corporation under the laws of the state of Connecticut, and was operating its single-track road with sidings and switches extending from the city of Bridgeport, in the state of Connecticut, to the city of Pittsfield, in the state of Massachusetts, and forming a part of what is

Iron Co. v. Elkins (1893) 90 Va. 249. The general principle as to the duty to prescribe rules was enunciated in the course of the argument, but, as a matter of fact, the injury was caused by the failure of the master to provide adequate protection against flying objects.

The following selection of extracts from various opinions will indicate sufficiently the language in which the obligation of protecting the servant by a proper system has been defined. Other instances will be found scattered through the passages quoted below from cases dealing with special points.

The failure of one "who employs servants in a complex and dangerous business" to "prescribe rules sufficient for its orderly and safe management" is negligence. *Richlands Iron Co. v. Elkins* (1893) 90 Va. 249.

"Without such regulations their employees would be at the mercy of others [coemployees] whom they had no election in employing, or over whose actions they have no control." *Pittsburg, Ft. W. & C. R. Co. v. Powers* (1874) 74 Ill. 341.

"The rule is well settled that it is the duty of all persons and corporations having many men in their employ in the same business to make and promulgate rules which, if observed, will afford protection to the employees. This is the more necessary where the manner of doing business is such that the danger or safety of an employee at any given time depends upon the way in which some other employee is engaged at the same time. In such a case, where the action of one employee may make that dangerous which, if he took no action, would be safe, it is undoubtedly the duty of the common employer to make such rules as will enable the person whose safety is put at risk, to be advised of the danger and to avoid it." *Eastwood v. Retsof Min. Co.* (1895) 86 Hun. 91.

"It is settled doctrine that a railroad company is bound to guard its employees against negligence of coemployees, so far as it can, by the enactment and promulgation of reasonable rules in the management of its business." *Abel v. Delaware & H. Canal Co.* (1891) 128 N. Y. 662.

"It is also the duty of a railroad company to use reasonable and proper precautions to protect its employees from injury while engaged in the performance of their duties." *Gould v. Chicago, B. & Q. R. Co.* (1885) 66 Iowa, 590.

"It is certainly the duty of railway companies to have suitable regulations for the doing of their business, which will give reasonable protection to their employees where the exposure is such that prudence requires it." *Houston* 43 L. R. A.

& T. C. R. Co. v. Strycharski (1894) 6 Tex. Civ. App. 555.

"A failure to make proper rules or establish a proper method for the conduct of his business" will make the master liable for injuries to his servant, caused by improper or negligent conduct of the work by coemployees, which the observation of a proper and sufficient rule would have prevented." *Ford v. Lake Shore & M. S. R. Co.* (1891) 124 N. Y. 493, 12 L. R. A. 454.

"When a railroad company's employees are known to be doing their work in a reckless and dangerous manner it is the duty of the company [master] to change the manner of operation by some regulation or rule." *Doling v. New York, O. & W. R. Co.* (1897) 151 N. Y. 579.

"The intestate, upon entering the defendant's employ, assumed and assented to the ordinary risks incident to the service. But employers cannot avail themselves of this assent unless they take reasonable precautions to insure the servant's safety while in the performance of his duties, and there can be no exemption from liability for injuries sustained by a servant, when such injuries are traced to the employer's failure to take such precautions. Within the operation of this principle a corporation is bound to carry on its business under a proper system and under reasonable rules and regulations, and if, through a failure to establish such, a servant is injured, the corporation is liable. The master is responsible for his own negligence and want of care, and this may appear from his failure to furnish proper machinery and materials for the work, or from the employment of incompetent and unfit servants and agents, or from a failure to make proper rules or establish a proper method for the conduct of his business." *Ford v. Lake Shore & M. S. R. Co.* (1891) 124 N. Y. 493, 12 L. R. A. 454.

In *Reagan v. St. Louis, K. & N. W. R. Co.* (1887) 93 Mo. 348, the court cited with approval the following passage from the treatise of *Shearm. & Redf. Neg. § 93*: "It is also the duty of the master, so far as he can by the use of ordinary care, to avoid exposing his servants to extraordinary risks, which they could not reasonably anticipate, though he is not bound to guarantee them against risks. One who employs servants in complex and dangerous business ought to prescribe rules sufficient for its orderly and safe management. His failure to do so is a personal negligence, for the consequences of which he is liable to his servants."

The subjoined statement of the general rule by another text-writer has been adopted in *Texas & N. O. R. Co. v. Echols* (1894) 87 Tex. 330: "If a master is engaged in a complex

known as the 'Berkshire Division' of the defendant. (2) At all of the regular stopping places for trains, with three exceptions, the defendant maintains a telegraph office, and the departure of all trains from stations having a telegraph office is at once telegraphed to New Haven, to the train despatcher. (3) At all of the regular stopping places for trains, with three exceptions, the defendant maintains a time board, upon which the station agent places in large figures the time of departure of each train from these stations. The time board apprises the conductor and engineer of each train of the time of departure of the train last at the station, and going in the same direction, and these officials rely upon such information in regard to the position of trains in advance, in the absence of special order. (4) The movement of all trains upon this

division was in the exclusive control of the train despatcher at New Haven. Conductors and engineers and all officials were bound to obey his orders. He acted in the name, by the authority, and in the place, of the defendant. (5) The division superintendent ordered trains to run, and the train despatcher gave the running orders by telegraph. (6) The train despatcher had at all times the location of every train, regular and extra, running upon this division, as they passed the telegraphic stations, and knew at what stations or places each train was to stop, and about the length of time it would be required to stop. (7) Whenever special orders to control the movements of trains are necessary, the train despatcher at New Haven sends such orders by telegraph to the operator located at a station which such train is approaching, and the operator hands

business that requires definite regulations for the safety and protection of his employees, a failure to adopt proper rules, as well as laxity in their enforcement, is negligence *per se*, and the establishment of defective or improper rules is such negligence as renders the master responsible for all injuries resulting therefrom. Wood, Mast. & S. § 403; 3 Wood, Railway Law, § 382."

To the same general effect, see also Pittsburg, Ft. W. & C. R. Co. v. Powers (1874) 74 Ill. 341; Hartvig v. N. P. Lumber Co. (1890) 19 Or. 522; Evansville & T. H. R. Co. v. Holcomb (1894) 9 Ind. App. 198; Gulf, C. & S. F. R. Co. v. Finley (1895) 11 Tex. Civ. App. 64; Crew v. St. Louis, K. & N. W. R. Co. (1884) 20 Fed. Rep. 87 (in charge to jury).

The doctrine that continuance of work with knowledge of a danger may charge the servant with contributory negligence or an assumption of the risk has been applied in reference to a defective system.

Thus, a brakeman who is notified by a rule of the company that he will sometimes have to couple cars which have lumber, etc., projecting over their ends, and is required to observe the manner in which such cars are loaded, cannot, even if such method of loading is negligent, recover for injuries received in coupling a car so loaded, for he is negligent in voluntarily engaging in the service with knowledge of the company's nonperformance of its duty. Brennan v. Michigan C. R. Co. (1892) 93 Mich. 157.

In Texas & P. R. Co. v. Cumpston (1897) 15 Tex. Civ. App. 493, one of the assignments of error was as follows: "The court erred in charging the jury that defendant would be liable if it did not establish rules and regulations to protect its employees. This was error, because there was no pleading nor evidence showing what rules and regulations should have been established." But the court of appeals said: "It was not necessary for appellees to show, either by their pleading or evidence, exactly what rules and regulations should have been established. The pleading and testimony were amply sufficient to show that proper rules and regulations should have been provided, that it was practicable, and that they were not provided. The evidence indicates that the company did not use ordinary care for the protection of its employees, but negligently left them in a dangerous place, without proper regulations for their safety."

The above principle is sometimes expressed in terms of the doctrine as to the assumption of risks by the servant.

"The rule that the servant takes the risks of the business is subject to the qualification 43 L. R. A.

that the master must exercise reasonable care to guard the servant, while engaged in his duties, from unnecessary hazards, including hazards from negligence of coemployees. In the business of a railroad this duty is especially important in view of the dangers of the employment, and the serious consequence likely to ensue from the negligence of coemployees." Abel v. Delaware & H. Canal Co. (1891) 128 N. Y. 662.

In Sheehan v. New York C. & H. R. R. Co. (1883) 91 N. Y. 332, it was argued by the defendant's counsel that the plaintiff took the risk of defects in the defendant's system of running trains by telegraphic orders, but the court said: "There are cases where such an argument might apply, but I am not aware of any principle which releases the master from liability to an employee who has been injured by the very act of his employer, or by the omission, on its part, to provide rules which, faithfully carried out, would insure safety. There was no such bargain between the parties, and public policy forbids that one should be implied." Compare Wild v. Oregon Short Line R. Co. (1891) 21 Or. 159; Ford v. Lake Shore & M. S. R. Co. (1891) 124 N. Y. 493, 12 L. R. A. 453.

So "if the rules and schedules of a railroad company, calculated and provided for the purpose of running the trains with safety and avoiding collisions, be defective or ambiguous, and an employee knows the rules, or has ample opportunity to know them to such an extent as will authorize the authorities of the road to presume that he does know them, and he continues in the service of the company and makes no complaint or endeavor to have the defect remedied, he may be deemed to have waived his right, and he is barred from claiming damages for an injury suffered by him in consequence of such defect." Georgia R. & Bkg. Co. v. Rhodes (1870) 56 Ga. 645.

It devolves on the master to show that he has observed the duty of making proper regulations. It is an affirmative fact that he can readily show, whilst usually the plaintiff cannot prove its negative. The servant must prove negligence, and to exonerate himself the master should show that proper regulations to prevent accidents had been adopted, and these having been shown to have been made, the presumption is that the act was in violation of the rule, and the company will not be liable, unless the servant inflicting the injury was incompetent, and the company knew it, or had reasonable and proper means of knowing it. Pittsburg, Ft. W. & C. R. Co. v. Powers (1874) 74 Ill. 341.

a copy of said order to the conductor and a copy to the engineer of said train. (8) On said day the regular way freight, known as '1411,' and so designated hereafter in this finding, started from Great Barrington at 5:30 A. M. It gradually fell behind its schedule time, and at Falls Village was considerably late. Freight trains are often late, and everyone connected with the operation and movement of defendant's trains knew this. (9) At Great Barrington the conductor received an order from the division superintendent to stop at Kent Furnace, and attach to 1411 three freight cars on siding there. (10) Kent Furnace is between North Kent and Kent, and is nothing but a railroad siding, where freight trains occasionally stop, but only upon orders from the division superintendent. There is no station, no station agent, no telegraph, or time board there.

There are only two other places on this division where freight trains stop similar to this place, viz., Trumbull Ice Pond and Glendale. Kent Furnace is an unusual stopping place, not named upon the official time table in use by defendant's employees. (11) Freight 1411 ran at the rate of from 20 to 25 miles an hour,—the usual speed of freight trains,—and when it left Cornwall Bridge at 10:28 A. M., its last stopping place, and the last station at which telegraphic orders could have been issued to it, it was one hour and eighteen minutes behind its regular schedule time. (12) The only station between Cornwall Bridge and Kent is North Kent, where they have no telegraph, and where 1411 was not required to stop, and did not stop, on this day. (13) Kent Furnace is about 7 miles and Kent about 8½ miles from Cornwall Bridge. (14) Freight 1411

II. Limits of the duty to promulgate rules.

a. In general.

The extent and quality of the obligation of the master to frame rules for the guidance of his servants will be more clearly understood if we advert to the decisions in which the language used has a special relation to the limits of that obligation.

On the one hand, we find in those decisions such positive forms of statement as these: "The law imposed on it [the master] the duty of making and enforcing such reasonable rules and regulations for the government of men in its [his] service as to prevent or guard against injury by one servant to another, in so far as that was reasonable and practicable." *Doing v. New York, O. & W. R. Co.* (1897) 151 N. Y. 579.

"The defendant, in making rules for the government of its employees, is bound to use ordinary care and to anticipate and guard against such accidents and casualties as may reasonably be foreseen by its managers exercising such ordinary care." *Warn v. New York C. & H. R. R. Co.* (1894) 80 Hun, 71.

The establishment of defective or imperfect rules is as much negligence as the failure to establish any rules. *Texas & N. O. R. Co. v. Echols* (1894) 87 Tex. 330.

Where an employer knows, or ought to know, that a certain rule is inefficient, either because it is not calculated to furnish proper protection, or because it is habitually disregarded by employees, it becomes his duty to adopt such other additional regulations as will secure the safety of the servant concerned. *Fordyce v. Briney* (1893) 58 Ark. 206.

Otherwise he must see to it at his peril that the existing rule is carried out. *St. Louis, A. & T. R. Co. v. Triplett* (1891) 54 Ark. 280, 11 L. R. A. 773. (See generally, as to the duty to enforce existing rules, *V. infra.*)

As against the employer, his own rules furnish competent evidence of a proper standard of care. *Baltimore & O. R. Co. v. Camp* (1895) 31 U. S. App. 213, 65 Fed. Rep. 952, 13 C. C. A. 233.

Since the law, irrespective of the rules of a railroad company, imposes upon it the duty of inspecting its cars properly, it is not error to allow a plaintiff to prove that the rules of the company required an inspection at terminal and intermediate points. *Kentucky C. R. Co. v. Carr* (1897) 19 Ky. L. Rep. 1172.

But it would be error to allow a witness to be asked a question based on the hypothesis that the rules of the employer can, as against the servant, be referred to as evidence that a 43 L. R. A.

certain way of doing the work was careful. The law, and not the rule of the employer, defines negligence. *Pennsylvania Co. v. Stoelke* (1882) 104 Ill. 201.

The negative aspect of the same principle is illustrated by such statements as the following, in which the language of the courts is either given verbatim or followed very closely.

An employer is "only bound to use ordinary care in formulating rules, and it is not reasonable to proceed upon the assumption that every injury to an employee can be guarded against and prevented by making such rules. It is the duty of the defendant [employer] to anticipate and guard against, by rules or otherwise, only such accidents and casualties as might reasonably be foreseen by him in the exercise of ordinary prudence and care." *Berrigan v. New York, L. E. & W. R. Co.* (1892) 131 N. Y. 582.

"Even if it could be shown, after the accident occurred, that it might have been prevented by adopting and enforcing some suitable rule, that would constitute no proper test of liability. The failure to adopt rules is not proof of negligence, unless it appears from the nature of the business in which the servant is engaged that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity of such precautions." *Morgan v. Hudson River Ore & I. Co.* (1892) 133 N. Y. 666.

The law "does not impose upon a railroad company the duty of making a specific rule for every particular act that is to be performed by its employees. The failure to adopt a particular rule is not evidence of negligence, unless it appears that the master in the exercise of reasonable care should have foreseen and anticipated the necessity therefor." *Ely v. New York C. & H. R. R. Co.* (1895) 88 Hun, 323; *S. P. Burke v. Syracuse, B. & N. Y. R. Co.* (1893) 69 Hun, 21.

Thus, a railroad company is not negligent in failing to publish rules for the regulation of such simple work as the moving of cars by hand on a siding down a slight grade. *Moore Lime Co. v. Richardson* (1897) 95 Va. 326. (Plaintiff's decedent walked behind the car he was pushing, and was caught by another which overtook it.)

"A rule easily followed by servants, and, when followed, securing safety to co-servants, is a reasonable compliance with the duty owing by the company to them. *Niles v. New York C. & H. R. R. Co.* (1897) 14 App. Div. 70.

Unless the rules adopted by railroad companies are shown to be "palpably unreasonable or clearly insufficient," they ought not to be charged with negligence on account of their

reached Kent Furnace about 10:50 A. M. and while the train remained on the main track the engine began the work of getting the three freight cars from the siding to the main track. (15) The usual running time for the freight train between Cornwall Bridge and Kent Furnace, where no stop is made at North Kent, is twenty-one minutes, and the usual stopping time to do the work at Kent Furnace is fifteen minutes. (16) The work at Kent Furnace on this morning would have taken the usual stopping time, fifteen minutes. (17) Between 5:30 and 6 A. M. an extra train, known as '474' and hereafter in this finding so designated, consisting of a snow plow, locomotive, and tender, the snow plow being ahead of the locomotive and tender, and pushed by the locomotive, left Pittsfield, for the purpose of clearing the track of the defendant of snow. (18) Train 474 ran

at about 40 miles an hour, and steadily gained on 1411. In order that 474 should do effective work, it was necessary that it run between 35 and 40 miles an hour. (19) Train 474 received telegraphic orders at Falls Village to run extra to New Milford. New Milford is the fourth station below Kent. This gave 474 the right of the track to New Milford, keeping ten minutes off the time of all regular trains. Thereafter train 474 ran under this order, which was in accordance with the rules. When 474 reached a station, and the time board showed that the last train at the station departed ten minutes or more before, 474 might continue its run in the absence of special order. (20) Train 474 passed Cornwall Bridge at 10:52 A. M. twenty-four minutes behind freight 1411, under the order recited in paragraph 19, *supra*. (21) Train 474 knew freight 1411

adoption and use. *LITTLE ROCK & M. R. Co. v. BARRY*.

The promulgation of such rules as, if faithfully obeyed, will give reasonable safety to workmen, is a full discharge of the employer's duty. *Evansville & T. H. R. Co. v. Tohill* (1895) 143 Ind. 60.

The test of the sufficiency of a rule is that it shall be reasonably well calculated to secure the safety of the employees, if it is faithfully obeyed. *Hannibal & St. J. R. Co. v. Kanaley* (1888) 39 Kan. 1. For similar expressions, see *Warn v. New York C. & H. R. Co.* (1894) 80 Hun. 71; *Texas & P. R. Co. v. French* (1898, Tex. Civ. App.) 22 S. W. 866.

Or that it "protects the servant as far as reasonably can be done against the hazard of the negligence of coemployees." *Abel v. Delaware & H. Canal Co.* (1891) 128 N. Y. 662.

Or that, "if faithfully and carefully observed, it will give reasonable protection" to the employee concerned. *Abel v. Delaware & H. Canal Co.* (1886) 103 N. Y. 581, 57 Am. Rep. 773.

Or that it is a safeguard upon which "a person of ordinary prudence" may rely as affording "reasonable protection" against the danger to which the workman was exposed in the particular case. *Fordyce v. Briney* (1893) 58 Ark. 206.

Before a railroad company can be found guilty of negligence in not making and promulgating any specific rule, it must at least be shown that the rule is reasonable, proper, and, if observed, would give reasonable protection to its employees. *Larow v. New York, L. E. & W. R. Co.* (1891) 61 Hun. 11.

In the absence of evidence showing that rules would be useful or feasible under the circumstances, the master cannot be found negligent in not having promulgated them. *Atchison, T. & S. F. R. Co. v. Carruthers* (1896) 56 Kan. 309.

Compare *Terre Haute & I. R. Co. v. Becker* (1896) 146 Ind. 202, where the court denied that the company was negligent in omitting to promulgate an additional rule which would have been useless and supererogatory. (See VIII. f, 1, *infra*, *sub finem* for the specific facts of the case.)

"A charge of negligence [on the part of an employer] for not making rules is avoided by the proof of a rule and practice, actually in force, which rendered any other rule apparently unnecessary." *Kudik v. Lehigh Valley R. Co.* (1894) 78 Hun. 492.

In *Simpson v. Central Vermont R. Co.* (1896) 5 App. Div. 614, plaintiffs' counsel contended that the defendant might have made further rules beside those in force, but the court re- 43 L. R. A.

marked that "so long as the rules which are promulgated will, if observed, secure safety, it is wiser to leave the making of new rules to the company."

"The doctrine imposing liability upon railroad companies for failure to adopt particular rules, the necessity for which was not apparent to them, should not be unduly or unreasonably extended. And since the company has a paramount interest in protecting its property from injury or destruction, and also in avoiding all liability for damages to employees and passengers, and the officers of the company deemed this system of signals and rules for the management and control of the movements of trains to be fully adequate for all purposes, these considerations must have some weight in determining whether the omission to promulgate a particular rule constitutes a neglect of duty, in not being able to foresee certain contingencies." *Niles v. New York C. & H. R. R. Co.* (1897) 14 App. Div. 58.

An employer cannot be held liable on the ground of a failure to make rules to provide for a contingency which could not reasonably be anticipated. *Whalen v. Michigan C. R. Co.* (1897, Mich.) 72 N. W. 323 (unexpected, unusual, and unexplained failure of an air-brake to work).

The fact that an old and experienced employee, fully aware of the possible dangers of the situation existing at the time of the accident, deemed it unnecessary to adopt the precaution which it is suggested should have been embodied in a rule, has been mentioned as a circumstance tending very strongly to show that it was not negligence not to adopt such a rule. *Niles v. New York C. & H. R. R. Co.* (1897) 14 App. Div. 70.

On the ground that an employer is not under any duty to make rules for the purpose of regulating acts which are in themselves negligent, it has been held that a railroad company is not chargeable with negligence because of its omission to make a rule for the protection of brakemen against injury received in boarding moving freight cars, when there is opportunity to board them while they are standing. *McDugan v. New York C. & H. R. R. Co.* (1894) 10 Misc. 336.

One of the purposes of a rule is to convey a warning to the servant as to the danger of doing a certain act or doing it in a certain way. See *Latorre v. Central Stamping Co.* (1896) 9 App. Div. 145, where the main issue was whether a minor employee should have been instructed, and the court said that under the circumstances the jury would have been justified in finding

had passed Cornwall Bridge at 10:28. (22) Train 474, under the rules of defendant, had the right to proceed, and under the order recited in paragraph 19 was bound to proceed, and did so, running at the rate of 42 miles an hour. (23) No one on board of train 474 knew that 1411 had received orders to stop at Kent Furnace. The conductor in charge and the engineer knew, from the order, that 474 had the right of track to New Milford. (24) No one in charge of or on 1411 knew officially that 474 was in the rear. The conductor and rear brakeman had heard the night before that 474 would be out in the morning, but had no information that 474 was in fact out. No one on 1411 knew the location of 474 at any time on said day. The conductor of 1411 had cautioned Rear Brakeman Hall, at West Cornwall, the station just north of Cornwall Bridge, to look out for

474, but gave him no further caution or order. (25) No order was received by those in charge of 474 or 1411 of the location of either of said trains, or of any fact relating to either train. (26) The train despatcher knew that 474 must overtake 1411 either at Kent Furnace or on the track before reaching Kent; and all of the foregoing facts except those in paragraphs 1, 14, 16, and 24, and the last two lines of paragraph 18, were known, or ought to have been known, to him, as well as those contained in paragraphs 49 to 53, inclusive. (27) The snow plow on 474 was in charge of plaintiff's intestate, the assistant roadmaster of defendant, who was engaged in working the flanges,—the appliances used in cleaning the tracks,—lifting them when they came to bridges, switches, etc., and lowering them thereafter. (28) Within the front part of said snow plow was

that such instruction was necessary, or that there should have been some rule or regulation on the subject.

Hence the question whether the case was one in which there should have been a rule is sometimes determined upon the same principle as those which are controlling where the question to be settled is whether the servant should have been instructed as to some danger of the employment.

Thus, in *Houston & T. C. R. Co. v. Strycharski* (1894) 6 Tex. Civ. App. 555, the court discussed the liability of the employer as follows: "It is certainly the duty of railway companies to have suitable regulations for the doing of their business, which will give reasonable protection to their employees where the exposure is such that prudence requires it. But all risks which an employee incurs in the service cannot be so provided against by previous regulation. There are some from which, by the use of his senses, he must protect himself. Such are those which are open and patent to his observation. Such was that from which appellee suffered. When the circumstances are such that the master is required, in the exercise of due care, to have a rule for the protection of the servant, the latter may presume that the rule exists until he ought to know the contrary; and he may rely on such presumption without being guilty of negligence, and may hold the master liable for any harm that results from the absence of the rule. But there is no authority that we know of which exacts from the master the duty of cautioning the servant against a danger which the servant, while performing his work, may see and guard against as well as could the master himself if present, or anyone else whom he might put to give the warning."

In this point of view it is clear that the simpler the acts to be performed, the less ground will there be for inferring the existence of an obligation to frame rules. Thus, it has been held that negligence cannot be predicated of the failure of an employer to promulgate rules for the guidance of men engaged in loading ore on cars and moving them along the track only a few hundred feet in length, not by engines, but by their own strength or that of a horse. *Morgan v. Hudson River Ore & I. Co.* (1892) 133 N. Y. 686.

Nor is a railroad company bound to make rules to govern its laborers as to what should be done to secure the remnants of the stacks of ties and prevent them from falling. *Texas & N. O. R. Co. v. Echols* (1894) 87 Tex. 339. The court said: "In this case the work to be done was of that character which could be per-

formed and understood by any laborer of common intelligence. In its performance there was no danger greater than attends any work commonly done in the ordinary avocations of life. The reason for the rule requiring of the master the precaution of prescribing regulations for the discharge of such duties does not exist here, and therefore the rule does not apply to this case. The same requirements apply to all employers, railroads, manufacturers, merchants, farmers, and in fact every branch of business, when the business is such that the danger to the servant exists by reason of the very nature of the service to be performed; and it applies to neither when that danger may not be reasonably anticipated on account of the character of the work. Suppose that a citizen of the city of Houston had been running a wood yard, with hands employed in hauling and stacking cord wood, and at the same time other hands taking down the stacks of wood, and delivering it to customers. The same danger would exist as in this case, that a stack of wood 8 feet high, left unsecured, with a narrow base, might fall upon one passing, in discharge of a duty, in the yard. The same reason for the owner of the wood yard to make rules for the performance of this duty would arise out of this state of facts. Indeed, there is scarcely an employment in which labor finds remuneration that is not attended by some dangers, arising out of the negligence of coemployees. The rule is a sound and salutary one, when applied to cases involving extra risks, but it would be burdensome to all characters of ordinary business if extended beyond the necessity out of which it originated."

The employer's failure to promulgate a written rule cannot be made the basis of an action, where oral instructions covering the same subject-matter have been given. *Whalen v. Michigan C. R. Co.* (1897, Mich.) 72 N. W. 323.

b. Extent of employer's duty tested by the usage of other persons engaged in the same business.

Where the rules promulgated by an employer afford ample protection, if duly observed, the fact that different rules for the same emergency have been adopted by other employers is not sufficient to show that he is negligent. *Smith v. New York C. & H. R. R. Co.* (1895) 88 Hun, 468.

But within certain limits the usage of other employers supplies an important element in the determination of cases of this type.

"When the question is whether the case was one in which rules ought to have been made, the fact that other people or corporations en-

a small elevation above its main floor, known as the observatory or cupola, and from which through two circular windows about 15 inches in diameter, the track could be seen. The snow plow was so constructed that it prevented a view ahead of the engine by the engineer. (29) Rule 104 of said defendant for the movement and operation of trains provides that 'when a train is being pushed by an engine, a flagman must be stationed in a conspicuous position on the front of the leading car, so as to perceive the first sign of danger, and immediately signal the engineman.' (30) The cupola was designed to carry two men, one to work the flanges, and one to act as a lookout. (31) Between West Cornwall and Kent Furnace no one was in the cupola as a lookout or flagman. The assistant superintendent of the division was in said cupola watching the work of the plow, for which purpose he boarded the plow at Falls Village. (32) In the small

compartment on the main floor of the plow were a stove, and nine men, who were laborers, to shovel snow in case of a drift, and other employees of defendant. (33) Said day was very cold, and the snow plow threw the snow considerably, rendering it difficult to see ahead. Just before the accident the plow was not throwing much snow, and a lookout could see through said two windows. (34) During the trip from Pittsfield, an employee, by direction of the conductor, had cleaned the two windows in the cupola every time 474 stopped. It was impossible to clean them while the train was in motion, and these windows had not been cleaned since 474 stopped at West Cornwall, eighteen minutes before. (35) After 1411 stopped at Kent Furnace, the rear brakeman, Hall, went up the track to flag 474. Rule 97 covered all the duty devolving on Hall, and provides: 'When a schedule freight train is detained at any of its usual stops beyond its

gaged in the same business had or had not found it necessary to make rules upon that subject, is one which might well be considered." Eastwood v. Retsof Min. Co. (1895) 86 Hun. 91.

The positive branch of this rule is illustrated by an Illinois case in which it was held proper on the cross-examination of a witness to ask whether it was not the custom of the defendant company, or of all companies, to have a foreman with the sectionmen, to warn them of the approach of trains. Pittsburgh, C. & St. L. R. Co. v. McGrath (1885) 115 Ill. 172.

In *Abel v. Delaware & H. Canal Co.* (1891) 128 N. Y. 662, the trial judge had admitted in evidence, against the objection of the defendant, the rules of other railroad companies, and among other rules those enacted for the protection of repairmen, and instructed the jury upon the obligation of the defendant to make and promulgate proper rules for the conduct of its business. He referred to the fact that he had admitted the rules of other companies to be proved, "not because it was the duty of this company to adopt the rules of any other company, but to better enable you to judge and determine, in looking at the different rules that prevail, what is a reasonable and proper rule." After some further remarks on this point the judge proceeded: "I think rules might have been suggested, not adopted by any company. You have a right to consider whether some rule which occurs to you, even though no company had adopted it, would have been a better rule and given better protection, and such an one as ought to have been adopted and maintained. The 'defendant's counsel excepted to that part of the charge' in relation to the jury determining what were proper rules, and they might conclude what rules should be." But the court of appeals said: "If the charge is to be construed as leaving it to the jury to determine, irrespective of the evidence, what rules ought to have been adopted for the safety of the repairmen, and to find the one way or the other on the question of the defendant's negligence in conformity with a conclusion so reached, the charge was undoubtedly erroneous. But this is not the fair interpretation of the charge. The plain object of the court was to guard the jury against giving undue weight to the fact that more specific, and, as the plaintiff's counsel contended, better, rules had been adopted by other companies than had been adopted by the defendant. This is very apparent from what follows the clause quoted: 'So that some other company has adopted a rule, you can't hold as mat-

ter of right that this company should have adopted it. If, on examining the rules of other companies and those that prevailed here, you should think that one set of them was not a reasonable protection, and the other was, it would help you very much in getting at what ought to be done. That is the reason why this evidence was admitted.' The effect of the charge was that the jury were to weigh the evidence, and, in view of the rules adopted by different companies, determine whether the defendant had discharged its duty in the premises, and that they were not to find a rule proper or improper because some other company has adopted or rejected it. The court was endeavoring to aid the jury in weighing the evidence which related to the rule under which the defendant's business was conducted, and that adopted on the same subject by other companies. We do not think the jury were misled."

On the other hand, the fact that no rule covering the circumstances out of which the injury arose has been promulgated by other employers in the same kind of business points very strongly to the conclusion that the failure to promulgate such a rule is not actionable negligence. See this point emphasized in *Berrigan v. New York, L. E. & W. R. Co.* (1892) 131 N. Y. 582; *Morgan v. Hudson River Ore. & I. Co.* (1892) 133 N. Y. 666.

"But the fact that no such rules had been made [by other employers in the same business] is not conclusive against the necessity of making them. It is simply a fact to be considered. Where the business is complicated, the circumstances are those which do not occur often, and the danger is not serious, it may well be that the fact that other people engaged in the same business have found no necessity for making rules for the particular case is almost conclusive that such rules are not necessary. But where the circumstances are such that any person can see what might happen in a given case, and the danger is plain and obvious, the jurors might be at liberty to infer that rules to protect the employee were necessary, although they had no experience in the particular business, and although there was no evidence that other corporations in the same business had made rules for such cases." Eastwood v. Retsof Min. Co. (1895) 86 Hun. 91.

In *Crowe v. New York C. & H. R. R. Co.* (1893) 70 Hun. 37, it was laid down that a railway company cannot be held negligent in failing to promulgate a rule which has never been adopted, and which would not be practi-

leaving time, when the rear of the train can be plainly seen from a train moving in the same direction at a distance of at least twenty telegraph poles, the flagman must go back with danger signals not less than fifteen telegraph poles, and as much further as may be necessary to protect his train; but, if the rear of his train cannot be plainly seen at a distance of at least twenty telegraph poles, or if it stops at any point that is not its usual stopping place, or if an extra train is stopped at any point, the flagman must go back not less than twenty telegraph poles, and, if his train should be detained until within ten minutes of the time of a passenger train moving in the same direction, he must be governed by rule No. 99.' The employees of defendant occasionally violated this rule, and the conductor of 1411 knew this. Trains sometimes stopped so short a time that a strict compliance with the rule was impossible unless the brakeman was left behind,

which sometimes occurred. 474 was an extra train, and Hall's duty under the rules was to go back twenty telegraph poles, and flag the same. This was a distance of 3,000 feet, the telegraph poles being 150 feet apart. Hall went up the track about 600 feet, when train 474 rounded a sharp curve. (36) The assistant superintendent saw Hall running up the track and flagging, as soon as he could have seen from 474; and when 474 was about 600 feet from Hall he jumped from the cupola to the compartment, and motioned the conductor to stop the train. The conductor at once jumped upon the cupola, and pulled the bell rope twice, but it did not ring the bell in the engine cab. This bell rope connected with the engine, and the engineer relied upon it to warn him of danger ahead. (37) The engineer saw around the sharp curve, from the right hand side of his cab, Flagman Hall, when about 300 feet ahead, and he at once did all that he could do to stop 474 by

able if it were adopted, but the above cases show that the former of the grounds here suggested is laid down in too unqualified terms.

In *DoIng v. New York, O. & W. R. Co.* (1893) 73 Hun, 270, a case the facts of which are stated in VIII. a, *infra*, the plaintiff was non-suited on the ground that no evidence had been given that any rules were in use by other corporations engaged in business of a similar character, and no experts or other witnesses had given testimony tending to show that any rule was necessary or practicable in such a case, nor was the evidence such as to make the necessity and propriety of making and promulgating the rule contended for so obvious as to make the question one of common experience and knowledge. The abstract correctness of this doctrine was not denied by the court of appeals, but it was held that the principle which really controlled the case was that, when a master knows that his employees are doing their work in a reckless and dangerous manner it is his duty to change the manner of operation by some regulation or rule. *DoIng v. New York, O. & W. R. Co.* (1897) 151 N. Y. 579. The decision in (1893) 73 Hun, 270, was followed in *Ely v. New York C. & H. R. Co.* (1895) 88 Hun, 323, holding that the failure of a railroad company to adopt rules or regulations governing the loading of rails upon a flat car by gangs of men on either side is not negligence rendering it liable for an injury to one so engaged from the falling of a rail thrown on the car from the opposite side, unless rules relating to such work have been adopted by other companies, or a rule would be necessary and practicable. But the position taken by the court of appeals in (1897) 151 N. Y. 579, renders it difficult to say whether this decision would be upheld upon the facts disclosed, if it came under review in the higher tribunal.

Sometimes the employer's liability in this point of view has been determined by applying the test of the doctrine of assumption of risks.

Thus, in *Hannibal & St. J. R. Co. v. Kanaley* (1888) 39 Kan. 1, we find the court arguing as follows: "Again, a railroad company is not required to change its orders, or signals, for the movement of its trains, because some other railroad company has adopted a different system of orders or signals. A railroad company may even have in use a system of orders or signals shown to be less safe than that adopted by another railroad company, without being liable to its employees for the consequences of the use of such orders, or signals. If the employee thinks

proper to continue in the service of the company with the knowledge of the orders or signals in use, it is at his own risk, and all that he can require of the company is that he shall not be deceived as to the degree of danger he incurs."

c. Rules prescribed must be definite and intelligible.

See also VII. *infra*.

It is sufficiently obvious that an employer cannot be said to have discharged his duty in regard to the framing of rules unless their provisions are sufficiently specific to furnish the employees affected with adequate information respecting the acts which are to be done in order to carry out the employer's ideas as to the proper manner of performing the work.

Thus, a general rule that freight is to be safely loaded so that it cannot fall off the cars is not sufficient as a rule in regard to loading timber above the sides of the car, so as to relieve the railroad company from liability for injury to a servant by the fall of timber from a gondola car on which it was piled above the sides without stakes to hold it, although stakes were furnished by the company to be used in the discretion of its servants. *Ford v. Lake Shore & M. S. R. Co.* (1891) 124 N. Y. 493, 12 L. R. A. 454. The court said: "Method or system as to loading lumber, there was none. Having furnished a good car and stakes that might be used, the manner of loading lumber was left to the judgment and discretion of its agents and servants. It was not sufficient for the defendant to show that its employees knew that the rule I have quoted applied to lumber, and also knew that the general usage required it to be staked, and that stakes were furnished and available to the men in the particular case before us. All this may be assumed to be true, and yet the fact exists that the use of the stakes was not enjoined upon the servants by any rule of the defendant or by any instruction ever given them. Having furnished the car and the stakes, it was left to the judgment and discretion of the foreman whether to use the stakes or not, and in this particular instance they were not used for the reason that they supposed the lumber would stay on the car over the short distance it was to be carried. And it is because of the failure of the defendant to require the use of the stakes in all cases that the neglect of its servants in this case is imputed to it. There was no rule, and the only method or system was such as the foreman in each par-

reversing and applying brakes to engine and tender. (38) There was no air brake on said plow, the only brake being a hand brake. (39) Train 474 slowed down in running the 900 feet to train 1411, after Flagman Hall was seen. It was running about 20 miles an hour when it struck the rear of the freight train as it stood on the main track. It plunged through three freight cars before it stopped. The collision occurred at 11:02 A. M., ten minutes after 474 passed Cornwall Bridge. (40) As a result of the collision, the conductor of 474 was killed, some of the men in the compartment were injured, and the plaintiff's intestate was fatally injured. He lived about two or three hours after the collision, suffering greatly, and then died. He was fifty-one years of age, in good health, and at the time of his death, and for some time before, he had been the assistant roadmaster of the Berkshire Division of the defendant, having been em-

ployed on this division some thirty years. (41) Had the engineer been notified, through the bell, of the flagman ahead, and had he then done all he could to have stopped the train, the collision could not have been avoided, but probably its force and extent somewhat modified. (42) There was no negligence on the part of any of the employees of train 474, or of train 1411, except Rear Brakeman Hall. (43) Said train 474 was properly equipped, and its appliances in good order, except that it had no hospital stretcher on board, as required by statute, and no air brakes on the snow plow. Its appliances were in good order, except the said bell cord and bell. Train 1411 and its appliances were proper, and in good order. (44) The absence of the hospital stretcher in some degree increased the sufferings of the plaintiff's intestate, who had to be removed on litters for some distance, but did not cause his death. (45) Train 474 could have been

placed in a position to render aid to the plaintiff's intestate, but it was not so placed. It is a ticular case should deem the safe and proper one to pursue. Under such a state of facts the employer must be deemed constructively present during the loading of the cars, and the acts of his agents are in law deemed to be his acts. The improper and negligent loading of the cars is thus traced directly to the defendant, and its negligence established."

Where car repairers are required to work on a siding which trains may, in the ordinary course of business, enter from either end, and the custom is to protect such car repairers by placing a blue flag at one end only of a car which is undergoing repair, the company is negligent in not promulgating a more definite rule than one which merely provides that "blue is a signal to be used by car inspectors." *Chicago, B. & Q. R. Co. v. McGraw* (1896) 22 Colo. 363.

So, also, a rule for the protection of car repairers is essentially defective where it omits to designate the person by whom the danger signal may be removed. *Abel v. Delaware & H. Canal Co.* (1891) 128 N. Y. 662. (This case is reviewed at length in VIII. a, *infra*.)

So, also, it is as much the duty of a master to specify in a rule the means by which the notice of danger for which it provides is to be given as it is his duty to direct that such notice shall be given. *Evansville & T. H. R. Co. v. Holcomb* (1894) 9 Ind. App. 188. (Rule requiring that actual notice of any switching done in the daytime on repair track should be given to the men working there, but not designating the person by whom notice was to be given, held not sufficient as a matter of law.)

But it would seem that as the work of examining, repairing, and moving cars in a yard is irregular, and not susceptible of being arranged with that nicety and exactness which can conveniently be applied in the running of regular trains, a railroad company is not negligent in promulgating general rules in regard to the duties to be performed under such circumstances. *Beesl v. New York C. & H. R. R. Co.* (1877) 70 N. Y. 171.

A rule which requires employees of one class to protect themselves by certain precautions against the possible consequences of certain acts of employees of another class cannot be impugned on the ground of insufficiency because it does not in terms forbid the latter class of employees to do those acts. *Corcoran v. Delaware, L. & W. R. Co.* (1891) 126 N. Y. 673. There one of the rules of the defendant provided that "men repairing cars must see for themselves that they are protected by a flag

when under and between the cars;" another that "a red flag by day, red light or fire on the track by night, indicates danger; on perceiving such the engineer shall immediately stop his train before passing such signal." The trial judge, under the defendant's exception, submitted to the jury the question as to the sufficiency of the rules, the only suggestion made as to their insufficiency being that they did not in terms prohibit the coservants of the plaintiff from moving other cars upon the one from which the red flag was shown and under which the plaintiff was. But the court of appeals said: "This idea was necessarily included in the regulation which required a red flag to be hung out from a car in process of repair, and the rule must have been so understood by any person of common intelligence. It is not suggested that . . . [the coservant] was ignorant of the meaning of the signal. The rule would not be any more effective to prevent the accident, or more likely to insure observance, had it been followed by a provision, in express words, forbidding the employees from moving cars against, or in the direction of, another car from which a flag was exhibited. We think there was no proof of neglect on the part of the defendant to make and promulgate suitable and proper rules for the information and government of its employees, to warrant the submission of the case to the jury."

d. Necessity for rules,—whether for court or jury to decide.

In the absence of any testimony as to the possibility or usefulness of any code of rules or system of signals, which might be framed for the purpose of warning employees of the approach of detached cars in railroad yards, a jury is not justified in finding that the company was negligent in failing to promulgate such a code or system. *Atchison, T. & S. F. R. Co. v. Carruthers* (1896) 56 Kan. 309.

But where the evidence is, as is commonly the case, conflicting, or such as may be construed differently by reasonable men, it becomes a question of fact for the jury whether proper rules have been established. *Gulf, C. & S. F. R. Co. v. Finley* (1895) 11 Tex. Civ. App. 64.

The doctrine which is usually laid down, therefore, is that the question whether the master has failed in its performance of the duty which it owes to provide such appliances, and a system of transacting its business under a rule which would render their work reasonably

stopped in about 1,500 feet, or the distance of ten telegraph poles. (46) Had the rear brakeman gone back twenty telegraph poles, and signaled, and had those in the cupola or on the engine of 474 seen him, and done their duty, the collision would not have occurred. (46½) The rear brakeman had about time to have gone back 3,000 feet after 1411 stopped at Kent Furnace, but not time enough to have returned to 1411, nor to have returned within the ordinary time of stopping at Kent Furnace. (47) The rules or regulations for the movement and operation of trains adopted and used by the defendant were substantially the same as those adopted by the American Railway Association after protracted conferences, and revised from time to time at the semiannual meetings of this association. About 90 per cent of the steam railways of this country are using these rules with such modifications as adapt them to the particular railway. (48) For

the general movement and operation of trains these rules are the best and safest general rules yet devised by the best railroad talent of the country. (49) The only protection afforded by these rules to trains 474 and 1411 to prevent their colliding was the rule quoted in paragraph 33, *supra*. These rules were not and are not intended to cover all emergencies. These call often for special orders. (50) No order had been sent 474 or 1411 when they should meet, and it was certain they would meet unless 474 was stopped before 1411 reached Kent. It was part of the train dispatcher's duty to notify trains, not regulated by the time tables and rules, in advance, where they would meet, so that they might know this fact, and collisions be avoided. Ordinary care required such orders, and in his failure to notify trains 474 and 1411 of this he was negligent. (51) Train 474 was a special and irregular train, run for an unusual purpose, for the

safe, is a question for the jury. *Warn v. New York C. & H. R. Co.* (1895) 92 Hun, 91.

In an action by a car repairer for injuries resulting from the car under repair being struck by a moving train, it is error to nonsuit the plaintiff, where the defendant admits that, while cars are being repaired (as this was), on tracks other than the repair tracks, "ordinary prudence, care, and the customs and regulations of the company, require that such work should not be done except while the car is being protected by watchmen or other suitable protection," and no evidence is offered that any such protection was provided. *Luebke v. Chicago, M. & St. P. R. Co.* (1883) 59 Wis. 127.

Whether, in the operation of trains, emergencies which no system of rules can anticipate and provide for have arisen, and whether, in view of such emergencies, the company has acted with the care which the circumstances demand, are questions of fact for the trial court. *Sprague v. New York & N. E. R. Co.* (1896) 68 Conn. 345, 37 L. R. A. 638. There a collision was caused by the incompetence of an inexperienced engineer, and the appellate court refused to review the following conclusion of the trial court: "The superintendent and train dispatchers did not give Conrad special orders or proper messages to guide him in the movement of his train from Hawleyville, and failed to exercise reasonable care in this regard, in view of Conrad's known inexperience and the condition of business and situation of trains on the road on that day. The defendant was guilty of negligence amounting to a want of reasonable care in not providing, in some way, for the special direction of Conrad under the circumstances disclosed by the evidence. The collision was due to the incompetency of conductor Conrad, and to the negligence and want of reasonable care of the defendant, its superintendent, trainmaster, and dispatchers, as above stated."

But the jury cannot be asked whether some specific rule suggested by the plaintiff should have been adopted. *Larow v. New York, L. E. & W. R. Co.* (1891) 61 Hun, 11. (For facts, see VIII. a, *infra*.)

Unless at least some evidence is offered showing that it was reasonable or practicable to obviate by a rule such accidents as that for which the servant seeks indemnity. *Berrigan v. New York, L. E. & W. R. Co.* (1892) 131 N. Y. 582. (See quotation from opinion in VIII. a, *infra*.)

To justify the submission of the question of the master's liability to the jury it must appear 43 L. R. A.

from the evidence, either that some rule relating to the work in which the servant was engaged had been adopted by other employers engaged in business of a similar character, or that, in the opinion of experts or other witnesses qualified to speak on the subject, a rule was necessary and practicable in such a case, or that the necessity and propriety of making and promulgating a rule is so obvious as to render the question one of common knowledge and experience. *Ely v. New York C. & H. R. Co.* (1895) 88 Hun, 323, stating the effect of *Berrigan v. New York, L. E. & W. R. Co.* (1892) 131 N. Y. 582. (See the passage quoted in VIII. a, *infra*.)

In *Cumpton v. Texas & P. R. Co.* (1895, Tex. Civ. App.) 33 S. W. 737, the propriety of submitting to the jury the question whether the defendant should have provided reasonable regulations on the subject was made by the court to depend upon whether it was practicable under the given circumstances.

In *Morgan v. Hudson River Ore & I. Co.* (1892) 133 N. Y. 666, the plaintiff was one of several workmen engaged in loading with ore certain cars which were moved by hand or horse power along a slightly inclined track, and had crept under one of the cars to sweep some ore off the rails, when a car on the grade above him was started in some way, owing to the improper act of some co-servant or outsider in removing the blocking. It was left to the jury to say whether it was a case for rules, and, if so, what particular rule should have been adopted. This the court of appeals held to be error, saying: "The recovery was based entirely on the absence of rules. It was not suggested at the trial, nor is it on this appeal, what particular rule the defendant could have adopted that would have been likely to prevent the accident. No evidence was given that any rule is in use in business of a similar character by other corporations of the same class carrying on like operations, nor was there any evidence by experts or other witnesses to show that any rule was necessary or practicable in such cases. It was left to the jury to say whether or not it was a case for rules, and if so, what particular rule should have been adopted. We know nothing with respect to the views entertained by the jury on these questions, except so far as they are indicated by their verdict for the plaintiff. It is not probable that they concluded that any definite rule should have been promulgated, but were content to hold that, as the plaintiff was injured, the defendant ought in

first time the morning in question. The circumstances of this case were unusual, and present an emergency which probably no general code of rules could provide for, and the rules in question did not provide for. It required special orders and special instructions to trains 474 and 1411, so that train 474 should not collide with 1411 between Cornwall Bridge and Kent. (52) Extra trains are run daily over said division, averaging from eight to fifteen, and some days as high as twenty. (53) It would be impracticable to operate extra and regular trains entirely by special orders. In case of emergency, this must be done, and general rules cannot cover them. The meeting places of trains not upon the time-table and of regular trains off the regular time are provided for by special orders, and not governed by the printed rules. (54) Those in charge of 474 and 1411 and Rear Brakeman Hall were familiar with the rules, and knew that in

ordinary cases the rules, and not special orders, would govern the movement of all trains on the division. The defendant had exercised ordinary care in the selection of all of its employees on trains 474 and 1411. (55) On March 20, 1896, the plaintiff was duly appointed administratrix of the estate of said Jerry Nolan, and duly qualified. (56) Written notice of a claim for damages was made in conformity to the statutory provision. (57) Time-table No. 23 and rules are made a part of the record, but need not be printed. Copies of the same may be handed to the judges of the supreme court of errors. (58) I find as a fact that these rules did not sufficiently provide for this emergency, and for the reasonably safe operation of trains 474 and 1411. This emergency required the exercise of great care by the defendant, since the danger of collision was great. (59) I find as a fact that the defendant was negligent in not providing for

some way to have prevented it, or, in case it did not, respond to him in damages. Almost every conceivable injury that a servant receives in the course of his employment may in this way be submitted to a jury, and with the same result."

Whether or not the evidence is sufficient to show a case in which the duty to make rules rested on the employer is a question of law for the court. *Texas & N. O. R. Co. v. Echols* (1894) 87 Tex. 339.

In one case the court remarked: "A rule which would require no movement of the engine to be made . . . except in response to a signal from one person, when he might be in a position where his signal could not be seen by the engineer, would be such an unreasonable impediment to the prompt despatch of defendant's business as a public carrier, that we do not consider the question whether or not defendant was bound to adopt it, debatable, or one upon which fair-minded men would differ." *Rutledge v. Missouri P. R. Co.* (1894) 123 Mo. 121.

In *Hewitt v. Flint & P. M. R. Co.* (1887) 67 Mich. 61, it was held that the plaintiff had not succeeded in establishing a want of ordinary care on the defendant's part where the evidence (as stated by the court) was to the following effect: "The platform car which caused the accident had stood upon the track for a month, and during the entire existence of the siding no car was shown ever to have left it before without being moved by the defendant's servants. Those connected with the freight train which backed in upon the siding just before the accident say it did not touch the car, and this testimony is substantially undisputed. The wind which, it is claimed, moved the car is shown to have produced a pressure against the end of the car not exceeding 20 pounds, which would hardly be expected to move a car weighing 7 tons on a grade such as this siding was shown to have been. This side track had been in constant use for at least sixteen years, holds all kinds of cars, and no case of a car of any kind going out by force of the wind has ever been known at that station. It also appears by the testimony of competent and skillful engineers and mechanics and railroad men that upon this siding there was no occasion for using stop-blocks; that their use was accompanied with inconvenience and danger; that good railroad management dispensed with them when not actually necessary, and that no necessity existed for their use upon this siding. There was no pretense but that all of the employees of 43 L. R. A.

the defendant were competent, skilled, and experienced men." (See also the specific rulings referred to in VIII. *infra*.)

III. *Habitual practice of employees, how far a legal substitute for a rule.*

An obvious corollary to the proposition that the master is responsible for the exercise of due diligence in directing the mode and manner of carrying on his business is that he is not liable where the mode in which it is carried on, by his authority, is reasonably safe, prudent, and careful, howsoever that result may be brought about. *Rutledge v. Missouri P. R. Co.* (1894) 123 Mo. 131.

Hence, whether an employer who is charged with a breach of the duty to make rules is entitled to shelter himself under the plea that the casualty which produced the injury would not have occurred if a certain customary method of doing the work had been adopted depends upon whether that method has actually become an incident of the management of his business, not only with his sanction and approval, but also in such a sense that his employees comprehend that he requires and expects them to conform to it. In other words, such a method is regarded as the legal equivalent of a rule when it is recognized and regularly enforced by the employer, and not otherwise.

In the case just cited a switchman, while uncoupling cars, was thrown to the ground by the sudden checking of the train in response to an unauthorized signal by another employee. The evidence showed that there were printed rules prescribing the signals for movements of trains, and that, according to the custom of the yard, those signals should have been given by the person engaged in the coupling. In discussing the question whether sufficient precaution had been taken to secure the safety of the employees, the court said: "That practice or custom was a part of the mode of conducting defendant's work, and its long continuance implies that it had the sanction of defendant. The employees were expected to conform to it as part of the usual course of the defendants business. . . . What greater protection would the plaintiff have had from the existence of a formal rule, directing the work to be done in the manner in which the men already observed? How can it justly be said that there is need of a particular rule, or negligence in failing, to declare it, when the practice which it would prescribe has already been adopted and is followed by the men to whom it would apply? . . . The practice of

this emergency, and for the safe operation of trains 474 and 1411 by special orders and instructions, in addition to the general rules, and that this collision resulted from the defendant's failure to so provide. (60) I find as a fact that the operation of these trains under these general rules alone, under the circumstances of this case, was not a suitable and safe method to operate these trains. (61) I find as a fact that the train despatcher did not exercise ordinary care in not issuing special orders for the reasonably safe movement of these trains. (62) I find as a fact that the injury to plaintiff's intestate resulted from the combined negligence of Rear Brakeman Hall and of the defendant. (63) I find as a fact that the defendant did not exercise ordinary care in the movement and operation of trains 474 and 1411. (64) I find as a fact that the plaintiff's intestate was not guilty of any negligence contributing to his injury or death."

the workmen, no less than any possible rule, sanctioned the repetition of the first signal, in some circumstances, by another employee, in order to catch the eye of the engineer. The latter (who testified for plaintiff) declared that he stopped the locomotive and train in response to a lantern signal given by some one. If that signal, at the time plaintiff was hurt, did not originate with the plaintiff, there was a plain violation of the custom and practice of the yard, quite as much as there would have been a violation of the rule, had one existed to the same effect."

In *Luebke v. Chicago, M. & St. P. R. Co.* (1885) 63 Wis. 91, 53 Am. Rep. 266, the court, in ruling that sufficient precaution had been taken to secure an employee working under a car, where the evidence showed that, while he was under the car, three trainmen in the employ of defendant were standing by the car, and that it was the duty of each of them, incident to his employment, to act as a watchman to protect the plaintiff from injury, said: "True, no written or published regulation of the company to that effect was shown; neither did any witness in the employ of the company testify that he had been charged by any officer of the company with the duty of watching for the safety of other employees working under cars upon the tracks; but many such witnesses testified that their duty in that behalf was well understood by them and other employees of the company. It was a sort of common law of the company obligatory upon its employees, and as thoroughly understood by them as though it had been embodied in the printed regulations, and read by the officers of the company to them. It thus became a rule or custom of the company as well as an understanding between its employees."

In *Texas & P. R. Co. v. Campbell* (1894, Tex. Civ. App.) 39 S. W. 1104, it was proved that there was a custom in force which required employees engaged in handling the cars to notify those engaged in repairing, before setting cars in upon the repair track; and it was conceded that this custom, if observed, was a sufficient regulation for the purpose. The court refused to attribute any importance to the fact that this regulation was not contained in a written rule.

On the other hand, the fact that certain employees were in the habit of observing a custom or rule for their own protection will not operate as a discharge of the employer's duty to see that the department of his business to which it relates is conducted upon a safe system, where 43 L. R. A.

Defendant claimed the law to be as follows: "(1) That, if the collision occurred through the negligence of Rear Brakeman Hall, the plaintiff was entitled to nominal damages only, because Nolan, the plaintiff's intestate, and said rear brakeman, were fellow servants. (2) That, upon the facts in evidence, the defendant, having operated its trains under suitable rules and regulations, and having properly equipped said trains, had performed its entire duty towards plaintiff's intestate, and the law imposed no higher degree of care than that exercised by it. The court sustained the defendant's first claim, and did not pass upon its second claim, except to find as a matter of fact from the evidence submitted that the defendant did not exercise ordinary care in the operation of these trains, and that ordinary care required additional precautions by way of special orders to those provided in the rules for the reasonably safe operation of these trains."

there is no evidence that it was published by printing, or generally known to that particular class of employees against whose acts it was supposed to be a safeguard, or that it was regularly prescribed by the employer in some way, or that he required it to be obeyed. *Abel v. Delaware & H. Canal Co.* (1886) 103 N. Y. 581, 57 Am. Rep. 773.

Still less will the mere supposition or "general understanding" of defendant's employees be deemed competent evidence of the existence of a rule. *James v. Northern P. R. Co.* (1891) 46 Minn. 168.

The following passages from the prevailing and dissenting opinions in *Rutledge v. Missouri P. R. Co.* (1894) 123 Mo. 131, may also be advantageously cited as illustrative of the principle that the crucial point to be determined in cases of this kind is whether or not it was by the exertion of the employer's authority that the observance of the custom was secured.

In the former *Barclay, J.*, in criticising a remark made by Judge Thomas on the former appeal that it seemed to be well settled also that rules adopted by the employees, not regularly prescribed and obedience to which is not required by the company, would not excuse the company from the performance of the duty of making needful rules for the safe prosecution of the business, said: "It does not appear . . . in the present record that the employees . . . were not required to conform to the practice or custom described. The evidence throughout plainly indicates the contrary, and that it amounted to a verbal rule or direction as part of defendant's method of doing business, taken in connection with the printed rules, touching the giving of signals. . . . The case as now presented does not, therefore, fall within range of the remark of Judge Thomas above quoted. But we think, moreover, that learned judge (as the conclusion then announced by him shows) had no intention of holding that a custom, generally recognized and practised by managers and workmen as the correct mode of conducting a certain business, could form the basis for a recovery against the master, simply because the practice had not been reduced to the form of a paper or formal rule."

In the latter *Macfarlane, J.*, reasoned thus: "It is said that, if the employees adopt a custom under which their duties are performed, which gives reasonable protection, there is no reason for a rule by the master, embodying the same methods as those thus voluntarily adopted.

Messrs. Stoddard & Bishop, for appellant:

The questions as to defendant's negligence which the trial court has determined as questions of fact, are questions of law, and the trial court erred in refusing to so consider them.

The only question for the trial court to determine was whether the conduct of the defendant under the conceded circumstances was what we should expect that of a man of ordinary care to have been under such circumstances.

To reach a conclusion in the matter required a consideration and determination of it as a question of law.

Sharp v. Lockwood, 12 Conn. 159; *Belden v. Lamb*, 17 Conn. 451; *Schoonmaker v. Albersen & D. Mach. Co.* 51 Conn. 392; *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 471; *Union P. R. Co. v. McDonald*, 152 U. S. 282, 38 L. ed. 443; *Morrissey v. Bridgeport Traction Co.* 68 Conn. 215.

To this proposition I do not accede. A rule, unless enforced, is of no purpose in the way of protection. The enforcement of rules, only, makes them effective. The master alone has the authority to enforce their observance. The laborers among themselves have no such authority, or any other effective means of enforcing the observance of a custom. So, a custom has no more binding force on an employee than has a rule which, with the master's knowledge, is habitually disregarded. A rule unenforced secures no protection to employees. *Barry v. Hannibal & St. J. R. Co.* (1888) 98 Mo. 66. A custom permits a discretion by each employee. An authoritative rule leaves no discretion. The latter gives protection, the former allures into unexpected perils. . . . The evidence in this case tended to prove that the signal to stop the train was not given, as custom required, by plaintiff, who was charged with the duty of uncoupling the cars, and who was exposed to the dangers incident thereto. We cannot say that the negligent act of some other employee would have been committed had all engaged in the work been acting under, and been governed by, a rule formulated and enforced by the company, instead of one voluntarily adopted by the employees for their mutual protection, and having only such binding force as the care, competency, humanity, or discretion of each might enjoin.

We do not say that a custom if known to the employees and sanctioned and enforced by the company, would not answer the purposes of a written or printed rule. Whether the master sanctioned and enforced the custom in question in this case was a question for the jury."

Where the consequences of a violation of a rule by the injured employee are in question (see XI. *infra*), a custom which has been regularly observed is, for legal purposes, equivalent to a rule promulgated by the master. *Crane v. Chicago, M. & St. P. R. Co.* (1896) 93 Wis. 487, where an experienced locomotive fireman who, in violation of a well-understood custom among engineers and firemen, went under an engine to clean out the ash pan without notifying the engineer, and was scalded by the engineer's blowing off the engine, was held chargeable with such contributory negligence as to preclude a recovery for the injury.

So, also, a steam-ferry company is not liable for the death of an oiler on a ferry boat, caused by the failure of the engineer to warn him before starting the machinery, where a rule of 43 L. R. A.

The question is, Was it the duty of defendant to perform the acts required of it by the trial court? This has always been held to be a question of law, and the fact that the trial court has in so many words determined it as one of fact is not effective to make it such.

Nolan v. New York, N. H. & H. R. Co. 53 Conn. 471; *Sprague v. New York & N. E. R. Co.* 68 Conn. 345, 37 L. R. A. 638; *Morrissey v. Bridgeport Traction Co.* 68 Conn. 215.

In cases similar to the present one the reasonableness of rules and regulations has been held to be a question of law and not of fact.

South Florida R. Co. v. Rhodes, 25 Fla. 45, 3 L. R. A. 733; *Wolsey v. Lake Shore & M. S. R. Co.* 33 Ohio St. 234; *Vedder v. Fellois*, 20 N. Y. 130; 2 Bailey, Personal Injuries Relating to Master & Servant, § 3325; *Memphis & C. R. Co. v. Graham*, 94 Ala. 556; *Illinois C. R. Co. v. Whittemore*, 43 Ill. 423, 12 Am. Dec. 138; *Louisville, N. & G. S.*

such engineer, known to deceased, requiring him, if he should be going into a dangerous place and the engineer should not be in the engine room, to withdraw the starting bar and place it on the floor of the engine room to notify him not to start, was disobeyed by the deceased. *Stevens v. San Francisco & N. P. R. Co.* (1893) 100 Cal. 554.

In such a case as this, it is obvious that the question whether the custom was enforced or not by the employer is immaterial. The servant's incapacity to recover is referable to the principle that he knows himself to be doing his work in a manner which is likely to cause him injury.

IV. The master's duty to promulgate his rules.

The principle is undisputed that, "where rules are prescribed or regulations adopted for the government of employees in and about the discharge of their duties, it is the duty of the employer to give notice of their existence, and so to promulgate them as to afford to the employee a reasonable opportunity of ascertaining their terms." *Port Royal & W. R. Co. v. Davis* (1894) 95 Ga. 292.

The duty of informing a servant of a rule is specially imperative where he is hired to fill a position temporarily. *East Tennessee, V. & G. R. Co. v. Turnaville* (1892-93) 97 Ala. 122.

The general principle holds although the plaintiff, in a written application for employment, has undertaken to "study the rules governing employees, carefully keep posted, and obey them. *Carroll v. East Tennessee, V. & G. R. Co.* (1889) 82 Ga. 452, 6 L. R. A. 214.

That a traffic manager omits to see personally that the printed notices of alterations in the movements of trains are served upon the employees who ought, in the course of business, to be warned of such alterations, is no evidence of systematic mismanagement on the part of the company. His duty is fully performed if the notices are handed to his subordinates for distribution. *Conway v. Belfast & N. C. R. Co.* (1877) Ir. Rep. 11 C. L. 345, Affirming (1875) Ir. Rep. 9 C. L. 498.

Whether the master was negligent in failing to promulgate and enforce a rule adopted by it, is a question of fact for the jury. *Warn v. New York C. & H. R. E. Co.* (1895) 92 Hun. 91.

Usually the question whether the rules have been duly published is considered as in connection with the question whether the means

R. Co. v. Fleming, 14 Lea, 145; *Norfolk & W. R. Co. v. Wysox*, 82 Va. 261; *Ohilton v. St. Louis & I. M. R. Co.* 114 Mo. 91, 19 L. R. A. 269; *Avery v. New York C. & H. R. R. Co.* 121 N. Y. 44; *St. Louis, I. M. & S. R. Co. v. Adcock*, 52 Ark. 410; *Kansas City, Ft. S. & M. R. Co. v. Hammond*, 58 Ark. 334; *Hoffbauer v. Davenport & N. W. R. Co.* 52 Iowa, 343, 35 Am. Rep. 278; *Enright v. Toledo, A. A. & N. M. R. Co.* 93 Mich. 409; *Abel v. Delaware & H. Canal Co.* 103 N. Y. 587, 57 Am. Rep. 773; *Pittsburgh, C. & St. L. R. Co. v. Lyon*, 123 Pa. 140, 2 L. R. A. 489.

There was imposed by law upon the defendant the duty to make and promulgate rules for the movement of these trains, which, if faithfully observed, would have afforded reasonable protection to the plaintiff's intestate.

Rutledge v. Missouri P. R. Co. 110 Mo. 312.

The proximate cause of this unfortunate

adopted for publication were such that knowledge of them should be attributed to the servant. This topic will be discussed in a subsequent part of the note. (See IX. c. *infra*.)

V. The master's duty to enforce his rules.

See also X. XI. f, g, h, *infra*.

An employer does not discharge his whole duty to the public by merely framing and publishing proper rules for the conduct of his business and the guidance and control of his servants, but he is also required to exercise such a supervision over his servants and the prosecution of his business as to have reason to believe that it is being conducted in pursuance of such rules. *Whittaker v. Delaware & H. Canal Co.* (1891) 126 N. Y. 544, Followed in *Warn v. New York C. & H. R. R. Co.* (1894) 80 Hun, 71, where the court referring to a certain rule of the defendant said: "If . . . [It] was intended to apply to a train like the one in the inspection of which the plaintiff was injured, it became a question of fact whether the defendant was guilty of negligence in regard to its proper promulgation and enforcement. If that rule was not intended to apply to such a train, then it became a question of fact whether the defendant had performed the measure of its duty within the rule" that a railroad company is bound to protect its employees, so far as it can, by the promulgation of reasonable rules.

The duty of a railroad company does not end with prescribing rules calculated to secure the safety of employees. It is equally binding on it honestly and faithfully to require their observance. *Richmond & D. R. Co. v. Hissoog* (1892-93) 97 Ala. 187.

Laxity in the enforcement of rules is negligence. *Texas & N. O. R. Co. v. Echols* (1894) 87 Tex. 339.

Where a car repairer is injured through the negligence of an assistant roadmaster (a person "exercising superintendence under Code, § 2590, and therefore a vice principal) in shunting, contrary to the regulations of the company, a defective car on to the repair track by a "running switch," the company cannot be heard to plead that other well-regulated roads were in the habit of doing what it had done. *Louisville & N. R. Co. v. Davis* (1892) 99 Ala. 593.

Where a mine is operated by a company through an incline extending from the surface several hundred feet into the earth, by means of cars run upon iron rails laid therein, and it is an established rule of the company that a

accident was the failure of the rear brakeman to observe the rules, and the fact that now in cold blood and with this experience before us we are enabled to suggest innumerable precautions which, if adopted by the defendant, might have averted this collision, furnishes no just ground for holding that the exercise of reasonable care required their adoption.

Hayes v. Western R. Corp. 3 Cush. 274.

The facts that the freight train was late, that it had no official information of the proximity of the extra to it, and that the extra was not informed that the freight would stop at Kent Furnace siding, are not sufficient to charge the defendant with negligence in the absence of proof that the trains were so dangerously near together that the rear brakeman did not have sufficient time to comply with the rule, an observance of which would confessedly have averted the collision.

signal called a "tally" shall be sounded at twenty-three minutes before 5 o'clock every evening, at which time the cars shall cease running up and down the incline and the workman shall have the right of way for the space of seven minutes to reach the surface, it is negligence on the part of the company to allow the "tally" to be given by an employee stationed at an intermediate point on the incline where it is impossible for him to know when cars will be sent down by the engineer at the top. *Sliver Cord Combination Min. Co. v. McDonald* (1890) 14 Colo. 191.

By promulgating a paper rule the master does not become responsible for its observance in every case which it fitted. "A rule . . . is but a direction or command as to the mode of carrying on the work. The master is bound to the use of reasonable diligence in enforcing it; but he certainly is not an insurer of its observance." *Rutledge v. Missouri P. R. Co.* (1894) 123 Mo. 121.

In some cases negligence in respect to the enforcement of a rule may be inferred where the defendant has noticed that it is constantly being violated and is therefore insufficient for the protection of certain employees, unless some other employee is personally present to see that the precautions which it contemplates are properly observed. Such was the opinion of the court in *St. Louis, A. & T. R. Co. v. Triplett* (1891) 54 Ark. 289, 11 L. R. A. 773, where the only rule promulgated for the protection of men working on repair tracks was one which forbade men to do switching on such tracks without the permission of the foreman of repairs. It was asserted by the company that if this rule was sufficient, when faithfully observed by its employees, to guard against the danger, the company has discharged its duty. The court, however, said: "This seems to be a general rule of law, when the circumstances are such that a reasonably prudent person might rely upon rules and regulations to afford protection. But if the master sees proper to rely upon such methods of protection to his servants, and the occasion demands it, he should also adopt such measures as may be reasonably necessary to secure the observance of such rules. The fact that rules have been adopted is only evidence by the decree of care and diligence exercised by the master in any given case."

Whether a master can be held liable on the ground that he neglected to take proper precautions, in relation to an elevator, to prevent persons in their employ from using it in a manner

Relyea v. Kansas City, S. & G. R. Co. 112 Mo. 86, 18 L. R. A. 817.

When a rear-end collision occurs, and it appears that a rule of the company has been violated, but for which fact the collision would not have occurred, the negligence of the employees violating such rule constitutes the "proximate cause."

Enright v. Toledo, A. A. & N. M. R. Co. 93 Mich. 409; *Illinois C. R. Co. v. Neer*, 31 Ill. App. 126; *Cincinnati, I. St. L. & C. R. Co. v. Lang*, 118 Ind. 579; *Henry v. Lake Shore & M. S. R. Co.* 49 Mich. 501; *Peterson v. Chicago & N. W. R. Co.* 67 Mich. 108; *Louisville & N. R. Co. v. Markee*, 103 Ala. 173; *Shepard v. Boston & M. R. Co.* 158 Mass. 174; *McGrath v. New York & N. E. R. Co.* 14 R. I. 358; *Slater v. Jewett*, 85 N. Y. 61, 29 Am. Rep. 627; *Hinz v. Chicago, B. & N. R. Co.* 93 Wis. 16; 1 Bailey, *Personal Injuries Relating to Master & Servant*, §§ 550-554.

and for a purpose for which it was not intended, and contrary to the rules of their business, depends upon three questions of fact: First, whether the condition of the elevator, its relation to the business of the defendants, or to the work in which the plaintiff was engaged, and all the circumstances of the case, were such as to require of the defendants some precaution against such improper use; second, whether they were guilty of neglect, either in not taking precautions, or in respect to the sufficiency of the precautions taken by them; third, whether the plaintiff was injured by reason of the want or insufficiency of such precaution. *Avilla v. Nash* (1875) 117 Mass. 319. The master's duty as to supervision, as understood in Massachusetts, has been lately discussed in this series in subd. X. of the note on *Knowledge as an element of an employer's liability to an injured servant*, *Walkowski v. Penokee & Gogebic Consol. Mines*, 41 L. R. A. 33.

Cases of this description, like all others in which the gist of the action is the employer's negligence, are sometimes controlled by the principle that the servant's continuance of work with knowledge of such negligence precludes him from recovery on the ground either of the assumption of the risk or of contributory negligence. Thus, a railway company is not liable for injuries to a brakeman because of its failure to furnish him with a coupling stick, as provided by its rule, where such sticks are not in use by the brakemen on its road, and are regarded as useless appliances in coupling cars, and the injured brakeman had been in its employ for a month, and made no objection on the ground of not being furnished with a stick. *Louisville & N. R. Co. v. Bryant* (1893) 15 Ky. L. Rep. 181.

But although the long acquiescence of a servant in a departure from rules is competent evidence to prove an assumption of the additional risk thereby incurred, a compliance with an exceptional order varying from the rule, suddenly made, does not constitute such acquiescence. *Baltimore & O. R. Co. v. Camp* (1895) 31 U. S. App. 213, 65 Fed. Rep. 952, 13 C. C. A. 233.

VI. No recovery by servant unless omission to promulgate rules was proximate cause of the injury.

The general principle that the plaintiff in an action for negligence cannot recover damages unless he shows that the negligence was the proximate or efficient cause of his injury, has been applied in several cases of the type reviewed in the present note.
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Messrs. John Cullinan, Jr., and Thomas M. Cullinan, for appellee:

Is the negligence of the defendant a question of fact or a question of law?

The trial court treated it as a question of fact, and in so doing was in line with a long succession of decisions in this state which have definitely fixed the doctrine of the law upon this point.

Sprague v. New York & N. E. R. Co. 68 Conn. 347, 37 L. R. A. 638; *Fritts v. New York & N. E. R. Co.* 62 Conn. 503; *Donovan v. Hartford Street R. Co.* 65 Conn. 201, 29 L. R. A. 297; *Dundon v. New York, N. H. & H. R. Co.* 67 Conn. 266; *McAdam v. Central R. & Electric Co.* 67 Conn. 445; *Heenan v. Bridgeport Traction Co.* 67 Conn. 594; *Carstesen v. Stratford*, 67 Conn. 433; *O'Neil v. East Windsor*, 63 Conn. 150; *Farrell v. Waterbury Horse R. Co.* 60 Conn. 239; *Fiske v. Forsyth Dyeing, Laundering &*

The want of a legal connection between the master's failure to make rules and the injury was the basis of the subjoined rulings. Where a train running ahead of its regular time comes into collision with another, an employee injured by the collision cannot recover damages on the theory that the system of running trains was defective, unless the train's running ahead of its time is the direct cause of the accident. *Relyea v. Kansas City, Ft. S. & G. R. Co.* (1892) 112 Mo. 86, 18 L. R. A. 817.

Where a special order of the company prohibits the running of trains at a greater rate of speed than 20 miles per hour at a given switch-point, the court does not err in charging the jury as follows: "If . . . [the engineer] was not running faster than 20 miles per hour when he passed the switch, you ought to find that he did not violate the bulletin order mentioned, even though he ran faster than that at a point further back on the track." *Western & A. R. Co. v. Bussey* (1894) 95 Ga. 584.

Nor is it error, in view of the existence of such an order, to refuse a request to charge that it was the duty of the engineer to "slacken" the speed of the train at such point; the request leaving out of consideration the rate of speed at which the train in question was actually being run at such given point at the time the collision occurred which resulted in the injury complained of. *Ibid.*

In *Rutledge v. Missouri P. R. Co.* (1892) 110 Mo. 312, it was held that the trial court should have sustained defendant's objection to the introduction of any evidence on the ground that the petition did not state facts sufficient to constitute a cause of action, where it first averred that plaintiff proceeded, in pursuance of orders given him by the yard master, to uncouple the car, and before he reached the proper place to perform that duty "someone unknown to him caused the cars to be moved without notice to him, whereby he was thrown from said car" and injured, and then also averred that the failure of defendant "to have such proper system and published rules regarding said matters was directly the cause of said train of cars being suddenly, without notice to plaintiff, moved," whereby he was thrown off and injured. The court said: "We do not see how these two allegations can stand together. He first alleged that he did not know who caused the train to move, and, of course, he did not know why and how it was moved, and not knowing this he could not affirm that the movement was the result of the failure to establish rules. It is evident

B. Co. 57 Conn. 118; *Darrigan v. New York & N. E. R. Co.* 52 Conn. 285, 52 Am. Rep. 590; *Congdon v. Norwich*, 37 Conn. 420; *Williams v. Clinton*, 28 Conn. 266; *Park v. O'Brien*, 23 Conn. 345; *Beers v. Housatonic R. Co.* 19 Conn. 566.

The placing entirely within the province of the trial court the question whether, upon all the evidence, a railway company exercised the required degree of care in operating its trains; whether its general rules and regulations were sufficient, or whether additional precautions by way of special orders and instructions were called for,—is not the law of Connecticut alone. It is abundantly supported by the decisions of other states.

14 Am. & Eng. Enc. Law, p. 908; *Sheehan v. New York C. & H. R. R. Co.* 91 N. Y. 332; *Pittsburgh, C. & St. L. R. Co. v. Henderson*, 37 Ohio St. 549; *Hunn v. Michigan C. R. Co.*

78 Mich. 512, 7 L. R. A. 500; *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 116; *Reagan v. St. Louis, K. & N. W. R. Co.* 93 Mo. 348; *Abel v. Delaware & H. Canal Co.* 103 N. Y. 581, 57 Am. Rep. 773.

The conduct of the defendant was not what the conduct of a prudent man would have been under like circumstances.

Peltier v. Bradley, D. & C. Co. 67 Conn. 49, 32 L. R. A. 651; *McAdam v. Central R. & Electric Co.* 67 Conn. 447.

If the negligence of the company contributed it must necessarily have been an immediate cause of the accident, and it is no defense that another was likewise guilty of wrong.

Grand Trunk R. Co. v. Cummings, 106 U. S. 702, 27 L. ed. 267; *Wilson v. Willimantic Linen Co.* 50 Conn. 433, 47 Am. Rep. 653; *Sprague v. New York & N. E. R. Co.* 68 Conn. 347, 37 L. R. A. 638; *Elmer v. Locke*,

this is a mere surmise, supposition, or guess of the plaintiff. The *probata* must correspond with the *allegata*. . . . At all events we think the plaintiff was bound to prove how and why this sudden movement occurred, and this he utterly failed to do. If the sudden movement was caused by the voluntary action of the engineer or in pursuance of a signal given by someone other than plaintiff, and this action of the engineer was caused, or the signal was given by the wrong person, because defendant had failed to promulgate and enforce proper rules and regulations in regard to the movement of trains in its yards at Chamois, defendant is liable for the injury caused by such movement. We can appreciate how important it is in the management of trains to have a proper system of signals to protect the employees from danger; and the propriety of conferring on the switchman performing the duty of coupling or uncoupling cars the right to give signals to stop or start is apparent, whether on the cars or on the ground. On the other hand, if the sudden movement was the result alone of the ordinary operation of the train going onto the switch, plaintiff must be held to have assumed the risk of being thrown off the car by it, and therefore cannot recover. This is one of the risks of the employment which the law holds that he assumed when he engaged to perform the work assigned him. He mounted the car while in motion, and he knew it was going in on the switch, and hence he should have taken proper precaution against the ordinary movements of the train."

Where the proximate cause of the death of a car repairer was the unauthorized removal by some unknown person of a red flag used as a signal of danger, the questions whether a flag of that color was a sufficient warning, or whether a flag of some other color would have been more suitable, are immaterial. *Abel v. Delaware & H. Canal Co.* (1890) 31 N. Y. S. R. 356 (after the re-trial ordered in (1886) 103 N. Y. 581, 57 Am. Rep. 773).

The omission of a railroad company to make a rule prohibiting "running switches" cannot be regarded as the efficient cause of an injury to a brakeman, who, with a full knowledge of the movement of a car which is being side-tracked by this method, puts himself in front of it to arrange the couplings, and, catching his foot in a frog, is knocked down and run over. The injury under such circumstances is due to his own negligence. *Sheets v. Chicago & I. Coal R. Co.* (1894) 139 Ind. 682.

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Where the locomotive of a freight train on a main track is unexpectedly set in motion and comes into collision with one standing on a side track close to the junction between the two tracks, thereby crushing to death the fireman of the latter who is engaged in oiling the wheels, the want of a proper system of signaling is not the efficient cause of the accident, where it appears that the signal required by the rules of the company was not, as a matter of fact, given, and that the signal in obedience to which the locomotive was actually put in motion was misunderstood by the engineer. *Peaslee v. Fitchburg R. Co.* (1890) 152 Mass. 155.

Failure of a railroad company to prescribe a rule confining the giving of signals to some one person connected with the making up or movement of a freight train will not render it liable to a brakeman injured by the starting of the train upon a signal given by another brakeman who supposed that the former's work of uncoupling cars had been completed, in the absence of anything to show that the same mistake would not have been made had the brakeman giving the signal been the only person authorized to signal. *Cole v. Rome, W. & O. R. Co.* (1893) 72 Hun, 467.

Where a switchman, acting under a sudden impulse and in the mistaken belief that a switch is wrongly set for a train approaching on the main track, manipulates it so as to throw that train on a siding, thereby causing the death of an engineer, it is not error to refuse to submit to the jury the question whether the company was negligent in failing to adopt a rule requiring switches to be locked, and switchmen to be at their posts when trains were passing on the main track. *Burke v. Syracuse, B. & N. Y. R. Co.* (1893) 69 Hun, 21.

Failure of an employer to make and promulgate rules for operating a machine does not render him liable for an accident to an employee from her hand being caught between revolving cylinders while cleaning the same, owing to the inherent danger of the work, and not to any action or failure to act on the part of her fellow servants, which proper rules might have prevented. *DeYoung v. Irving* (1896) 5 App. Div. 490.

In *Benfield v. Vacuum Oil Co.* (1894) 75 Hun, 209, the plaintiff was injured by an explosion caused by the contact of the flame of his lamp with gas which escaped from a tank of paraffine oil when he opened it. The court in commenting on the testimony of the plaintiff, that he had been in the habit, during the whole of his experience with the paraffine tanks, of doing the

135 Mass. 576; *Cone v. Delaware, L. & W. R. Co.* 81 N. Y. 206, 37 Am. Rep. 491; *Crowell v. Thomas*, 90 Hun, 198; *Paulmier v. Erie R. Co.* 34 N. J. L. 155; *Rogers v. Leyden*, 127 Ind. 50; *Young v. Shickle, H. & H. Iron Co.* 103 Mo. 324; *Sherman v. Menominee River Lumber Co.* 72 Wis. 127, 1 L. R. A. 173.

Hamersley, J., delivered the opinion of the court:

The finding of facts upon which judgment is founded contains a statement in detail of inferences produced in whole or in part by weighing evidence, and the credit to be given witnesses, and also of the conclusions drawn from these inferences. The former are called "facts," as denoting adjudicated facts, which can only be retried by an appellate court having jurisdiction in the trials of such facts. This court does not have appellate jurisdiction of that nature. The

superior court is the court of last resort for that purpose; and its adjudication of such facts, in the exercise of original or appellate jurisdiction, is the end of litigation, unless, in the process of adjudication, it has violated some rule or principle of law. *Styles v. Tyler*, 64 Conn. 432; *Thresher v. Dyer*, 69 Conn. 404, 408. The alleged failure to determine such facts correctly is improperly assigned in the appeal as error, and cannot be considered. The request of counsel for the certification of testimony in support of such claimed errors is an abuse of the provisions in respect to certifying evidence. *Thresher v. Dyer*, 69 Conn. 404, 408. The latter—that is, conclusions drawn from such facts—are also called facts, but with a much broader signification, including all issues that the line separating the province of the jury from that of the judge in a jury trial practically leaves to the jury. The word "fact," used in this broad sense, does

work assigned to him in the same way as on the night in question, and that no explosion had ever before occurred, remarked: "If this is true—if he had habitually raised the lid of the tank with his lantern in his hand, or hanging on his arm, and done so with impunity, then the inference is unavoidable that the conditions present on the night in question were materially different from those which usually prevailed, and the only reason for that difference which is suggested by the evidence is that the heat in the tank was greater than it ordinarily was when the lid was raised, and that this was caused by leaving the steam on longer than was proper, and that the tank was opened too soon after the steam was shut off. This conclusion, if it afforded the correct hypothesis to account for the unusual and, indeed, unprecedented explosion, is important in two respects as bearing upon the question of the defendant's liability; for, first, it tends to show that the danger here encountered was one not reasonably to have been apprehended by the defendant, and second, it demonstrates either that the negligence of the fellow servant, the engineer, who devolved his own duty upon the plaintiff, or of the plaintiff himself, who undertook the performance of that duty, or of both, contributed to occasion the accident and to produce the injury complained of, and in either case there could be no recovery in this action."

In *Gibson v. Oregon Short Line R. Co.* (1893) 23 Or. 493, it was contended that the rules to protect track-walkers from dangers of an approaching train, while in the discharge of their duties, were defective in not providing that the engines should whistle at frequent intervals before approaching bridges or trestles on which trackmen might be walking. It was held, however, upon the evidence disclosed by the record, that the injury was not owing either to the fact that the engine did not whistle, as required by the rules, or to the fact that the rules were defective in not requiring the engine to whistle at more frequent intervals, inasmuch as the plaintiff saw the approaching train half a mile ahead, and had ample time to retreat or step from the bridge to the caps, and there remain in safety until the train passed.

VII. Construction and meaning of rules.

When a rule is clear and explicit, free from ambiguity and equivocation, evidence of usage and custom is inadmissible to vary or alter its terms. *Memphis & C. R. Co. v. Graham* (1891) 94 Ala. 545.
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It is error to leave to the jury the determination of the meaning of a rule. *Western & A. R. Co. v. Moore* (1893) 94 Ga. 457.

A witness cannot be asked whether, under some particular rule, there would be any objection to doing a certain thing in a certain way, as this would be asking him to construe the rule, and this is not within the domain of verbal evidence. *Pennsylvania Co. v. Stoelke* (1882) 104 Ill. 201.

An ambiguous rule promulgated by a corporation for the government of its employees in a dangerous service should generally be taken in its stronger sense against the corporation and in favor of the employee. *Western & A. R. Co. v. Moore* (1893) 94 Ga. 457.

Obscurity of language which renders rules unintelligible to employees creates a species of trap for them, and, where the consequence of holding a given rule valid will be to disable an employee from recovering damage on the ground that he violated its provisions, the courts very properly apply the principle that rules are to be strictly construed against the master.

As was well said in *Western & A. R. Co. v. Bussey* (1894) 95 Ga. 584, "when the [a railroad] corporation itself enters upon the task of framing rules which shall stand as law unto its employees, the law-making power should be reasonable in framing such rules, and should express them in such language, and so directly, as to be entirely unequivocal. If by the formulation of rules it undertakes to meet the varying exigencies which may arise in the conduct of its business, substituting direction to him for a discretion which otherwise the employee would be required to exercise, and for the exercise of which he would be answerable, their statutes must be at least unequivocal, and within the comprehension of the class of persons upon whom they are designed to operate. Nothing should be left to intendment. It should be borne in mind that the persons ordinarily employed in the conduct of this business, and for the government of whom these rules are designed, are not learned or skilled in the technical rules of statutory interpretation; and therefore, if they be not couched in such terms as to make them intelligible to employees, or if they be so far equivocal as to express one thing and mean another, it would be a harsh rule of law which would hold the employee answerable where he conformed to the express direction of the master, but in doing so violated what the latter may be pleased to term the spirit of a rule."

not accurately denote matters not reviewable by this court. In defining facts as denoting those questions practically within the province of a jury, we are controlled, not only by established practice, but by the constitutional provision forbidding any violation of the political "right of trial by jury." In defining facts as denoting questions not reviewable by this court, we are controlled by "the primary distinction drawn by the Constitution, between the jurisdiction original and appellate of courts for the full trial and adjudication of causes, and the jurisdiction of a court of last resort for correcting errors in law which may have intervened in the course of a trial." *Atwater v. Morning News Co.* 67 Conn. 504, 526. "The true distinction as drawn under our system of jurisprudence, in connection with this provision of the Constitution, between facts that the trial court must find from the testimony, and the application of the prin-

ciples of law in reaching a judgment based upon such facts," includes "questions of law," as distinguished from "questions of fact," in a jury trial, but is not fully expressed by that distinction. While the jurisdiction of this court may be affected in its practical operation by existing procedure or practice, the jurisdiction itself "is coextensive with the judicial power of the state in all matters wherein legal principles,—that is, rules of law or principles of equity,—appear to have been erroneously or mistakenly determined by a trial court." *Styles v. Tyler*, 65 Conn. 454.

The limitations of procedure formerly existing, in connection with the practice followed in view of that procedure, prevented in some instances the full exercise of our jurisdiction, and the conclusions of trial courts, because not presented in such manner as to be reviewable under existing procedure and practice, have been spoken of in

In *Richmond & D. R. Co. v. Mitchell* (1892) 92 Ga. 82, the plaintiff, as part of his contract of employment with the company, subscribed an instrument to the following effect: "I fully understand that the rules of the Richmond & Danville Railroad Company positively prohibit brakemen from coupling or uncoupling cars, except with a stick, and that brakemen or others must not go between the cars under any circumstances, for the purpose of coupling or uncoupling or adjusting pins, etc., when an engine is attached to said cars or train; and in consideration of being employed by said company, I hereby agree to be bound by such rule, and waive all or any liability of said company to me for any results of disobedience or infraction thereof. I have read the above carefully and fully understand it." The court said: "It may be fairly presumed that the rules referred to and quoted from in the contract were carefully prepared, deliberately adopted, and embodied in some written or printed document. It is allowable therefore to notice the phraseology critically in order to ascertain whether or not, fairly construed, that phraseology embraces such a coupling as was attempted in this case. The plaintiff was neither coupling nor uncoupling cars, nor did he go between the cars, nor was the engine attached to any cars or train. The evidence is, in substance, that the plaintiff, who was a brakeman, stationed himself, in the way usually practised by employees, upon the foot-board of the pilot on the tender, and while there attempted to withdraw with his hand, without using a stick, a pin and link from the coupling apparatus of the engine, the engine and tender being in motion backwards at the time towards a standing car in the rear, for the purpose of being coupled thereto. Certainly the rules as quoted do not, by their letter, cover such a transaction as that in which the plaintiff was engaged. It is said, however, that they do cover it in spirit and intention. This seems to be altogether too doubtful, for, as we have already said, there is a presumption that such rules would be carefully considered and accurately expressed, and we may add that they ought to be construed more strongly against the party who made and adopted them than against one who merely assented to and agreed to be bound by them when they were presented to him as a basis of contract. The strong probability is that, in preparing the rules, such a case as the present, though it might frequently occur, was overlooked, and therefore was not provided for. We think this is the truth of the matter, and we 43 L. R. A.

hold with confidence that the rules have no application to the present case."

Notwithstanding a rule of the defendant company requiring all trains to stop at schedule meeting and passing points, it is not error to refuse a request to charge in an action for injuries caused by a collision, that it was the duty of the engineer to stop his train at the point where the collision occurred, it not appearing that the same was either a schedule meeting or passing point. Nor is it error to charge the jury that the engineer under such rule could pass other than schedule meeting and passing points "at such rate of speed as common prudence dictated as safe." *Western & A. R. Co. v. Bussey* (1894) 95 Ga. 584.

A special bulletin order regulating the speed of trains when passing certain particular switch points designated therein, has no application to switch points generally; and in the absence of evidence showing that the point at which the disaster occurred was of the particular class of switch points embraced within the terms of such order, a court does not err in charging the jury that this order could have no application to the point in question. *Ibid.*

Under a rule of a railroad company in these words: "Conductors and trainmen are required to be at terminal stations thirty minutes before the leaving time of their trains. Brakemen must examine the coupling apparatus and brakes before train starts and report to the conductor such as are not in good order."—It is *prima facie* incumbent upon brakemen to examine brakes only at terminal points before the starting of a train. *Western & A. R. Co. v. Moore* (1893) 94 Ga. 457.

Evidence is not admissible to show that employees of the company interpreted and acted upon such a rule as meaning that it was a brakeman's duty to examine the brakes upon a car taken on at a station before the train left that station, without showing that the plaintiff so understood or so acted on the rule, or knew that the other employees did so. *Ibid.*

A rule to the following effect, "Coach switching conductors must see that brakemen, with good and sufficient brakes, are on any moving cars; and they are cautioned as to making flying switches (switch rope being furnished). Avoid such switching, even if it increases your work," is advisory only, and imposes caution on the employees when making such switches, but does not forbid them. *Youll v. Sioux City & P. R. Co.* (1885) 66 Iowa, 346.

Rules prohibiting switchmen from using any

language appropriate enough for the purpose, as questions of fact. But whenever the record before us has legally presented all the facts found by the trial court as the basis of its judgment, and the conclusion drawn from those facts has been plainly erroneous, and such error has been lawfully assigned, we have uniformly held such conclusion, although for some purposes it might be called a question of fact, to be, *quoad* the jurisdiction of this court, a question of law; i. e. it is reviewable. When the finding of facts states evidence so that the conclusion must be reached by weighing evidence, the finding is essentially a report of evidence, and not a statement of facts adjudicated; and the question of legal inference from facts that may be involved is irregularly presented. *Corbin v. American Mills*, 27 Conn. 274, 278, 71 Am. Dec. 63. In *Bloodgood v. Beecher*, 35 Conn. 469, the judges were equally divided upon the ques-

tion whether, upon the finding of facts in that case, the intention of a mortgagor to prefer the mortgagee to his other creditors could be drawn by this court as a conclusion of law; *Hinmon, Ch. J.*, and *Park, J.*, holding that it could not, and *Butler* and *Carpenter, JJ.*, holding that it could. The case was decided by the second vote of the Chief Justice. In *Mead v. Noyes*, 44 Conn. 487, the trial court, in an action of replevin, spread upon the record the facts from which it drew its conclusion that the plaintiff was the owner of, and entitled to immediate possession of, the property replevied. Upon motion in error, this court reversed the judgment, because the conclusion from the facts found was an error in law. In *Hayden v. Allyn*, 55 Conn. 280, 289, Judge Loomis, speaking for the court, laid down the broad principle that whenever, in trials to the court, the judge has fully weighed the testimony, and passed upon the credit of wit-

tools or appliances of any kind which are not "safe," and stating that employees will be upheld by the company in refusing to use tools, machinery, rolling-stock, or appliances which are unsafe, cannot be construed in such a sense that they are deemed to be violated by an employee who makes a pilot-bar coupling with a "Janney" coupler, where such a coupling, although more dangerous than one made with the ordinary apparatus, can be made safely by the exercise of due care. *Kerns v. Chicago, M. & St. P. R. Co.* (1895) 94 Iowa, 121.

A rule that "no lumber, wood, stone, materials, or tools" shall be placed within 5 feet of the rail applies to loose tools, etc., which are liable to be accidentally moved by the wind or other causes, without the concurrence and against the wish of the railroad company, and not to permanent structures, such as cattle guards. *McKee v. Chicago, R. I. & P. R. Co.* (1891) 83 Iowa, 616, 13 L. R. A. 817.

In *Louisville & N. R. Co. v. Kenley* (1893) 92 Tenn. 207, where the question was whether the promise of a conductor to repair a car was binding on the company, it was denied that a rule to the effect that "conductors, flagmen, brakemen, and train porters were to report to, and receive their instructions from, the master of trains," had any application to complaints about defective appliances.

In *Haas v. Chicago, M. & St. P. R. Co.* (1894) 90 Iowa, 250, one rule declared that a work train "must not leave a station, when directed to run by special order, unless the conductor and engineer had a copy of the same in their possession;" while another required the conductor to show his order to the brakeman, and the engineer to show his to the fireman. The conductor of such a train received a message stating that a certain passenger train was fifty-three minutes late, and kept his train at a station until half an hour after this period had expired, the train crew having meantime taken their dinner at a place about two blocks away, where it was doubtful whether a passing train would have been heard, and then ran out his train without having inquired whether the passenger train had passed through the station, and without having received any message regulating the movements of his own train. A collision took place between the work train and the belated passenger train, and the fireman of the former was killed. The company sought to escape liability on the theory that the fireman was guilty of contributory negligence in not having refused to obey the directions of the 43 L. R. A.

conductor until he had first satisfied himself that such directions were authorized by a new telegraphic order superseding the one which announced that the passenger train was late. The court, however, refused to set aside a verdict finding that the fireman was not negligent in remaining at his post, saying: "It is scarcely necessary to say that such a rule would destroy the discipline essential to the proper management of trains, and we find nothing in the record which requires that it be enforced in this case. Whether Davies knew that No. 3 had not passed when the conductor ordered his train out onto the main line is not shown. It is probable, but not certain, that he would have heard the train had it gone through the station while he was at dinner. But conceding that he should have known that it had not yet arrived, it does not follow that he knew his train should not have been ordered out. He knew that he had not seen a telegraphic order which announced any further change in the time of No. 3, it is true, but he did not know what information the conductor had received. It may be said that it was his right to see the order, if one had been received, and that until he saw it he should have acted on the presumption that none had been sent, but such a course on his part was not required by the rules. They provided that train and engine men should be held equally responsible for the violation of any of the rules governing the safety of the trains, and that they should take every precaution for the protection of trains, even if not provided for by the rules, but they also provided that the conductor should have charge and control of the train and of all persons employed on it, and made him responsible for its movements while on the road, 'except when his directions conflict with the rules or involve risk or hazard.' In either of which cases the engineer was to be held alike accountable. Brakemen and firemen were required to report every instance when the conductors and engineers should fail to show their telegraphic orders as provided by rule 101, but we find nothing in the rules which required them to disobey the orders given. The provision holding them equally responsible for the violation of the rules governing the safety of the train must be given a reasonable construction. It applied to each one within the range of his own duties, and did not make him responsible for the wrongful actions or omissions of others. It is said that Davies and all the other train-men forgot all about No. 3. That

nesses, and specifically found, as the basis of his judgment, the inferences produced by the testimony, so that the evidence "had exhausted itself in producing the facts thus found, nothing remained but for the court, in the exercise of its legal judgment, to draw its inference from the facts"; and "in such a case the conclusion of the court can always be reviewed by the appellate court. An erroneous conclusion is an error of law, and not an error in an inference of fact." This principle was deliberately affirmed in *Tyler v. Waddingham*, 58 Conn. 375, 386, 8 L. R. A. 557, and applied to a special finding of facts, from which was drawn the conclusion that the plaintiff, at the time of making the contract with a partnership, elected to give exclusive credit to a single partner. In *Ward v. Ward*, 59 Conn. 188, 197, the principle is recognized as established, although its application in that case is treated with some subtlety. The principle may at times be

is not shown by the evidence, although the rear brakeman testified to that effect; but it is evident that he had no means of knowing the fact in regard to the engineer and fireman. The conductor and rear brakeman forgot it. The engineer remembered it, but, as the conductor had just come from the telegraph station when the signal to move was given he concluded that the train had passed. It is not shown that Davies had forgotten it, nor is it shown that he knowingly went into a place of danger, and the jury may well have found that he was not negligent in remaining at his post."

A rule of a railroad company that when a train "stops for any cause," danger signals must be given, including the placing of torpedoes on the track at least thirty telegraph poles from the rear of the train, seems intended to apply to trains stopped by accident or obstruction or unexpectedly compelled to stop between stations, and not intended to be followed every time a train stops at a station. *Northern P. R. Co. v. Poirier* (1897) 167 U. S. 48, 42 L. ed. 72. (The contention was that the conductor of one train which was running a short distance ahead of another failed to comply with such a rule.)

Where there is no rule which, in express terms requires the engineer to give any signal for sending out a flagman to protect a train, in case of a stoppage on the main line, but a rule states that "five short blasts of the whistle is a signal to the flagman to go back and protect the rear of his train," and the conductor is also required to protect his train by flagging, in case of stoppage, the construction to be placed on the rules is that it is the engineer's duty, upon stopping his train, to give the signal for the flagman to be sent back, and the duty of the conductor to take that precaution without the signal. *International & G. N. R. Co. v. Culpepper* (1898, Tex. Civ. App.) 46 S. W. 922.

A rule requiring warning signals to be displayed at an adequate distance from a place where work is to be done "which will render the track unsafe or impassable, or unsafe for trains at their usual rate of speed," has no application to a case where a bridge which has sunk about an inch below its proper level is being "surfaced." Under such circumstances it is rather the duty of the workman to clear the track for the trains, and the track is not impassable nor even dangerous within the meaning of the rule. *Aurandt v. Chicago, M. & St. P. R. Co.* (1894) 90 Iowa, 617.

One of the rules of a railroad company ran 43 L. R. A.

misapplied, but a mistake of this kind cannot shake its authority. It is not only supported by the true *ratio decidendi* of a long line of decisions, but is imbedded in the very structure of our system of jurisprudence. Settling the credit of witnesses, weighing evidence, ascertaining the truth from conflicting testimony or incongruous evidential facts, this is the peculiar province of, and under our system within the exclusive jurisdiction of, trial courts; and a mistake in the inference produced by such means is an error in fact. When such facts are adjudicated, a mistake in drawing the legal inference—i. e. in applying the law to the facts found—is an error in law. The application of this principle has been hampered, and its meaning somewhat obscured, through inadequate and uncertain methods for bringing into action the jurisdiction of this court. Sometimes the conclusion of a trial court from conceded facts is so clearly right that

as follows: "At stations (except where governed by the automatic block signals) upon the passing of every train, the red signal will be at once displayed next the track upon which the train has passed, and kept there until it has been gone the length of time given in the timetable between it and the train that should follow, if not more than ten minutes, but in all cases kept there for five minutes; and no train will pass this signal until the five minutes shall have elapsed, unless otherwise ordered in the timetable or by special instructions." The plaintiff's decedent placed a lantern between the rails after the passage of a train, and left it there more than five minutes. Then hearing another train coming, which was due ten minutes after the first, he rushed out on the track to take up the light and was struck by the train. The court declined to accept the plaintiff's contention that the decedent was required by the rule to display the signal after the passing of the first train and keep it there ten minutes until the exact time when the second one was due, and that he was therefore killed in doing what he had been expressly directed to do. The first part of the rule, it was pointed out could only be applied when both trains were to stop at the station and not when the second one was to pass by, this case being governed by the last clause. The plaintiff therefore was held to have been rightly nonsuited, as the only legal inferences that could be drawn from the evidence were either that the decedent had placed the lantern in a dangerous place, or that he, through carelessness, did not remove it when he should have done. *Foss v. Old Colony R. Co.* (1898) 170 Mass. 168.

A rule requiring car repairers, while at work on main or side tracks, to put out a blue flag as an indication of their presence, does not apply to cars upon which repairs are being made in the shops or shop yards. *Quick v. Indianapolis & St. L. R. Co.* (1889) 130 Ill. 334.

The effect of evidence that it was a part of the duty of trackmen to look out for wild trains, and that they had no other means of protection except to take care of themselves, is not qualified by a rule that wild trains "must run cautiously around curves and over grade crossings, looking out for trackmen," the proper interpretation of the rule being that the caution has reference to the safety of the train, not of the trackmen. *Sullivan v. Fitchburg R. Co.* (1894) 161 Mass. 125.

Evidence that a railroad company has pro-

practically no question is presented; and in such cases we have said that the conclusion is one of fact, properly decided; yet if in such cases the conclusion, instead of being clearly right, had been a palpable *non sequitur*, we would have reviewed it as a question of law, unless the question were irregularly presented. But more frequently the alleged error in a conclusion from conceded facts has been irregularly presented, either through mistake in making up the record, or through defect in methods for obtaining a record which should properly present the question; and in such cases we have said that the conclusion is one of fact, not reviewable. Such indeterminate use of the phrase "question of fact" or "conclusion of fact" must be taken in connection with the circumstances of each case, and cannot be treated as precisely distinguishing those conclusions which are to be treated as facts in respect to the jurisdiction of this court,

nor as modifying the settled principle that the unwarranted conclusion of a trial court in drawing its inference from the special facts which, in compliance with existing law of procedure, it has found for the purpose of drawing that inference, is essentially an error in law.

For many years, and especially since 1879, the legislature has endeavored, by means of various statutes, to modify the law of procedure so as to require a trial court to place upon record the special facts on which its judgment is founded, and to enable this court to exercise its full jurisdiction in reviewing the legal judgment of a trial court in drawing its inference from conceded facts. Such legislation has considerably enlarged the facilities for exercising the jurisdiction of this court. The effect of this legislation has been the subject of frequent consideration, and the main general conclusions reached are summarized in

mulgated rules requiring track repairers to examine their sections daily to ascertain if the track is safe, and to keep them and the cattle guards in good repair, is inadmissible in an action to recover for injuries received by a brakeman through a collision with the wing fence at a cattle guard, where there is no allegation that the fence which caused the injury is not in good order, and the rules gave the track repairers no authority to remove such fences. *McKee v. Chicago, R. I. & P. R. Co.* (1891) 83 Iowa, 616, 13 L. R. A. 817.

Where the language of a rule regulating the movements of trains may, when read in the light of the circumstances inducing its promulgations, be fairly construed as being not intended to be applicable to night trains, it is a question of fact for the jury whether the servant was guilty of negligence in putting that construction upon it, and moving a train accordingly. *Texas & P. R. Co. v. Leighty* (1895) 88 Tex. 604.

VIII. *Illustrative decisions as to the sufficiency of rules framed for the protection of railroad servants.*

a. *Rules for the protection of car repairers, and other railroad employees doing work on side tracks.*

The work of repairing a car while it is standing upon a track in a yard where switching is in progress is one of peculiar danger, and the courts have always held railroad companies to a strict account in regard to the duty of protecting employees engaged in such work, so far as that object can be attained by proper regulations.

In fact, as already mentioned (*I. supra*), one of the very earliest cases in which the employer's duty in regard to rules was discussed established the doctrine that it is the duty of railway companies to provide for the protection of this class of workmen by proper regulations. *Vosc v. Lancashire & Y. R. Co.* (1858) 2 Hurlst. & N. 728, 27 L. J. Exch. N. S. 249, 4 Jur. N. S. 364.

There the trial judge asked the jury, first, whether the deceased was guilty of negligence. Secondly, he said that no railway company by establishing rules could justify its servants in not taking due care of human life; if they drove wagons into a place where men may be at work, it was the duty of the company to see that proper rules for the safety of such persons 43 L. R. A.

were established; and he asked the jury whether there was negligence; whether the shuntsman, pointsman, and driver did all that the rules of the company required; and whether the accident was caused by the company not giving proper directions to its servants? The jury found that the accident was owing to the defective rules, and that no person other than the defendants was guilty of negligence. A verdict entered for the plaintiff upon this finding was sustained.

There is, therefore, no dispute as to the general principle that it is the duty of a railroad company to establish regulations advising its servants engaged in moving cars on a track of the whereabouts of an employee at work in this dangerous position, and to provide adequate means of warning him of the approach of danger. *International & G. N. R. Co. v. Hall* (1890) 78 Tex. 657.

By some companies the rule has been adopted that the switches leading to such a track must always be locked, and this precaution is presumably entirely adequate. *St. Louis, A. & T. R. Co. v. Triplett* (1891) 54 Ark. 289, 11 L. R. A. 773.

Considering the lamentable frequency with which car repairers are injured, and the fact that these employees are, as was observed very truly in the case last cited, entirely helpless so far as any precautionary measures that they might take to protect themselves are concerned, it is perhaps to be regretted that the courts have ever conceded that anything short of this or some other provision for absolutely blocking the repair track should have been deemed adequate to absolve a railroad company from a charge of negligence. But the cases impose a much lower standard of liability, the accepted doctrine being that the company performs its whole duty by issuing suitable directions for the placing of danger signals to notify the other employees of the fact that the repairs are going on.

A railroad company is not required to have a watchman or bumpers to protect repair tracks where one of the rules provides that car inspectors and repairmen before they go under or between cars, shall display a red signal in the direction from which a train could approach, and that trainmen shall under no circumstances back or couple on to any car while such flag is displayed. *Peterson v. Chicago & N. W. R. Co.* (1887) 67 Mich. 102. (Accident caused by failure of foreman of car repairers to move red

Thresher v. Dyer, 69 Conn. 404, 408, and *Winsted Hosiery Co. v. New Britain Knitting Co.* 69 Conn. 565, 575. In the latter case we say: "The judgment or ultimate conclusion of a court upon the special facts in issue, as ascertained from the evidence and settled by the trier, is a conclusion of law, and, as such, reviewable by this court; and this is true whether such facts are settled by a special verdict of a jury or by a special finding of a judge;" and referring to the changes in procedure: "We think that the result of this legislation is that in cases tried to the court the judge is now authorized, and, upon request, required, to find and state in a special finding the facts adjudicated by him in reaching his ultimate conclusion, including all specific facts which, when so adjudicated, must determine the nature of the ultimate conclusion and subordinate conclusions involved therein by force of settled rules and principles of law.

flag to end of the section of cars last run on the repair tracks. Adequacy of rule decided as matter of law.)

A regulation which has been pronounced very efficient is the following: "A blue flag by day and blue light by night, placed in the draw, head or on the platform or step of a car at the end of a train, or car standing on a main track or siding, denotes that car repairmen are at work underneath. The car or train thus protected must not be coupled or moved until the blue signal is removed by the repairmen." *Abel v. Delaware & H. Canal Co.* (1886) 103 N. Y. 581, 57 Am. Rep. 773. There the only rule which had been made bearing upon the case was as follows: "A red flag by day and a red lantern by night, or any signal violently given, are signals of danger, on perceiving which the train must be brought to a full stop as soon as possible, and not proceed until it can be done with safety." The court, in upholding the plaintiff's contention that it was, under the circumstances, a question for the jury to determine whether the defendant should not have promulgated such a rule as the one above set out, or one substantially equivalent to it, said: "This rule seems from its phraseology to have been mainly, if not exclusively, intended for the government of moving trains, and was not very well adapted for the protection of men under stationary cars, upon side tracks, engaged in making repairs. There was no rule prohibiting the removal of the signal, and the signal was not intended exclusively for the protection of such men, nor did it give notice that human life was in danger."

On the second appeal (1891, 128 N. Y. 662), the court again held that it "was for the jury to determine whether the rule . . . [in evidence] provided both for the putting up of the danger signal and its removal so as to protect the repairmen as far as reasonably could be done against the hazard of the negligence of co-employees." The following remarks of the court are worth quoting: "Donnelly on the first trial testified substantially that the only rule he heard of was rule 63, and what the repairmen told him, *viz.*: That they worked under the protection of a red flag. It is evident that if this was the extent of the regulations on the subject, the repairmen had a very inadequate protection. If the red flag was put up and maintained, wherever the repairmen were at work and the meaning of the signal was known by the switchmen, as it probably was, the repair-

The judgment rendered on such an adjudication of facts is merely the voice of the law declaring the legal effect of the facts adjudicated."

These considerations must control the disposition of the claim made in the case before us, that the conclusions we are asked to review are conclusions of fact, and not of law.

It appears that the defendant operated a single-track railroad; that train 474 (an extra train), following train 1411 (a regular way freight), ran into the latter train, which had stopped to attach some freight cars standing on a siding; and in the collision one Jerry Nolan, the plaintiff's intestate, was killed. Every special fact from which the trial court inferred the liability of the defendant for the injury is found, including the rules and regulations adopted by the defendant for safely operating these trains. The finding shows the neglect of one Hall, the rear brakeman of train 1411,

men would be protected except as against the reckless or heedless conduct of the switchmen. But it was essential to the efficiency of the rule that it should designate the persons authorized to remove the flag. It was shown that this was done by the rules of the New York Central Railroad which provide that the repairmen alone should have power to remove the flag from cars on a repair track. The same rule was recommended in railroad manuals published before the occurrence of the accident in question. It is obvious that such a similar regulation, which should place the duty and responsibility of removing the flag upon persons officially designated, was essential to the car repairers' protection. The rule that they should put up a red flag when they commenced work, unaccompanied by a rule prohibiting the brakemen or other employees from taking it down when they desired to remove cars from the cripple track, unless by the consent or direction of the repairmen engaged in repairing the cars, would leave the repairmen exposed to the danger of the mistake or negligence of the brakemen. If it was left to the brakemen to determine for themselves whether there were men engaged in repairing the cars, and whether the flag might be safely removed or not, and to act upon their judgment in removing it, the chances of accident would be greatly increased."

If it is practicable for a railroad company to prescribe a certain distance along which cars to be repaired must be moved on a repair track, in order to prevent any danger of their being struck by moving locomotives or cars on the adjacent lead tracks, the question should be submitted to the jury whether or not the company had provided reasonable regulations on the subject. *Cumpston v. Texas & P. R. Co.* (1895, Tex. Civ. App.) 33 S. W. 737.

In *Doling v. New York, O. & W. R. Co.* (1897) 151 N. Y. 579, the evidence tended to establish the following facts: The deceased was at work repairing a crippled car in the repair shop, which occupied the whole of a building 50 feet wide and about 200 feet in length. Three tracks passed through the shop through doors which were kept closed, and there were no windows on the side where the tracks entered the building from the yard. These tracks ran from the shop out into the yard and were connected with the main track and other tracks by switches. The three tracks were used for the purpose of moving crippled cars and material into and from the shop to the main and side tracks. The cars were moved by being kicked or shunted by means

to obey the rules provided for the protection of his train under such circumstances, and that the collision might not have happened if the rules had been obeyed, but also shows that Nolan and Hall were fellow workmen; and the trial court therefore holds that the defendant is not liable for this neglect. The question of liability is not otherwise affected by the relation of master and servant. The complaint does not allege that this relation existed between Nolan and the defendant, and claims nothing by reason of that relation, but charges the defendant with negligently conducting itself in the management of said trains; and the only allegations, so far as is material under the finding, of acts constituting such negligent conduct, are: "by failing to give proper telegraphic information to the conductor and engineer of each of such trains relative to the position of the other of said trains," and "by failing to exercise proper supervision of the run-

ning of said trains," so that train 474 ran into train 1411, and, as a result of the collision, said Nolan, who was rightfully on the former train, was killed. The trial court draws from the special facts found the following inferences: That the rules and regulations of the defendant "did not sufficiently provide for this emergency (i. e. the operation of the trains in the manner as found), and for the reasonably safe operation of trains 474 and 1411; . . . that the defendant was negligent in not providing for the emergency (i. e. the operation of the trains as found), and for the safe operation of trains 474 and 1411, by special orders and instructions, in addition to the general rules; . . . that the operation of these trains under these general rules alone, under the circumstances of this case (i. e. the special facts as found), was not a suitable and safe method to operate these trains; . . . that the train dispatcher did not ex-

of force applied to them by engines some distance from the shop, and in that way propelled by the momentum into or near the shop doors and controlled while in motion by the brakes. On the day that the deceased was killed some of the men who worked in the yard or about the shops were moving cars on the tracks outside the shop for the purpose of collecting and moving scrap iron. There was a pile of this iron near one of the tracks about 20 feet from the shop door, and the men wanted to load it upon a car. With this end in view they placed a car already loaded with 24,000 pounds of scrap iron on one of these tracks at a point about 800 feet from the doors and there kicked or shunted it towards the shop. The brakeman evidently saw that the force applied would send the car past the pile of iron where they intended to have it stop, and possibly through the doors, and he attempted to control the movement with the brake, but, for some reason, it did not work, and the car ran past the pile of iron, and killed the deceased, who was working inside one of the crippled cars. He had no means of guarding against such a peril, as it was impossible for him to see the approaching car, even if the work at which he was employed would permit him to be on the lookout, since the doors were closed and there were no windows. The court said: "The question is whether this was an accident or the result of some neglect or breach of duty on the part of the defendant. A loaded car was driven through the door of a workshop filled with busy men and one of them was killed. That the defendant's workmen in attempting to move cars in this manner in the yard were engaged in a very dangerous, if not reckless, experiment, cannot well be denied. The danger of the experiment consisted in moving cars in such a way that no one could tell exactly when or where they would stop. If upon the occasion in question the force applied was so measured that the car would stop at the pile of scrap iron, the deceased would not have been killed, but if the force applied was sufficient to send it 20 feet further and it could not be controlled by the brake, the danger to the men inside the shop was so obvious that the manner in which this part of the defendant's work was carried on may very well be characterized as reckless. We will assume then, what cannot be questioned, that the workmen were doing the defendant's work in a dangerous and reckless manner. But these workmen were doing nothing but what, according to the testimony, they had been doing for years before. If the defendant per-

mitted its employees to carry on its operations upon these three tracks outside the shop in such a manner as to endanger the lives of those inside, who could not protect themselves, it failed to discharge to the deceased the duty which the law imposed upon it of furnishing him a reasonably safe place to do his work. The defendant had the power to control and regulate its business. The law imposed upon it the duty of making and enforcing such reasonable rules and regulations for the government of the men in its service, as to prevent or guard against injury by one servant to another in so far as that was reasonable and practicable. It could certainly put an end to the practice of propelling cars upon these tracks by a force that could not be controlled, and it could provide for moving them in some other and safer way. In other words, it could change this method of doing the work by making proper rules and regulations to that end. The jury could have found from the evidence that the practice of kicking or shunting cars upon these tracks in the direction of the doors of the repair shop was known to the defendant. The danger to be apprehended from such a practice was so obvious that the defendant, in the proper discharge of the duties which it owed to its employees, was bound to guard against it by proper rules and regulations, so far as that was reasonable and practicable." (See also II. e. *supra*.)

A cause of action on the ground of the failure to promulgate suitable rules for the safety of car repairers is sufficiently stated where the complaint imputes to the defendant carelessness and negligence in causing and permitting a locomotive to run against the place at which the plaintiff was at work. *Wild v. Oregon Short Line R. Co.* (1891) 21 Or. 159. The court said: "The language of this allegation is broad enough to admit evidence of all kinds and grades of negligence on the part of the defendant which resulted from causing or permitting the locomotive to run down upon the place where the plaintiff was at work, and thereby rendering it unsafe and causing the injury. This would include the failure to provide such rules, or to adopt such precautionary regulations, as were needful to regulate or oversee the running of the locomotives upon the tracks and switches of the yard as would render the place and employment reasonably safe. While a servant assumes the risks ordinarily incident to his employment, and all open and visible risks, including the negligence of a fellow servant, yet he has a right to presume that the master will

exercise ordinary care in not issuing special orders for the reasonably safe movement of these trains; . . . that the injury to plaintiff's intestate resulted from the combined negligence of Rear Brakeman Hall and of the defendant; . . . that the defendant did not exercise ordinary care in the movement and operation of trains 474 and 1411." These inferences are reviewable as conclusions of law. It is true that, in stating the inferences, the trial judge says, "I find as a fact," etc., but this is immaterial. It is the duty of the trial judge to find, as facts within the peculiar province of a trial court, those inferences which are controlled by the weighing of evidence and the credit given to witnesses. It is also his duty to find his conclusions drawn from these inferences of fact; and, in a certain sense, these latter are findings of fact, but they are conclusions reviewable by this court, and the name given them does not alter their intrinsic

character of conclusions reviewable for error in law.

We think the court below erred in reaching these conclusions. They are all drawn in support of the claim set up in the complaint that the defendant violated the legal rights of the plaintiff's intestate, because it failed to exercise proper supervision of the running of said trains, and because it failed to give telegraphic information to the conductor of each train relative to the position of the other. The supervision of the trains (unless as involved in the failure to give telegraphic information) is to be found in the rules for the movement of the trains. These rules are before us. They are substantially the same as those in use by about 90 per cent of the steam railways of this country; and the trial court finds that, "for the general movement and operation of trains, these rules are the best and safest general rules yet devised by the best rail-

exercise due care for his safety by providing when necessary all such needful rules for the conduct of its business, or such precautionary measures, as will not needlessly expose him to risks not necessarily resulting from his employment. This being so, we hold the language of the complaint broad enough to cover the negligence imputed to the defendant. Nor does this work any hardship. If it had desired a more specific statement of the negligence imputed to it, that end could have been attained by a motion to make the allegation more specific; but the defect is not fatal to the sufficiency of the complaint as stating a cause of action."

Where cars are sent on to a siding without any warning to employees working thereon and cause the death of a brakeman while he is engaged in coupling the cars of another train, the question whether the company has exercised reasonable care in the making and promulgating of rules for the management of the cars in its yard, may properly be submitted to the jury, but the jury cannot be asked whether some specific rule should have been adopted. *Larow v. New York, L. E. & W. R. Co.* (1891) 61 Hun, 11. The court said: "The only negligence claimed was, that the defendant omitted to make and promulgate a rule to the effect that an engine should not enter upon a siding upon which there was another engine and cars without giving a signal or sending notice to the employees of that train. The court submitted to the jury the question whether such a rule was reasonable, and instructed it that if it found that it was reasonable, fair, and just, it might find that the defendant had omitted a reasonable rule, and was therefore negligent, unless the rules already established by the defendant substantially provided for such a case. The court well remarked that there was no evidence in the case that any other company had promulgated any such rule, and none to show whether such a rule could be practically followed in doing the work to be performed in the defendant's yard where the accident occurred. The court then added: 'You must use your best judgment, and, we assume, it is better than mine; hence, I have left it to you as a question of fact.' The effect of this instruction was to submit to the jury the question whether a certain rule should have been made and promulgated by the defendant without any proof whatever as to its practicability, or that any similar rule had ever been adopted or followed by any other railroad company in the management of the engines 43 L. R. A.

and cars in its yards. In other words, the plaintiff was permitted to suggest a rule for the management of the business of railroads, which, so far as appears from the evidence, was not shown to be either in use or practicable, and the court then submitted the question of its propriety to the jury, that it might, by guess or speculation, determine whether such a rule was proper, and, if so, might find that the defendant was negligent in not having adopted and promulgated it."

In *Berrian v. New York, L. E. & W. R. Co.* (1892) 131 N. Y. 582, it was suggested on behalf of the plaintiff that a rule of the company which prescribed a red flag by day and a red light by night upon a crippled or disabled car to indicate that it was not to be moved or collided with, for the reason that men who were engaged in repairing such car might be under or about it in such a position as to be unable to save themselves if the car was moved, should have been extended to the cars on a siding when being coupled; or, in other words, the company should have formulated and put in operation a rule which would require a red light by night and a red flag by day to be exhibited from the east end of the caboose or from the end of cars which are being coupled. The court, after laying down the general principle as to the extent of the master's duty, which has been already quoted (II. *supra*) proceeded as follows: "The question here is whether by the exercise of such prudence and foresight, they could have adopted any precautions against injury to the employees than such as they did, or whether there were still others that would suggest themselves to men of ordinary intelligence and vigilance. They had a body of rules embracing every case that was supposed to need regulation. One of these rules provided that when a locomotive was moving backward, its signals must be displayed upon the bumpers. It was made the duty of the yardmaster to see that cars were brought together with as slight a jar as possible, and coupled with coupling sticks. The engineers were required to use the utmost care in pushing cars into turnouts so as to avoid injuring them or other property. Brakemen were required to exercise great care in coupling cars, 'and as, for various causes, it is dangerous to expose the hands, arms, or person between the same,' they were required, before coupling, to examine the situation so as to act prudently. The deceased made the coupling alone, though he was not required to do so, but could have

road talent of the country." There is nothing in the record that calls for a review of this finding. For the purposes of this case, we assume the conclusion to be correct. These rules cover the movement of regular and extra trains. They provide for special orders for starting extra trains. They require the train dispatcher to give telegraphic information of the meeting place of such trains, and of trains moving in the opposite direction, as well as of regular trains off the regular time. But they do not require him to inform, by telegraph, trains moving in the same direction of their relative position, and for that purpose to keep in mind the position of all such trains, so as to decide, as they approach each station, whether there is a likelihood that a rear train may overtake, and, if the rules are not obeyed, run into, the forward train. On the contrary, they are drawn upon the theory that such telegraphic supervision of trains mov-

ing in the same direction, in view of all the conditions involved in operating a single-track road, tends rather to lessen than increase the safety secured by the rules adopted relative to the movement of such trains. The soundness of this theory has received judicial sanction. *Enright v. Toledo, A. A. & N. M. R. Co.* 93 Mich. 409, 413; *Illinois C. R. Co. v. Neer*, 31 Ill. App. 126, 134. In the latter case some self-evident reasons are given. We think in this respect the rules of the defendant do not violate its legal duty, and that their compliance or noncompliance with that duty, under a given state of facts (notwithstanding many cases hold that such question must be submitted, with instructions more or less precise, to a jury, by force of the law defining the province of a jury), is essentially an inference of law, and, when drawn by a trial court, is reviewable by this court. So far, therefore, as the proper supervision of trains 474 and 1411 depended

waited for the engine, and could have had the assistance of some of his coworkers to help him. He could have used a lamp, but did not, though he had a full supply. There were coupling sticks in the caboose for the use of the deceased, which, when used, had the effect, as the court below said, of lengthening the arms. He slept in the caboose and knew and understood the situation and the dangers of the business. Considering the precautions and aids which the deceased might have used to avoid the accident and did not, it would be quite as easy to show that the accident resulted from an omission to use these precautions on his part as that it was caused by the defendant's neglect to make a rule for the display, upon cars that were being coupled, of a red light or a red flag. There is no proof in the case that rules for such a case had ever been promulgated by any other railroad company, or that it was reasonable or practicable to provide against the occurrence of such an accident by a rule. The learned trial judge submitted to the jury the question whether the defendant was at fault in omitting to make and publish such a rule. This opened to the jury a wide field for speculation and conjecture. In the absence of some proof on the part of the plaintiff that such a rule was in operation by other roads, or of persons possessing peculiar skill and experience in the management and operation of railroads to the effect that such a rule was necessary or practicable under the circumstances, or unless the necessity and propriety of making and promulgating such a rule was so obvious as to make the question one of common experience and knowledge, the court is not warranted in submitting such a question to the jury. Besides, it affirmatively appeared that the rules in use by the defendant provided in a reasonable way against the occurrence of such an accident so far as such casualties can be prevented by rules. There was not, we think, sufficient evidence of any neglect of duty on the part of the defendant in this or in any other respect to warrant the submission of the case to the jury."

b. Rules to prevent the automatic or unauthorized movements of engines or cars.

A railroad company which constructs a siding upon an inclined plane owes the duty to an engineer of providing rules and regulations to secure the cars placed upon such siding from getting out upon the main line. *Lake Shore & M. S. R. Co. v. Topliff* (1895) 2 Ohio Dec. 522; 43 L. R. A.

Galveston, H. & S. A. R. Co. v. Crowsell (1894) 6 Tex. Civ. App. 160. In the latter case the precaution suggested was the use of a stub-switch so constructed that it would cause loose cars to run off the side track before reaching the main track.

An employer which requires the brakes to be securely set upon all cars standing upon its coal trestle is not guilty of negligence in failing to promulgate other rules, where the proof is that such rule is entirely adequate, if complied with, to prevent the moving of the cars to the injury of employees. *Kudik v. Lehigh Valley R. Co.* (1894) 78 Hun. 492.

In *Southern P. Co. v. Lafferty* (1893) 15 U. S. App. 193, 57 Fed. Rep. 536, 6 C. C. A. 474, the court after referring to the cases of *Filke v. Boston & A. R. Co.* (1873) 53 N. Y. 549, and *Booth v. Boston & A. R. Co.* (1878) 73 N. Y. 38, 29 Am. Rep. 97 (where the defendant's liability was predicated on the fact that the crew of trainmen was insufficient for the work to be done), proceeded as follows: "Both of these cases were decided upon the application of the familiar principle of law, which is clearly and distinctly stated by the Supreme Court of the United States in *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612, that the master is liable to the servant for an injury caused by the master's own negligence. It is true that in the cases referred to this principle was applied to trains put in motion by the railroad company, but it seems to us that the general doctrines therein announced are equally applicable to the facts of this case. It is the duty of a railroad company to see that its locomotive engines, after their run, are left in a place of safety. If left where they are liable to be put in motion by the careless, negligent, or wilful act of outside parties, it is as much the duty of the railroad company to see that they are properly guarded to prevent accidents from occurring, as it is to see that a sufficient number of employees are put on board the trains set in motion by its own orders. The company is bound to take ordinary care to prevent such engines from running out from the side tracks or turntable tracks, where they are left, onto the main track, of their own motion, or from being run out by any interference of outside parties. This duty it owes to its employees on trains regularly upon the main track, in order not to expose them to the extra risks of danger from accidents which might otherwise be liable to happen. The moving of such engines at such a time and in such a manner from the side

on the adoption of adequate rules for the safe operation of those trains, the only legal inference from the facts found is that the defendant did not fail to exercise proper supervision of the running of these trains.

The failure to give trains 474 and 1411 telegraphic information of their relative positions is found as a fact, and the conclusions of the trial court are simply an inference from this fact, in connection with other facts found, that the defendant, by this means, had violated the legal rights of the plaintiff's intestate. In other words, the inference is one of legal liability, and affirms that the law which defines the duties of railroad corporations, and the rights of persons lawfully on their trains, imposed upon the defendant the duty of giving such telegraphic information, and gave to the plaintiff's intestate the correlative right to have such information given. The validity of this inference is really determined in the disposal

of the claim that the rules of the defendant did not fulfil its legal obligation in the supervision of those trains under the circumstances of the case; i. e. the facts as found. The rules do not require such information to be given, because giving such information in all instances involving like conditions would tend to danger, rather than to safety. A railroad corporation, in operating its road as a quasi public highway, is engaged in a business dangerous to human life, and is exercising for its private benefit a franchise granted by the state, on condition that it transport such members of the public as have lawful occasion to use the highway with every precaution for their safety that public policy, as fixed by legislation or recognized by adjudication, requires. For these reasons, the law imposes upon the corporation a duty to use such precautions. That duty it owes to each person lawfully on its trains; and this, independently of any spe-

tracks is not one of the ordinary risks incident to the business in which Lafferty, the brakeman, was engaged."

In the same case the question whether or not the employment of only one watchman to perform that duty, where he is also required to wipe the engines and put them in proper order for service the next day is a reasonable precaution, was held to be one for the jury.

See also Hewitt v. Flint & P. M. R. Co. (1887) 67 Mich. 61, II. d. *supra*.

c. Rules to obviate injury from the sudden starting of railway cars.

In an action to recover damages for the death of a workman, who, while engaged in unloading gravel from a car, was thrown off by the sudden movement of the car, as to which he received no warning from the company's representative who ordered the movement, it is error to reject evidence going to prove that a railroad company was guilty of negligence in not having adopted a proper system for giving warning to its employees under such circumstances. *Campbell v. New York C. & H. R. R. Co.* (1885) 35 Hun, 506.

A coal company which adopts a system of bumping an empty car against a car which has been loaded with coal to start the latter along without special warning to the employee engaged in loading the car, or general rules affording an assurance of protection, is liable for injury to an employee caused thereby. *Wenona Coal Co. v. Holmquist* (1893) 51 Ill. App. 507.

d. Rules regulating the switching of cars.

A railroad company is under the duty of prescribing definite rules for the making of flying switches. *Chicago & N. W. R. Co. v. Taylor* (1873) 69 Ill. 461, 18 Am. Rep. 626.

An averment that the defendant negligently omitted to provide rules, signals, or systems in cases of flying switches, or of shunting or kicking cars, states a cause of action. *Reagan v. St. Louis, K. & N. W. R. Co.* (1887) 93 Mo. 343. There the defendant contended that the joining of the cars for the purposes and in the manner described in the petition was so common, necessary, and frequent, especially in the case of freight trains, that it could not be said to involve any extraordinary risk. But the court said: "We do not agree to the proposition. It is certainly a complex business requiring care, and must be dangerous if not done under proper regulations, at least so far as 43 L. R. A.

other servants are concerned, whose business requires them to be in and out of the cars, liable to be jolted. In these cases of making a flying switch, and of shunting, or kicking of cars, it is feasible and perfectly proper to have some rules and regulations to warn persons liable to be injured."

In *Davis v. Staten Island Rapid Transit R. Co.* (1896) 1 App. Div. 178, where the injury was caused by several cars running through an open switch on to a siding and coming into collision with other cars standing there, it was held that a railroad company performs its duty to its employees in regard to the opening and closing of switches, by promulgating a rule requiring conductors to look after the switches used by their engines. The court said: "Rule 132, if faithfully executed by the conductor, was ample to provide against such an accident as caused the death of Davis." It imposed upon conductors of trains the duty of looking after the switches. All that could be required from the company was that the rule should impose upon some of the employees the duty of seeing that the switches were closed. That is all that the respondent contends for. If the rule had provided, in the form suggested by the respondent's counsel, that the person who opened the switch should close it, it would in that form have constituted no greater safeguard against danger than the rule in force. The duty would have rested on an individual, just as the present rule imposes it, and it could have been neglected and omitted with as much ease as it was neglected in the instance before us. The proximate cause of the accident was not due to the failure of the defendant to make a proper rule, but to the neglect of a duty imposed by the defendant upon Conductor Sherman. For this neglect the defendant was not liable."

e. Rules as to the manner of loading railway cars.

In *Bushby v. New York, L. E. & W. R. Co.* (1887) 107 N. Y. 374, the defendant was held liable on the ground that it had established no system with regard to the use of side stakes on flat cars, and that it was not absolved from liability merely by reason of the fact that the station agent had, according to his custom, made a casual inspection to see if the load had been properly placed.

In *Ford v. Lake Shore & M. S. R. Co.* (1891) 124 N. Y. 493, 12 L. R. A. 454, the same subject underwent an elaborate discussion, the court saying: "In the case before us it was clearly

cial duty arising from a contract of carriage or employment. *McAdam v. Central R. & Electric Co.* 67 Conn. 445, 447. Each person lawfully on a train has a right to the protection of such precaution, and is entitled to damages for any injury done him in violation of this right. In holding that the rules for the supervision of trains under conditions like those attending the trains in question fulfilled the legal duty of the defendant in this respect, and that public policy does not require these rules to prescribe giving telegraphic information in the manner claimed, we necessarily hold that giving such information to these particular trains on the day specified is not a precaution required by public policy, and is not a duty imposed upon the defendant by law, and therefore a failure to give such information did not violate any legal right of the plaintiff's intestate.

But the claim is made that the conditions

the duty of the defendant to adopt some system for the loading of lumber upon open cars that would have regard for the safety, not only of the servants and those traveling over its roads, but to the safety of all persons who should be in the vicinity of its cars. The importance and extent of the business and the manifest danger from the falling of heavy sticks of timber from the cars, required this. But there was no rule on the subject. The only rule shown to exist had no particular reference to lumber more than any other freight, and it expressed nothing more than the obligation which the law put upon the corporation, *viz.*: to take due care that freight was safely loaded and should not fall from the car. But method or system as to loading lumber, there was none. Having furnished a good car and stakes that might be used, the manner of loading lumber was left to the judgment and discretion of its agents and servants. It was not sufficient for the defendant to show that its employees knew that the rule I have quoted applied to lumber, and also knew that the general usage required it to be staked, and that stakes were furnished and available to the men in the particular case before us. All this may be assumed to be true, and yet the fact exists that the use of the stakes was not enjoined upon the servants by any rule of the defendant or by any instruction ever given them. Having furnished the car and the stakes, it was left to the judgment and discretion of the foreman whether to use the stakes or not, and in this particular instance they were not used for the reason that they supposed the lumber would stay on the car over the short distance it was to be carried. And it is because of the failure of the defendant to require the use of the stakes in all cases that the neglect of its servants in this case is imputed to it. There was no rule, and the only method or system was such as the foreman in each particular case should deem the safe and proper one to pursue."

1. Rules as to the operation of trains by schedules or special orders.

1. Duty as to trainmen.

It is obvious that employees operating trains will be in constant danger of injury unless they have some reasonable means of knowing at what time they are to look for particular trains at various places along the line, and that this condition cannot be satisfied unless the movement of the trains upon each division of the road is

attended trains 474 and 1411 differed essentially from the conditions in general attending trains moving in the same direction, and differed so essentially as to constitute an exceptional case or emergency, unprovided for by the general rules, and of a character so peculiar to itself as to throw upon the defendant or its vice principal, the train despatcher, the duty of acting, in view of all these exceptional circumstances, as a man of ordinary prudence should act; that the trial court has found that the train despatcher did not so act; and that such a finding can never be reviewed by this court. This, in truth, is the real ground of the judgment, and the very gist of the question before us. We think the conditions attending trains 474 and 1411 did not differ essentially from those in general attending trains moving in the same direction, and did not create an exceptional case or emergency unprovided for by the rules; and that the finding of such

controlled by a single person at some convenient point, issuing his directions by telegraph according to a definite system which rests partly upon fixed timetables arranged beforehand and promulgated to the employees affected, and partly upon special orders adopted to meet emergencies for which the timetables have not adequately provided.

It is the duty of a railroad company "to use ordinary care and prudence in making and publishing . . . sufficient and necessary rules for the safe running of its trains." *Cooper v. Central R. Co.* (1876) 44 Iowa, 134; *S. P. Lewis v. Seifert* (1887) 116 Pa. 628; *Baltimore & O. R. Co. v. Camp* (1895) 31 U. S. App. 213, 65 Fed. Rep. 952, 13 C. C. A. 233.

"A railroad company is bound to regulate the time and manner of running its trains, so as to avoid collisions, and to enable all its servants to know when a train may be expected, and thus avoid danger." *Shearm. & Redf. Neg.* § 693, quoted in *Reagan v. St. Louis, K. & N. W. R. Co.* (1887) 93 Mo. 348.

The duty of a railroad company to make and enforce regulations for the safety of its servants embraces the duty of knowing where its trains are, and of giving such orders as are reasonably necessary to protect the trainmen. *Galveston, H. & S. A. R. Co. v. Smith* (1890) 76 Tex. 611.

But "the law does not require a railroad company to direct the movement of its trains by orders from the train despatcher alone, nor does the law require it to adopt any particular form of orders, or any particular system for communicating them; but a company has the right to direct the movement of its trains by train orders alone, or by train orders and signals, or by signals alone, or by time card alone." *Hannibal & St. J. R. Co. v. Kanaley* (1888) 39 Kan. 1.

In *Wright v. New York C. R. Co.* (1858) 28 Barb. 80, the question presented was whether it was negligence to require or permit approaching trains to reach a certain station at the same moment. The court said: "This was a question of fact to be solved by experience in running trains. If there is no difficulty in stopping the train at the proper place, and no danger of running by at any time, including the night, then timing the trains in this manner would not be negligence, assuming, of course, that the up train should run on to the side track. But if experience shows that there is danger, especially in a dark night, of the down train running by the east switch, then it would be gross

emergency by the trial court is an inference from the special facts found reviewable by this court. The conditions in general attending trains moving in the same direction under the rules, without telegraphic information of their relative position, includes: All trains, regular and extra, made up in all ways, even to a single engine; trains off their regular time, way freights being commonly behind time; stopping places for trains which are used only occasionally and not at regular intervals; trains moving at all times of day and night, and in all conditions of weather and atmosphere; trains moving at various rates of relative speed. The special facts found from which, apparently, the inference of an exceptional case or emergency is drawn, are the following: Train 474 consisted of an engine pushing a snow plow. Train 1411 was upward of an hour behind its schedule time. Train 1411 stopped to attach three freight cars at Kent

Furnace, which is merely a siding where freight trains stop occasionally and at irregular intervals. The rear train, when in motion, moved at a faster rate of speed than the forward train. The day was very cold, and the snow plow threw snow considerably, rendering it difficult for the lookout stationed on the snow plow to see ahead. Just before the accident, the plow was not throwing much snow, and the lookout could see. We think the conditions shown by these special facts, considered by themselves or in connection with all the special facts found, are within the conditions in general attending trains moving in the same direction; do not constitute an exceptional case or emergency unprovided for by the general rules; and did not throw upon the defendant or its train despatcher the special duty of keeping the conductors of those trains informed by telegraph of their relative position. No other inference can be legally drawn from the

negligence to provide for the arrival of the trains at the same moment, as there would be great danger of a collision."

No inference of negligence on the part of a railroad company towards its employees arises from its running two trains five minutes apart with orders to pass at a given place. *Terre Haute & I. R. Co. v. Leeper* (1895) 60 Ill. App. 194.

When schedules are departed from in the operation of trains such orders should be issued by the company as will afford reasonable protection to the trainmen. *Lewis v. Selfert* (1887) 116 Pa. 628.

"A railroad company," as was observed in a recent West Virginia case, "having prepared and promulgated its schedule, it must adhere to it, and if it makes a change or violates such schedule, it is its positive duty to notify all who may be affected thereby of such change. When, in contravention of its schedule, it sends a 'wild engine' over its track unexpectedly, it is in duty bound to warn all its employees who are rightfully on and using the track about its business, whether in charge of engine, train, or handcar, of the change in the schedule, and if it intrusts this duty to others, by bell, whistle, or otherwise, it makes such others its vice principals to that extent, and if they fail to discharge this duty the company must answer for their negligence unless it be shown that the injured person contributed thereto. . . . The company must protect its employees from all dangers created by itself or its authorized agents or agencies which such employees cannot themselves foresee, or by the use of ordinary prudence avoid. For it must furnish them a safe place to work. To send 'wild engines' and trains without any manner of warning or precaution over tracks already rightfully occupied by other employees is negligence in the highest degree criminal, in utter disregard of human life or limb, and worthy of the severest penalties the law can possibly inflict; and it is made less criminal by the degree of precaution taken to give the necessary warning, and only becomes excusable when the measures adopted are sufficient to protect such employees from threatened danger, provided they are free from fault themselves." *Turner v. Norfolk & W. R. Co.* (1895) 40 W. Va. 875.

The adoption and promulgation of rules permitting regular trains to be converted into extra trains running without a schedule, and requiring trains of the latter class to take a side track at least five minutes before the arrival of any

schedule train at the last station to which it is safe for the extra train to run, exonerates the company from liability for the death of an engineer of a schedule train from a collision between it and such extra train running ahead of its ordinary schedule, owing to the fact that the rule as to the side tracking has not been observed by his coservants in charge of the latter train. *Evanville & T. H. R. Co. v. Tohill* (1895) 143 Ind. 50. The court said: "The special verdict before us not only fails to find that the appellant had no rule by which the operatives of extra trains were to so run as to protect regular trains from collision, but it is, as we have seen, expressly found that the company maintained rules under which regular trains might be converted into extra trains; that trains of an inferior class should clear the right of way for trains of superior class; by taking a side track at least five minutes before the arrival of any schedule train at the last station to which it was safe for such inferior train to run; that No. 19 wholly failed to act in accordance with said rules, and did not take the side track at Pursell, where No. 20 could have passed in safety, but continued beyond said station to where the collision occurred. Thus it appears that obedience to said rules by No. 19 would have made the passage of No. 20, running by the schedule, entirely safe."

A jury is justified in finding that a railroad company is guilty of negligence in failing to promulgate a rule providing that, in cases where it is desired to give to a wild train the right of way over a regular train, and for that purpose to hold the latter at a certain station, the detaining message received by the operator shall be shown to the conductor or engineer of the regular train, and that a communication shall be sent back from them to the effect that they have received and understood the despatch. *Sheehan v. New York C. & H. R. R. Co.* (1883) 91 N. Y. 332. There the facts as stated by the court were as follows: The trains which came into collision were denominated on the schedule as Nos. 50 and 337. The former was due at Cayuga from the west on the day of the accident at 4:40 P. M. and was appointed to leave for the eastern points at 4:45. "At 4:46 the superintendent of the road telegraphed from Rochester to the conductor and engineer of the latter train while at Auburn." "Wild cat to Cayuga, regardless of No. 50, 12, G. H. B." It was shown that the numeral "12" at the end of the order, means "Answer how understood," and "G. H. B." were the initials of the superin-

facts. A conclusion from conceded facts drawn by a court in the exercise of its legal judgment, and controlled by the assumption that two and two make five, is just as truly an error in law as if it were controlled by the assumption that an ordinary breach of contract calls for exemplary damages. In the present case the error is not of this palpable kind. As a matter of first impression, there is room for hesitation and doubt; but, upon full consideration, it seems to us that the legal inference is clear, and that, in reaching its conclusion, the court below, unless influenced by the error involved in its inference that the rules adopted were inadequate, has failed to apply to the facts those settled principles of sound reasoning whose recognition and application are termed the soul of the law.

The plaintiff relies mainly upon the recent case of *Sprague v. New York & N. E. R. Co.* 68 Conn. 345, 37 L. R. A. 638. In that case

tendent of the road. No similar notice, however, was given to the conductor and engineer of train "50" to hold it at Cayuga, and it was in consequence of this omission that the collision occurred. "The rule of the defendant then in force . . . required this order [such as that sent to the conductor and engineer of train 337] to be first copied by the operator at Auburn in an order book provided for that purpose, and repeated back to the despatcher 'to be sure' (as the rule says) 'it is correct.' After receiving from the despatcher a message 'O. K.' the operator was required to make a copy on a blank for the conductor or engineer, the persons addressed, 'who will' (the rule requires), 'after comparing it with the book and seeing it is correct, sign their names to the book prefixed by the numeral "13." Thereupon the operator must transmit the '13' accompanied by the signatures of the persons addressed, to the despatcher. The numeral '13' signifies 'we understand' and is followed by a repetition of the order. In this instance [the case under discussion] the conductor and engineer of '337' answered 'We understand: wild cat to Cayuga regardless of No. 50.'" This rule was held to be perfectly adequate. "There was" as the court remarked, "full and perfect communication between the parties; nothing was left to the discretion of either the operator or the trainmen, nor was either permitted to exercise an independent judgment as to the meaning of the order or its delivery. Everything was precise and notice brought home to the persons to be affected." The omission to send a similar notification to the conductor and engineer of train 50 was then commented upon as follows: "Having ordered '337' to travel on the time of '50,' the defendant was bound to exercise every reasonable precaution that train '50' should not leave Cayuga before the arrival of '337.' No reason is given for not communicating with the conductor and engineer of train '50' before it reached Cayuga, or at least on its arrival there. The defendant annulled its timetable—made it imperative upon '337' to move in spite of the prearranged right of '50,' and not only omitted as to '50' the exceedingly proper and wise conditions on which alone '337' was permitted to obey, but failed to send any communication whatever to No. '50'. Its omission to do so not only defeated all previous precautions, but converted them into means of destruction. The object should have been to prevent train '50' from running according to the timetable. 42 L. R. A.

the plaintiff's intestate was a servant of the defendant, and was killed in a collision between his train and the train moving in the opposite direction, caused by the misconduct of the conductor of the opposite train. The complaint charged the defendant with liability on account of its violation of its duty as master in employing the conductor at fault to run this train, knowing him to be incompetent. Any other violation of duty on the part of the defendant was inseparably entangled with this, the real ground of the action. The main question considered was one of law as to the use of the admissions of a demurrer overruled upon a hearing in damages. Aside from this, our decision turned wholly upon the question whether, upon the facts as stated, we could find error in the conclusions of the trial court that the conductor was incompetent; that the defendant knew or ought to have known that he was incompetent, and with this knowl-

To secure certainty in that respect, the defendant should have so communicated with its conductor and engineer that these servants would understand the object. It is plain that the mode of communicating, already adopted with '337' was ample and effectual. Two parties only were involved, the master and its servants upon the train, and the only hazard was disobedience or forgetfulness on the part of those servants. In the method adopted another event was introduced, upon which the first was made dependent. Instead of communicating with the engineer and conductor the defendant communicated with a third person—the telegraph operator [at Cayuga] . . . for orders. The train was made subject to his will, and the object in view became dependent upon his memory, and his faithfulness in obeying the order, and the probabilities of its attainment were thereby lessened. It cannot be said, therefore, as matter of law, that the defendant so dealt with the problem before it as not to expose the plaintiff—its servant—to perils against which he might have been guarded by proper diligence on its part, and, as matter of fact, the jury might well find that it did not take such reasonable care to protect him from accident as the exigencies of the situation required. Indeed, the evidence shows that he was needlessly put in a place where injury was made inevitable, by the direct interference of the defendant. It is one thing for the orders of the master to go by report or hearsay to the servant, and quite another when they are received by him directly and without an intervener. In the first they are liable to be conceived wrong, and repeated untruly, as was the case in this instance, while in the last such mistake is at least improbable. The law does not exact absolute certainty, but when life is at stake it demands that care shall be taken to provide as far as possible against all contingencies, and whether the importance of a right understanding of the order, actually given, as to train '50,' required that one mode of communication rather than another should be adopted, was for the jury to say. Among other facts they could consider that the effect of starting train '50' on its prescribed time was as well known to the defendant when it directed '337' to move, as it was after the collision. That event came from no cause of the existence of which it was ignorant, but from one which it might have controlled. The defendant had created the exigency, and was bound, in some practicable way, to adjust the running time of train '50' to it, and

edge placed him in charge of the train where his incompetency caused the injury. Here the inference of legal liability from the conclusions of fact as stated was unquestioned. The finding shows that these conclusions were not inferred from subordinate specific facts found, but depended in part upon the weighing of evidence and credit given to witnesses. This sufficiently appears in the opinion, but more clearly in the record, which is not printed in the report. We held that such conclusions were plainly conclusions of fact, within the province of the trial court. No question was presented as to a conclusion from specific facts found where such conclusion is clearly a *non sequitur*. The defendant claimed that the question of its violation of a legal duty, by reason of the insufficiency of its railroad management, was a pure question of law. In referring to this claim, the opinion holds the question to be irrelevant to the case in hand, and that,

if the principle claimed is sound, it cannot control emergencies which no system of rules can anticipate and provide for. It is in this connection that the language specially relied on, relative to emergencies, is used. The language must be read in this connection, and in view of the circumstances of the case then before us. So read, the language does not establish any principle inconsistent with the views expressed in the present case.

After stating the specific facts found and the conclusions from those facts (which statement is strictly a part of the judgment, specially setting forth the facts on which it is founded), the finding states that the defendant claimed, as a matter of law, "that, upon the facts in evidence, the defendant, having operated its trains under suitable rules and regulations, and having properly equipped said trains, had performed its entire duty towards plaintiff's intestate, and the law imposed no higher degree of care

for the consequences of the omission of any reasonable act tending thereto, it was liable. It was not enough to tell Kieffer to hold the train. The duty of holding it devolved upon the defendant, and its breach was not excused by showing that it would have been held if Kieffer had performed his duty."

In *Dana v. New York C. & H. R. R. Co.* (1883) 92 N. Y. 639, involving the same facts as the case just cited, the plaintiff was nonsuited, and the court of appeals set aside the nonsuit for reasons similar to those which had led them to sustain a verdict for the plaintiff in the earlier case. A similar ruling under similar facts was made in *Sutherland v. Troy & B. R. Co.* (1891) 125 N. Y. 737.

Evidence that a train despatcher, when he required trains to run under special orders, failed to insist on receiving from the local operator to whom his orders were transmitted an assurance that the additional precautions required by the rules in such cases for the prevention of collisions had been taken is sufficient to support a verdict for the plaintiff. *Baltimore & O. R. Co. v. Camp* (1895) 31 U. S. App. 213, 65 Fed. Rep. 952, 13 C. C. A. 233.

In *Chicago, B. & Q. R. Co. v. McLallen* (1876) 84 Ill. 109, the defendant's assistant superintendent telegraphed to the conductor of an extra freight train to leave a certain station and run to the next, ahead of a passenger train then due by the time-table, and the conductor, in complying, was killed by a collision of the two trains. The conductor of the passenger train was not notified of such telegraphic order, and did not restrain speed. It was held that the deceased had a right to expect that the passenger train was behind time, and that his administrator was entitled to recover. The court said: "We think the evidence warranted the jury in coming to the conclusion that necessary prudence in such matters required that . . .

[the freight train] should not have been sent out under the circumstances, without the communication of an order to the passenger train regulating its speed so as to have insured safety against collision; that in this there was negligence on the part of the company in not having a rule requiring such an order in such exigency; or if this be a proper matter to be left to the care of the assistant superintendent in such case, it was want of prudence on the part of the assistant superintendent to order [the freight train] forward . . . without making it certain that the passenger train had an order in 43 L. R. A.

some mode restraining its speed and regulating its movements so as to guard with certainty against collision. . . . It seems more than probable that, if the statement of the operator had been properly understood by the conductor of No. 10, the collision would have been avoided. The liability of mistakes in the delivery of messages by telegraph was known to the company. A rule was in force requiring all orders to be repeated back to the main office and that the repetition should be approved and indorsed 'O. K.' before an order should be acted upon. We cannot say that the jury were wrong in saying that a failure to send such an order in this case was culpable negligence. If so, the negligence consists in the failure of the company to make a rule requiring this in such cases, or the negligence was that of the assistant superintendent to send such an order in the exercise of the discretion left in his hands in the absence of such rule."

Whether a system of operating trains, under which, where trains of the same class are going the same way, neither is notified of the movements of the other, although the one following is to make faster time than the other and must overtake it, is consistent with due care, is a question for the jury. *Illinois C. R. Co. v. Neer* (1888) 81 Ill. App. 126.

A general rule requiring freight trains to "approach all stations under full control, expecting to find trains using main tracks within station limits" has been considered far more certain to secure employees against rear collisions than a rule requiring the train despatcher to notify each train of the position of those going in the same direction. *Enright v. Toledo, A. A. & N. M. R. Co.* (1892) 93 Mich. 409.

This case was approved in *NOLAN v. NEW YORK, N. H. & H. R. Co.* where it is stated that the code of rules under review was substantially the same as that adopted by 90 per cent of the railroad companies of the United States.

A case in which a snow plow is at work behind another train does not present conditions so different from those which in general attend the movement of trains in the same direction on the same track that the company is bound to provide for them, as for an exceptional emergency not covered by its general rules, and to see that the conductors of the two trains are specially notified by telegraph of the relative positions. *NOLAN v. NEW YORK, N. H. & H. R. Co.*

A railroad company is under the duty of seeing that, at the last telegraph station which ex-

than that exercised by it;" and that the court did not pass upon this claim "except to find as a matter of fact, from the evidence submitted, that the defendant did not exercise ordinary care in the operation of these trains, and that ordinary care required additional precautions, by way of special orders, to those provided in the rules for the reasonably safe operation of these trains." The trial court did not err in refusing to sustain this claim of law in the terms in which it is phrased, but it did err in inferring from the specific facts found that it was the legal duty of the defendant to give the telegraphic information mentioned; and, for the purposes of review, this inference is not a conclusion from the evidence, which the finding shows had exhausted itself in producing the conclusions of fact from which the inference was drawn. This error is not raised by the assignment specifying error in the refusal to sustain the claim of law, but is

raised by the assignments specifying the reasons why the facts specially set forth do not support the judgment founded upon them. The only function in this respect of that part of the finding reciting the claim of law made is to show that the questions as to the legal inferences from the facts found were distinctly raised at the trial, and decided adversely to the appellant's claims. The real position of the plaintiff is that the trial court has found that the defendant failed to exercise ordinary care under the circumstances of this case; that the legal liability of the defendant consists in negligence; that the failure to exercise such care is negligence; that negligence is a question of fact entirely within the province of a trial court; and therefore the law determining the legal liability of the defendant was properly found as a fact within the exclusive province of a trial court to determine. We have already indicated the mistake involved in this posi-

tion. Trains pass before entering upon a section of the road upon which a construction train is at work, they shall, either by the promulgation of appropriate rules, or by special orders issued as occasion may require, receive a notification that the construction train is ahead of them, and a caution to keep a sharp look out. *Chicago, B. & Q. R. Co. v. Young* (1887) 28 Ill. App. 115.

Where the rules for the operation of trains on 53,000 miles of railroad are framed on the theory that it is more conducive to safety to require the men at all times to look out for, and protect themselves against, other trains without notice of their whereabouts and movements, than it is to undertake to give them such notice, a company which has adopted such rules is entitled to an instruction that they are neither unreasonable nor insufficient, although three competent witnesses have testified that such notice should be given. *LITTLE ROCK & M. R. Co. v. BARRY*.

A special order that a train which is behind time is to follow another train running on its regular schedule at an interval of time, the minimum of which is fixed by the general practice of the road, raises a clearly defined duty on the part of the men on the following train to look out for the one in front. For a collision between the trains, therefore, the company cannot be held liable on the theory that special directions to be on the lookout should have been given to the crews of both trains. Nor, if the interval between the two trains at the last station passed before the collision exceeded that allowed by the rules, can negligence be predicated of the omission to order the agent at that station to hold the following train. As that was in its proper position, there would have been no reason for holding it. *Kennelly v. Baltimore & O. R. Co.* (1895) 166 Pa. 60.

The extent of the duty to provide for the prevention of collisions in the special emergency created by a snow storm was considered in *Niles v. New York C. & H. R. Co.* (1897) 14 App. Div. 58, where it was held that the fact that a rule requiring that, in foggy weather, when a train cannot be seen at 300 yards, the trackman shall suspend ordinary work and patrol the track acting as signalman to warn trains of danger, had not been extended so as to make it applicable during the existence of unusual snowstorms, does not justify an inference by the jury of negligence by the company rendering it liable for injury resulting from the fact that a

train ran past a signal station and struck another which was standing just beyond it. It was contended by plaintiff's counsel that the same necessity for patrolling a track arose when there was a severe storm as when there was a dense fog, and that it was for the jury to say whether the company had not been negligent in failing to provide a rule by which the trackman should be required to act as signalman in both cases. The court, however, after pointing out that during snowstorms the clearing of the track from snow was a matter of paramount importance, and demanded the particular attention of the trackmen, proceeded as follows: "The doctrine imposing liability upon railroad companies for failure to adopt particular rules, the necessity for which was not apparent to them, should not be unduly or unreasonably extended. And since the company has a paramount interest in protecting its property from injury or destruction, and also in avoiding all liability for damages to employees and passengers, and the officers of the company deemed this system of signals and rules for the management and control of the movements of trains to be fully adequate for all purposes, these considerations must have some weight in determining whether the omission to promulgate a particular rule constitutes a neglect of duty, in not being able to foresee certain contingencies. It is true that the trackmen could have been relieved from the work of clearing the tracks by the employment of other men for that purpose, or by the assignment of other employees; but it is significant that Niles himself, an old and experienced employee, and knowing of the dangers to be apprehended from the storm more fully than others, deemed it unnecessary for the protection of his train, though much impeded by the snow, to adopt the precaution of dropping or sending back a trainman to warn any train that might be following. . . . And yet it is urged that the company itself was negligent in not requiring a precaution of that character during a severe snowstorm. Evidently he believed that he was amply protected by the existing system of signals and the rules governing the action, management, and control of any train that might be coming in his rear, and that the engineer would fairly observe them. He supposed, undoubtedly, that the tower signal would protect him, and that the engineer would not attempt to run past it, and especially at a good rate of speed. He relied upon the assumption that the towerman at the Verona

tion; but it is a mistake so often made, and so readily fallen into through the use of words expressing different ideas without due attention to the particular idea the word, as used, is intended to express, that we deem it advisable to restate the ground of our decision with special reference to the confusion of ideas that leads to such mistakes.

We are dealing with a practical question of procedure; i. e., Upon the process or record before us, what are the alleged errors that this court can review? The answer is briefly and broadly expressed in the saying: "Errors in law can be reviewed; errors in fact cannot." As we have seen, "fact" is a word of many meanings, and the saying is deceptive unless we keep in mind the particular meaning attached to the word as here used. We have explained that "fact," as here used, denotes those conclusions reached by the trier directly, from sifting testimony, weighing evidence and passing on the credit of

witnesses (conclusions which are not within the jurisdiction of this court, and cannot be reviewed or retried on appeal, whatever the process may be), and that it does not denote those inferences drawn by the trial court from the facts ascertained and settled by it as described (inferences which always involve, to some degree, the application of rules and principles of law to adjudicated facts, and may be reviewed whenever the legal process properly presents an alleged error, and we can see that the inference as to which error is alleged is in truth one of this nature). The word, as here used, may possibly have a little broader meaning in some exceptional cases, but this is immaterial to the purpose in hand. We have also explained that the word "fact," as here used, must be distinguished from the same word when used to denote those matters within the province of a jury. In the latter sense it often denotes the whole question of legal

tower would observe the rules, and hold the following train at least ten minutes after the departure of his own. A rule easily followed by servants, and, when followed, securing safety to co-servants, is a reasonable compliance with the duty owing by the company to them."

As an employer has a right to conduct his business on the assumption that his employees will discharge a duty which he imposes upon them by his rules, a railroad company operating a single-track road cannot be held negligent in failing to promulgate a rule that the crew of a regular train shall be notified of the position of an irregular train, where there is a rule in force which requires employees in charge of irregular trains to keep them out of the way of regular trains, and forbids, under any circumstance, the occupation of the main track by irregular trains within ten minutes of the schedule time of a regular train. *Terre Haute & I. R. Co. v. Becker* (1896) 146 Ind. 202.

One court has gone to the length of adducing the doctrine of assumption of risks as a ground for relieving a railroad company of the duty of notifying the men on one train of the movements of another train which had abandoned its schedule time.

In *Relyea v. Kansas City, Ft. S. & G. R. Co.* (1892) 112 Mo. 86, 18 L. R. A. 817, it was held, without much argument, that a railroad company is not guilty of negligence in ordering a train to run ahead of schedule time without giving the conductor of the forward train notice thereof, provided this is not an unusual course and specials are to be expected at all times. The correctness of this decision appears to be more than doubtful. It virtually lays down the doctrine that a railroad company may without culpability cast upon trainmen the duty of guarding themselves against the approach of special trains, and there is great difficulty in conceding this to be good railroad practice. The accident in question was proximately due to the fact that a section of the forward train was left standing on a grade while some of the cars were being switched on to the siding, and owing to the negligence of a brakeman in not securing them properly got under way and running down the incline came into collision with the train which was ahead of its proper time. The actual decision, therefore, may be referred to the doctrine of common employment, and this seems to be the sole ground on which it can be based.

An instruction stating the duty of a railway company in regard to the promulgation of rules 43 L. R. A.

calculated to secure the safe operation of its trains is not improper, where the complaint alleges generally that the company's mode of operating these trains when the plaintiff was injured was negligent. *Cooper v. Central R. Co.* (1876) 44 Iowa, 134.

2. Duty as to employees working on or near tracks.

The manner in which the principles which dominate the above cases have been applied where the employees needing protection are persons whose work brings them into positions where they are liable to be struck by passing trains is shown by the following decisions.

A railroad company engaged in preparing or altering its tracks, so as to render them dangerous, owes the duty to its trainmen of providing rules and regulations to protect them against such danger. *Lake Shore & M. S. R. Co. v. Topliff* (1895) 2 Ohio Dec. 522. This duty includes the duty of providing the repairmen with adequate means of keeping themselves informed as to time at which trains will arrive. Thus, where a railroad company employs men to make repairs to the track without interfering with the running of the regular trains the hours for which were well known, it is the duty of the company to see that the men are furnished with an accurate timepiece; and if there is evidence that the foremen were left to procure and regulate their own watches without any attention to the subject on the part of the company's officers, the question whether the company was negligent is for the jury. *Matteson v. New York C. R. Co.* (1862) 62 Barb. 364.

It is the duty of a railroad company to notify employees working on or near its tracks of a change in the running time of its trains. *Baltimore & O. R. Co. v. Whittington* (1878) 30 Gratt. 805.

In the absence of any rules requiring section men to guard against irregular trains, or of any care to notify them of the approach of such a train, proof of the death of a section man, while going with a hand car on a special order, through a collision with a wild train, creates a prima facie case of negligence on the part of the company. *Cincinnati, I. St. L. & C. R. Co. v. Lang* (1888) 118 Ind. 579. The court said: "It [the defendant company] was bound to know the nature of the service it had ordered him to perform, the place where it was required to be performed, and, with this knowledge, it had no right to put him in peril by sending out

liability, which, by the law of jury trials, must in certain cases be settled by a general verdict; and so far as it may be used, in connection with jury trials, to denote inferences from evidence as distinguished from inferences from adjudicated facts, it is, of necessity, used with an imperfect or uncertain meaning. The trial judge, in instructing a jury upon inferences of law, cannot ordinarily know what the inferences from evidence may be, and in all such cases must give his instructions hypothetically, and is limited in this by the consideration that the law of jury trial forbids his giving instructions upon the law in such manner as in truth to invade the province of the jury in drawing inferences from evidence. Whereas, in a trial to the court, the judge first adjudicates all the facts (*i. e.* inferences drawn from the evidence), and puts upon record those facts. The inference from those facts of legal liability, or of the conclusions

essential to legal liability, present to us, in a lawful process for that purpose, the questions of law, free from the limitations which hamper a trial judge in instructing a jury upon the same question. And it must be remembered that while there is in theory a distinction of a fundamental nature between the judicial function exercised in ascertaining facts from evidence, and that exercised in applying to conceded facts the rules of law for the purpose of inferring logical conclusions and legal liability, yet the two functions are essential to the one judicial act of passing judgment, and the precise line of distinction has little, if any, practical importance, except when the exercise of judicial power is divided between two branches of one court, as in a trial by jury, or is divided for the purpose of establishing an appellate court with a jurisdiction pertaining to the judicial function exercised in applying to conceded facts the rules of law, as in

an irregular train without in some way giving notice that its train had been sent out, or by so regulating its speed and management as to prevent injury to those engaged in the service required of them by the special order. By the order of the appellant the special duty in which the intestate was engaged was enjoined upon him, and having thus required him to perform the duty, it had no right to send over its road a train which the employees, engaged as was the intestate, had no reason to expect would make obedience to the special order unusually perilous. It may be true that the intestate was bound to know of the danger from regular trains, running according to time tables or rules, and yet not be true that he was bound to know that a wild or irregular train would be run over the road, and so run as to bring about a collision. The peril from the wild train he was not bound to anticipate, for the reason that, from the assurance impliedly contained in the special order assigning a designated duty to him, he had a right to assume, in the absence of counter-vailing facts, that, if he himself exercised care and diligence, the company would not send out a wild train without exercising ordinary care and diligence to prevent injury to him while traveling in the usual way to the place where he was called by the duty assigned him, and while performing that duty at the place designated."

The operation of the principles upon which the foregoing cases were decided is largely qualified by the doctrine that, as regards some employees, the fact that they have received a general warning or have in some other way acquired knowledge that they are to be exposed to constant danger from the irregular movements of trains, is sufficient to let in defense of assumption of risks as respects the general condition of the work, or of contributory negligence as respects the servant's failure to govern his conduct as a prudent man would have done in view of the possible perils to which the rules have called his attention. Thus it has been held not to be negligence on the part of a railroad company to send out a wild train without previous warning to a gang of section men, where its rules, known to such men, provide that the train preceding the wild trains shall carry a red signal, but that if it is impossible for those running the wild train to see that the train preceding carries such signals they must run at a slow rate of speed around all curves. *Shepard v. Boston & M. R. Co.* (1893) 158 Mass. 174. 43 L. R. A.

There, *Holmes, J.*, after quoting the rules mentioned, proceeded thus: "Stopping at this point it is plain that the defendant had a right to send trains over its tracks at whatever times it saw fit, and the rules on their face gave notice that it intended to exercise its right. The rules also gave notice on their face that while the signal ordered would be a warning when it was seen, in some cases no such warning could be given, and therefore that all persons interested must look out for themselves. The moment a man has notice that a train may come along a track without warning at any hour, if he is run down by such a train when he is traveling on the track the other way, it is impossible for him to escape the imputation of negligence merely by showing that such trains were few and the chance of their coming small. Furthermore the plaintiff implies that they knew the train was coming by his testimony that they did not know when it was coming. On the other hand, despatching a wild train without signal is not necessarily negligence in the defendant."

Compare *Criswell v. Pittsburgh, C. & St. L. R. Co.* (1888) 30 W. Va. 798, where the correctness of the same doctrine appears to have been assumed by the court, though the case really turned upon whether a foreman held to be a vice principal had neglected any of the duties imposed upon him by the rules. (See *X. infra.*)

In *Olson v. St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117, where the plaintiff was traveling on a handcar which came into collision with a snowplow it was held that he assumed the risk of injury from this cause. The court said: "The evidence tended to show that a quarter or more of the trains sent out are special or extra,—despatched without notice,—and that such is the uniform practice of the defendant; and that during the month of February, 1884, to the date of the accident, such trains over that section of the road averaged one or more each day, and also that the exigencies of the business and the impracticability of notifying section men in advance, owing to the nature of their work, extending over miles of track, and often remote from telegraph stations, obviously rendered it necessary to dispense with notice, and to adopt the present uniform practice in conformity with rule 70 [*i. e.*, that no notice would be given of the passage of extra trains]. And this fact itself, and the nature of the employment, would naturally

the correction of errors in law by this court. In such cases the necessary line of division, although based on a natural distinction in the character of judicial power exercised for the different purposes, may become, as in this case, a practical question of procedure.

Again, it must be remembered that the rule defining the erroneous conclusions of a trial court which this court can review is, and must be, of universal application. There is not a different rule for each class of actions. Actions in tort as well as actions in contract, actions to recover damages resulting from intentional wrongs, as well as to recover damages resulting from wrongs not intentional, are all subject to the same rule; and actions of tort or contract, wherein questions of negligence arise, are subject to the same rule. The mistake in question is largely due to overlooking this, in the confusion caused by a failure to distinguish, when the word "neg-

ligence" is used, the precise one of its many meanings intended to be expressed through the particular use. "Negligence" is frequently used to express the cause of action where a party seeks redress for injury from an unintentional wrongful act. In the nomenclature of the common law, this is called a "cause of action enforceable by the action of trespass on the case,"—"trespass," as signifying a passing over or beyond our right, i. e., a transgression or wrongful act (Bacon *Abbr. ad verb.*); "trespass on the case," as signifying a form of action devised to cover all cases where an actionable wrong is claimed under the particular circumstances of the case stated. "Negligence," so used, is a comparatively modern term of art, denoting a class of actions grouped under one head for the purpose of study and treatment. It covers the injury received; the act done, positive or negative; the proximate relation of the act to the injury; the legal rule of liabil-

suggest the importance of extra caution on the part of the men, and a reason for the rule. We think, therefore, there was evidence for the consideration of the jury tending to prove that the deceased had notice of the usage of the company, and that it was error of the court to refuse the defendant's first request to charge the jury to the effect that, if they should find that the deceased knew of such usage and practice of the company, he could not recover."

In *Turner v. Norfolk & W. R. Co.* (1895) 40 W. Va. 675, also, the court implies in its argument (p. 689) that a railroad company has discharged its whole duty in regard to the protection of a section foreman traveling on a hand-car, when it has expressly instructed him to be on the lookout for special trains, and, as a matter of precaution, to flag around curves and through cuts.

g. Rules prescribing means for warning employees of the proximity of moving trains or cars.

As to car-repairers see VIII. a, *supra*.

Cases involving the extent of a railroad company's obligation to see that means shall be provided for warning employees of the approach of trains or cars under circumstances in which time-tables are an inadequate notification, or in which it would be impracticable to regulate the movements of the trains by time-tables, turn upon considerations which are fundamentally the same as those which underlie the decisions reviewed in the preceding section, and may conveniently be grouped upon parallel lines.

Whether a railway company is negligent in omitting to provide a rule for the purpose of warning a trackman of the approach of trains where his work requires him to assume such a position that he cannot, without interrupting the work, see any considerable distance along the track, is a question for the jury. *Lake Shore & M. S. R. Co. v. Murphy* (1893) 50 Ohio St. 135.

Evidence that a trackman was run over by a train at a place where there was a double curve rendering it impossible to see an approaching train until it was close at hand; that there were several public crossings which the trains had to cross in approaching the place; that the neighborhood was a thickly-settled one within the limits of a city; that no signal of the train's approach was given by bell or whistle either at the crossing or in approaching the curve; and that the train which caused the in-

jury was engaged in a brisk race with another train on a parallel road, the pace maintained being, so far as appeared, in strict accord with the rules of the company,—is sufficient to take to the jury the question of the company's negligence in failing to provide regulations for the purpose of warning persons working at such places of the approach of trains. *Dick v. Indianapolis, C. & L. R. Co.* (1882) 38 Ohio St. 389.

A railroad company is not, as matter of law, guilty of negligence towards section hands who have occasion to travel by a handcar when it runs a train around a curve at the rate of from 25 to 32 miles an hour. *International & G. N. R. Co. v. Arias* (1895) 10 Tex. Civ. App. 190.

A railroad company cannot be found negligent in having failed to establish rules for the giving of notice of the approach of shunted cars in a yard where there is no evidence that such rules would be useful or feasible. *Atchison, T. & S. F. R. Co. v. Carruthers* (1896) 56 Kan. 309.

In other cases the theory of an assumption of risks has been relied on as absolving the company from liability under circumstances where strangers could have held it responsible.

Thus, a railroad company is not bound, for the protection of its car repairers when going to or from their places of work in moving cars in its freight yards, to have upon such cars a light, or man to handle it, or to require a man to precede each car to announce its approach. *Crowe v. New York C. & H. R. R. Co.* (1893) 70 Hun, 37.

The court said: "Great care and precaution are required on the part of railroad companies when they are moving cars in places where the general public have a right to pass, to in some manner announce their approach; but a different rule obtains in the companies' yards, where cars are being distributed and trains made up. The employees about such yard understand the situation; they know the manner of doing the business therein, that cars frequently pass along without a notice of their approach, and they assume the risks incident to the business thus conducted. Whether the foreman left the work when it was completed or a few minutes before, is not important. It was completed when Crowe left, and he understood the situation. The men were properly protected while the work was progressing by the two lighted lanterns heretofore mentioned. It is suggested that the work was not completed until the men had arrived at the tool house with

ity applicable to the case stated, and the application of that rule. The numerous definitions of "actionable negligence" attempt to state briefly and comprehensively the conditions essential to all of this group of actions. So used, "negligence" has no more relation to the question before us than if the meaning denoted were expressed in the older language of the common law,—those causes of action where the appropriate remedy is an action of trespass on the case to recover damages for an unintentional injury. Related to this meaning, and sometimes confused with it, "negligence" is used to denote the conception of moral blame or fault imputed to a person legally liable for the consequences of an unintentional act. This conception of the moral blame which should make one liable for the consequences of his acts is the foundation of our law of tort, and, in a wider sense, of our whole system of jurisprudence. In the very early stages of English law this

element of moral blame, in cases where the conception seemed too subtle for the times, was overlooked, and the innocent cause of a condition resulting in injury was held liable for damages to the innocent victim. But the true theory, that moral blame is an essential element of legal wrong, was soon fully recognized, largely through the potent and unacknowledged influence of the Roman law. *Dolus (i. e., injuria quam quis sciens volensque commisit) aut culpa (i. e., omnis protervitas, temeritas, inconsiderantia; desidia, negligentia, imperitia, quibus citra dolum, cui nocitum est)*, as used in the *Lex Aquilia*, and as approximately expressed in our common law by the terms "intention or negligence," describe the two phases of the moral blame or fault essential to make the one causing damage legally liable. 2 Austin, Jur. 109. The body of our law has been developed through the application of this conception to an infinite variety of facts or

their tools, and that until then they were entitled to some special protection to which they might not be entitled perhaps when engaged in other business about the yard. No reason is suggested for such a rule and none occurs to us. They were entitled when going to the tool house to the same protection and care on the part of the company to which they were entitled when moving about the yard performing their ordinary daily business."

Upon similar grounds, it has been held that the mere fact that in a railroad company's private yard, where cars are loaded and unloaded and trains made up, such cars are permitted to move along the tracks unattended by a brakeman, cannot be held negligence as matter of law, as against the company's servants employed in such yard. *Kelley v. Chicago, M. & St. P. R. Co.* (1881) 53 Wis. 74. The court said: "A court would probably be justified in declaring, as a matter of law, that it was negligence in a railroad company to permit its cars, or even a single car, to move along its track in a public place, such as a street crossing, or, perhaps, at its passenger depots, where the public are permitted to be upon and travel across its tracks, without having someone on the same to control its movements; but the question presented by this case is an entirely different question. The cars which were permitted to go along its tracks unattended, were in the private yards of the defendant, where no persons were expected to be present except its servants and agents, many of whom were present solely for the purpose of moving the cars on the tracks, without being upon the same as brakemen. If it was negligence to permit the cars to run unattended in the defendant's yard, where cars are loaded and unloaded and moved about for the purpose of making up trains, such negligence is not so apparent that a court may pronounce upon it as a matter of law. At most, it might be a fact to go to the jury upon the question of negligence."

In *Chicago & N. W. R. Co. v. Donahue* (1874) 75 Ill. 106, where a switchman was run over, the evidence showed that a watch or lookout was kept from the engine, but none from the rear car, and according to a special verdict, the train had on it the usual number of hands and none of the persons in charge was guilty of negligence in discharge of his particular duty. The question therefore was presented, whether the company was guilty of negligence in not providing rules whereby a switchman should have

been kept on the rear end of the train that produced the injury. The court said: "Whatever might be the duty of the company in this regard, so far as the public are concerned, where its track crosses a public highway, we are not prepared to hold it is under any such obligation to its own employees operating trains on its own private grounds. They are presumed to contract against the hazards incident to the service, and we do not understand it is the duty of the company to place one employee on the lookout to warn others of approaching danger, and that it is necessary for them to observe due care. It is their duty without warning to observe such care. This is a part of their undertaking, and any omission is at their peril."

So, also, the supreme court of Missouri in holding that neglect of duty by a railroad company toward a section hand cannot be predicated of its failure to have a brakeman on the end of a car pushed by a switch engine in the railroad yard, pointed out that the case was distinguishable from those in which the absence of some such precaution has been held to be negligence in regard to strangers having occasion to cross the track. *Loring v. Kansas City, Ft. S. & M. R. Co.* (1895) 128 Mo. 849.

Yet in *Sobleksi v. St. Paul & D. R. Co.* (1889) 41 Minn. 169, the doctrine is laid down that, independently of the rules prescribed by the company, it owed a duty to its yard switchmen to give a signal of the movement of an engine, where such has been the custom.

And another court has declared that, "Irrespective of a statute . . . the starting or running of a switch engine in a switch yard filled with a network of tracks, upon which cars [and engines] are constantly moving, and in which yard men are at work, without the ringing of a bell or the blowing of a whistle, is evidence of negligence." *Union P. R. Co. v. Elliott* (1898) 54 Neb. 209.

It has also been held that the risk that an engine which is believed to be on its way to the repair shops will in a few minutes back towards the place at which a yard clerk has just alighted from it, not only without signals, but without any lookout, is not one which is assumed by such clerk. *St. Louis & T. H. R. Co. v. Eggmann* (1895) 60 Ill. App. 291. Here, however, the special ground relied upon is evidently the wholly unexpected nature of the occurrence. The movement of the car being quite abnormal the employee was entitled to the benefit of the general principle that he could not be said to

events. It has its origin in the accepted law of ethics, and the unfolding of its meaning as a legal maxim is confided to the court. Indeed, the highest function of a judge is exercised in holding to a steady and definite course in the application of such a maxim to ascertained facts, whether their conjunction be novel or not. In the exercise of such a function, our system of jurisprudence develops under the control of fixed maxims and prior authorities. It is this control of the element of discretion inherent in the application of a general principle to each new state of facts that distinguishes the justice administered by a common-law judge from that of an oriental *cadi*. Whether this primary conception of moral blame is vague or not in itself, the principle of legal liability which in theory it justifies is certain. The legal liability is not wholly coincident with the moral blame. It depends upon the law, however derived; and that law consists main-

ly in rules of public policy defining and limiting the rights and duties pertaining to person and property. These rules are ordinarily intended to square with the highest theory of ethics,—an intention not always realized. But it is the law, and not the theory, which determines legal liability. No principle of legal liability which is, in the legal sense, uncertain,—which is derived, not from settled maxims and authority that must govern every case, but from the unrestrained will of a single man, or a dozen men, which can govern no other case,—is a legal principle. "*Ubi jus incertum, ibi jus nullum*," "Negligence," with the meaning under discussion, is a convenient term for denoting the conception of legal blame in a certain class of causes of action for the purpose of investigating the theory underlying the law which determines liability in such cases. It is a term more useful to the jurist, in seeking the theoretical sources of the law,

have taken a risk which he had no reason to anticipate.

In *Dick v. Indianapolis, C. & L. R. Co.* (1882) 38 Ohio St. 389, it was thought unnecessary to consider whether the act of 1872 (69 Ohio Laws, 49) by which railroad companies were made liable in damages for injuries occasioned by a failure of the engineer to sound the whistle and ring the bell at a public crossing on the same level with its tracks, was for the protection of travelers on the public way only, or extended to persons working upon the track, and held that, even in the absence of such a statute, it was the duty of the company to make and enforce reasonable rules and regulations to guard against danger at such crossings and in dangerous places.

But in another state it has been declared that such a statute is not enacted for the protection of employees. *Union P. R. Co. v. Elliott* (1898) 54 Neb. 299.

So, also, the refusal of a railroad company to make a regulation requiring engineers of trains approaching a quarry to sound their whistles before reaching it, for the protection of workmen at such quarry, is not unreasonable where another rule is established requiring the workmen to give signals to approaching trains when there is any reason for slowing up or stopping the trains, and it does not appear that the proposed regulation would have afforded protection to the workmen. *Kansas City, Ft. S. & M. R. Co. v. Hammond* (1894) 58 Ark. 324. The court said: "The rule suggested by appellee as a proper one could under no circumstances possess any virtue except in cases of persons near enough to the quarry, and the sound of the whistle there, to hear it, and yet far enough away to have more time to get off the track than they would have after the train comes in view and sounds the whistle, as is the rule in vogue, or as was done in the present case. It is impossible to say how far or near, then, persons must be to hear the whistle in any case, and still more so, when they are on a running hand car, in a rugged and hilly country, where the transmission of sound is obstructed and the sound itself is lost in the more immediate noise of the running car. Sounding the whistle at the quarry, or at any other point, would, of course, afford no protection to persons out of hearing, and yet so far from their destination as that they will be overtaken. The positive evil of the rule suggested is made apparent, for, having taken the place of a better rule, perhaps, it is never-

theless, of itself, in that case useless. The suggested rule, therefore, would only be applicable to special instances, and its application, if attempted to be extended beyond these special instances, might interfere with the application of more salutary general rules. We are unable to say that the refusal of the company to have the regulation suggested by the appellee was unreasonable. At all events, it was error to submit the question to the jury."

IX. Illustrative decisions as to the sufficiency of rules framed for the protection of servants in miscellaneous employments.

It is the duty of a lumber company to provide rules by means of which servants working at the foot of a chute down which heavy logs are constantly being thrown shall receive warning that a log is about to fall. *Hartvig v. Northern P. L. Co.* (1890) 19 Or. 522.

In *McGovern v. Central Vermont R. Co.* (1890) 123 N. Y. 280, a case in which a servant sent into a grain bin was buried under a mass of grain which had adhered to the sides, the court was of opinion that it might properly have been left to the jury to determine whether the omission to make rules and regulations prescribing the conditions under which servants should be required or permitted to enter the bins at the bottom was or was not a neglect of such reasonable care and precaution as a master engaged in such business was bound to take under the circumstances of this case.

In *Eastwood v. Retsof Min. Co.* (1895) 86 Hun, 81, the court in discussing the necessity for rules under the circumstances disclosed by the evidence, said: "In the case at bar it is evident that if a man were in the bin at work, standing upon the salt, he might very easily be engulfed so as to be unable to extricate himself if the chutes below were suddenly opened. Starting from that fact, which is undisputed, the inference might very well be drawn that a well devised set of rules, giving warning to the men who are in the bin, or forbidding the drawing off of salt when anyone was in the bin, would conduce greatly to the safety of the men who had occasion to be there. There is nothing in the evidence which would lead the jury to believe that such a rule was impossible or even difficult to enforce, and it is quite clear that such a rule might be of great use in insuring the safety of the men who had occasion to be in the bin. For these reasons I think that it was proper for the jury to consider upon the question of the de-

than to the judge in applying positive law to conceded facts. Used in this sense, "negligence" is largely synonymous with the "law of liability," in this class of actions (although it hardly covers the whole law of liability in such cases), and denotes a principle which is essentially compound, *i. e.* one which includes a variety of maxims and rules, any or all of which may be involved in its application to particular cases. This use of the word might not have produced the confusion it has led to, were it not that one of the rules covered by the term "negligence," and one most frequently invoked in actions of this character, involves the use of "negligence" with the primary meaning of the word; and so the considerations peculiar to this single rule have been easily commingled with those applicable when the same word is used, not with its primary meaning, but as a term of art signifying the whole principle of legal liability. "Negli-

gence," thus used, is scarcely distinguishable from "heedlessness," and may be shown in omitting to do an act, or in doing an act. When the law says a person whose conduct is negligent (in this sense), the other conditions of liability existing, is liable for damages caused by his conduct, the meaning of "negligent," like the meaning of any material word used in stating a rule of law, is a question of law, to be settled by the courts, whose province it is to declare the law; and, where the rule is intended to apply to an indefinite variety of events, the meaning of the rule in its application to each group of events is a question of law for the court. So it has been held in cases of "reasonable" notice to take a deposition (*Sharp v. Lockwood*, 12 Conn. 155, 159; *Sing Cheong Co. v. Yung Wing*, 59 Conn. 535, 543); "reasonable" time for presenting a note for payment (*Lockwood v. Crawford*, 18 Conn. 361, 372); "reasonable" or "dili-

gent's negligence, the failure to make rules for the government of its employees in this regard."

X. Relation between the doctrine of common employment and the duty of a master to promulgate rules.

a. Duty of making rules, assignability of.

It is obvious that there is no room for the application of the doctrine of common employment where the evidence shows that none of the plaintiff's fellow employees were chargeable with negligence in the discharge of the duties allotted to them, and the only question is whether the master himself has failed to use proper care in protecting the plaintiff from danger. *Missouri P. R. Co. v. Watts* (1885) 63 Tex. 549.

It is equally clear that, upon the plainest grounds of justice and logic, the act of a fellow servant should, for the purposes of legal liability, be esteemed non-negligent, where it was done in accordance with the ordinary routine of the work, even though it would be considered negligent if it had been done without reference to any prevailing custom. This is the rationale of the decision in *Sword v. Cameron* (1839) 1 Dunlop, B. & M. Sess. Cas. 498, where the master was held to be liable to a quarryman who was injured by the firing of a blast before he had time to reach a place of shelter, the evidence being that the shot was fired in accordance with the usual and inveterate practice of the quarry. This case was cited in *Bartons-hill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266, 289, in support of the proposition that the doctrine of common employment was unknown to the law of Scotland, but Lord Cranworth pointed out that the decision did not turn upon the negligence of the fellow workmen who fired the shot, and expressly stated that it was justifiable, on the ground that "the injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosion." A similar construction was put upon the case by Lord Chelmsford in *Bartons-hill Coal Co. v. McGuire* (1858) 3 Macq. H. L. Cas. 310.

As was observed by the court, in discussing the evidence in *Dolg v. New York, O. & W. R. Co.* (1897) 151 N. Y. 579, "if the men were acting without any known rule or regulation, and simply following a dangerous practice sanctioned by time and custom, the result might be imputed to the neglect of the defendant in omitting to change the method of doing the work

and adopting a safer one." See also the cases cited *passim* in the preceding subdivisions.

But the employer's duty in respect to rules may have the effect of rendering him liable for the act of a fellow servant even if it was undoubtedly negligent, for, among the absolute, positive, or nonassignable duties of a master is the duty of making proper rules, or establishing a proper method for the conduct of his business. *Ford v. Lake Shore & M. S. R. Co.* (1891) 124 N. Y. 493, 12 L. R. A. 454. The court, after stating (see the passage quoted in I. *supra*) that a want of care on the master's part may appear from various derelictions of specific duties among which is the duty to make proper rules, said: "These are the master's duties and responsibility cannot be evaded by their delegation to agents. As to such acts the agent occupies the master's place and the latter is deemed present and liable for the manner in which they are performed."

To the same effect, see *Northern P. R. Co. v. Peterson* (1896) 162 U. S. 346, 40 L. ed. 994; *Dana v. New York C. & H. R. R. Co.* (1883) 92 N. Y. 639; *Sheehan v. New York C. & H. R. R. Co.* (1883) 91 N. Y. 332; *Lewis v. Seifert* (1887) 116 Pa. 628. (See also the cases cited in X. c. *infra*.)

The "cases make it plain that, whenever the act is that of the master, or the duty to be performed is particularly his duty, the liability resting upon him for the proper performance of the act or duty is not shifted by the adoption of rules or regulations providing for the performance of the act or duty by the agent of the master." *Hankins v. New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 25 L. R. A. 396.

Hence a master cannot relieve himself from liability for an injury to an employee, resulting from a failure on his part, through his agents, actually to use such care for the safety of employees as the law makes it necessary for him to use, by any regulations, however stringent and however completely enforced, which do not actually result in the use of such care by his agents. *Missouri P. R. Co. v. McElyea* (1888) 71 Tex. 386, 1 L. R. A. 411.

Liability, therefore, may be imputed to a master where a vice principal fails to comply with rules which require him to acquire certain information which will promote the safety of his subordinates and govern his arrangements accordingly. Thus, if one of the rules of the railroad company, furnished to a section foreman for his guidance, provides that "extra

gent" search for a lost document (*Kelsey v. Hammer*, 18 Conn. 311, 317); and the principle may be illustrated in other ways. This is elementary law. Were it not so, the growth of any stable system of jurisprudence would be far less practicable. No difficulty can arise where the group of events calling for the application is clear and certain. But where, as sometimes happens, the group of events in respect to which the meaning of a word must be declared are of a nature insusceptible of clear statement, then, while the function of ascertaining facts from testimony, and that of applying the law to the facts, should be separately exercised by the trial judge, yet any adequate separate statement by him, in the record, of the results (*i. e.* the facts ascertained, and the application of the law to those facts) may be impracticable. Dilemmas of a similar nature account for most of the troublesome questions relating to the instruction of a jury by

the court. In a trial to the court, where the two functions are united, there is no difficulty, so far as the disposition of that case is concerned; but, inasmuch as a statement of the facts is impracticable, the application of the law is not apparent, and the case cannot serve as a precedent, and cannot be reviewed for error in law by an appellate court. In a large number of cases the material question is whether the ascertained conduct of a person is in law negligent, in the sense last indicated. Often the ascertained conduct cannot be formulated into a series of adjudicated facts. It consists of a single impression produced in the mind of the trier by the whole mass of relevant testimony. That impression cannot be stated in words. It is a mental view which language is not luminous enough to photograph. Is that conduct negligent in law? Clearly, the conclusion of the trier that it is or is not must be, *quoad* the trier, a conclusion of law.

trains may pass over the road at any time, without previous notice, and the foreman [of a gang of trackmen] must be always prepared for them," and another rule provides that "he must run the hand cars with great caution, and he must not permit them to be used unless he accompany them;" and another rule requires him "to compare his time each day with the clock at the nearest telegraph office, or with the conductor on the train," these rules, as well as the law, require him to use the opportunities thus daily afforded, or any other opportunities, to ascertain what trains are expected to run over his section of the track by previous arrangements and when, so that he may be prepared for them as well as he can be, and thus diminish the risk of a collision of extra trains with the handcar. If he neglects this duty, and, without any fault of one of the laborers under him, his handcar comes in collision with an extra train, which, had he performed his duty, would not have occurred, and the laborer on the handcar is killed or injured, the railroad company will be liable for the damages so sustained. *Criswell v. Pittsburgh, C. & St. L. R. Co.* (1888) 30 W. Va. 798.

A master is also liable for the negligence of an employee to whom is deputed the performance of the one special act without which a rule prescribed with a view to making the place of work safe would be wholly inefficacious. *Evansville & T. H. R. Co. v. Holcomb* (1894) 9 Ind. App. 108, where a railroad company was held liable for the injuries received by a car repairer in consequence of the negligence of a brakeman who was directed to notify him, in accordance with a rule of the company, that an engine was about to enter upon the track where he was working.

Similar principles are controlling where the master undertakes to delegate the performance of a nonassignable duty to another person not an employee. In *Bushby v. New York, L. E. & W. R. Co.* (1887) 107 N. Y. 374, where the plaintiff was injured through the defective loading of a railroad car, the defendant relied upon its "system," which was to let the shipper load and stake, while, as to inspection, its evidence only tended to show that if, in the general performance of the duties of their employment, the station agent found anything out of the way, he should correct it, or if the conductor or brakeman saw a defect, he should report it to the station master. No special duty was imposed on either in regard to inspection, nor did

rection given as to its manner. The court said: "The . . . proposition of the defendant is, that 'it is not necessary in this case to decide whether the stakes in question were or were not appliances or machinery within the meaning of the rule invoked by the supreme court at the general term' . . . for the reason that the system under which they were furnished, inspected, and employed was perfectly well known to the plaintiff, and he took the risks of the consequences of that system.' There was no system as to this matter. If the evidence shows that such practices had obtained before, it merely shows that the defendant chose to delegate a duty to the shipper which the corporation should have performed. It is equally responsible for his negligence; his negligence is its negligence."

In England the doctrine of vice principalship, after being exploded by the decision in *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, was restored by the provisions of the employers' liability act of 1880. This aspect of that statute was thus recently referred to by Lord Watson in a passage which is quite pertinent to the subject of the present note: "The main, although not the sole, object of the act of 1880 was to place masters who do not, upon the same footing of responsibility with those who do, personally superintend their works and workmen, by making them answerable for the negligence of those persons to whom they intrust the duty of superintendence as if it were their own. In effecting that object the legislature has found it expedient in many instances to enact what were acknowledged principles of the common law. Section 1, subsec. 1, provides that the employer shall be liable in cases where a workman is injured by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer. I see no reason to doubt that an arrangement of machinery and tackle which, although reasonably safe for those engaged in working it, is nevertheless dangerous to workmen employed in another department of the business constitutes a defect in the condition of the works within the meaning of the subsection. Sometimes (as in the present case), when the danger is not constantly present but recurs at intervals, the defect may be cured by giving the workmen timely warning of its approach. The employer may in such cases protect himself, either by removing the source of danger, or by making provi-

Whether it be considered as an inference from many facts, or as the declaration of the meaning of a rule of law in relation to a single fact, it is the inference of a legal wrong from ascertained fact, and that is essentially a conclusion of law. Equally clearly the conclusion of the trier must be, *quoad* the power of this court to review his inference, a conclusion of fact. Not because the inference is not one of law, but because the fact or facts from which the inference is drawn cannot, by any process known to the law, be transferred from the mind of the trier to the mind of the appellate court. When such a question comes before us, we say we will not attempt to review the conclusion; it is one of fact; and this notwithstanding the trial judge has conscientiously tried to give in his finding a word picture of a mental impression that cannot be painted in words. He has not succeeded. He cannot succeed. The precise legal infer-

sion for due notice being given. Should he adopt the latter course, he will still be exposed to liability if injury results from failure to give warning through the negligence of himself or of his superintendent." *Smith v. Baker* [1891] A. C. 325. 354.

b. Duty to publish the rules, assignability of.

The duty of framing suitable rules being certainly nonassignable, it would seem to be a necessary inference that the subsidiary duty of publication without the performance of which the framing would be an idle formality must also be nonassignable. The authorities upon the subject, however, are in conflict.

Thus we find it held, on the one hand, that a section foreman on whom is devolved the duty of informing his hands of the contents of a rule that extra trains may be expected at any time without notice, is *pro hac vice* the representative of the company. *Olson v. St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117.

Similarly a master cannot escape liability for injuries to a servant temporarily employed, upon the ground that he had furnished suitable materials and appliances the use of which would have prevented the injury, where the servant was not aware that they had been furnished, and the master had not adopted any rules or regulations requiring or directing his agents in charge of the work to advise servants temporarily employed of their existence. *Tully v. New York & T. S. S. Co.* (1896) 10 App. Div. 463. There the plaintiff, owing to there being no light between the decks of a ship, fell into an uncovered hatchway, and it was contended, in behalf of the defendant, that as it had provided sufficient lamps for the use of employees, the want of light was attributable, not to its negligence, but to theirs. But the court said: "There is evidence tending to prove that, when a vessel arrives at the dock, men appearing about there are employed to take off the cargo and to reload it with freight, and that they may have had no experience in the work they are called upon to perform in that service. They, unadvised, may not know of the facilities which can be afforded them when circumstances render their use and application desirable for safety. Conditions like that which caused the failure of the plaintiff to avoid the danger which he encountered, it may be assumed, are liable to arise and be produced in like manner. It would, therefore, seem to be reasonably incumbent upon the defendant to have some system by way of

since he has drawn must remain unknown. It cannot, therefore, be reviewed, and is practically a conclusion of fact. Now, this condition may arise in any kind of action, and is not peculiar to actions of negligence; using the word as a term of art describing a certain class of actions.

The mistake of the plaintiff arises mainly from confusing an ascertained fact,—where the fact is conduct claimed in law to be negligent,—incapable of transference from the mind of a trial court to that of an appellate court, with the legal inference drawn by the trial court from that fact, and which cannot be reviewed because the appellate court cannot have the fact from which the inference is drawn before it, and then applying the practical result of such a condition to the inference of liability in all actions classed under the term "actions of negligence." And this confusion arises mainly from the fact that the word "negligence," as used in respect to

rules or regulations. The availability of protective means and appliances to the workmen is not necessarily of any benefit to them unless they are advised of it. It may be that, if the defendant had provided rules which required those in charge of the work to advise the workmen of the precautionary means of protection which could be had, the plaintiff's misfortune might not have occurred. . . . It does not appear that the defendant had, by any rules or regulations whatever, required or directed the agents to advise workmen temporarily employed to work upon the steamships, in loading and unloading, of any precautionary means which it might, for their safety, be or become desirable to use. For this reason we think that the question whether the defendant was chargeable with negligence was for the jury."

On the other hand, the court, in *Oliver v. Ohio River R. Co.* (1896) 42 W. Va. 703, quotes with approval the following passage from a recent textbook: "It is not required that the master should see to it personally that notice comes to the knowledge of all those to be governed thereby. If there is due care and diligence in choosing competent servants to receive and transmit the necessary orders, the negligence by them in the performance of it is a risk of the employment that the coemployee takes when he enters the service." *Bailey, Master's Liability for Injuries to Servant*, p. 77.

The learned author considers that "after the person whose duty, on the part of the master, it is to promulgate rules, or to communicate them to those engaged in the service, has performed his duty, by communicating them to a servant, who in turn is to observe them, or communicate them to another, then the omission or neglect of such other is the omission or neglect of a fellow servant, to the same extent as his disobedience of an order or rule, after receipt of knowledge, . . . would be such an act." P. 85.

Yet at the same time he declares that, "as to those orders or rules relating to the appliances and ways, it being the absolute duty of the master to see that such appliances and ways are reasonably safe, the master should be held to a strict liability to see that they were actually received and known." P. 85.

With due deference, it is submitted that the distinction here relied on is logically unsound, and wholly inconsistent with the theory which makes the duty of protecting the servant by suitable rules an independent obligation co-ordinate with the obligations of seeing that the ma-

the same general subject, has entirely distinct, although closely-related, meanings, dependent on the particular purpose for which it is used. A similar confusion arises from the use of "ordinary care," which is used sometimes in reference to actual conduct under circumstances, as found by the trier, incapable of being so formulated in a finding as to state the facts really adjudicated, and show the inference actually drawn, and sometimes as indicating the rule of legal liability under any given state of facts. As used in the latter sense, it may denote the ultimate ground of every cause of action.

In the present case we hold that the inference of legal liability drawn by the trial judge is reviewable, because the events upon which the cause of action arises are of such a nature that they can all be fully and clearly found by a trial court as adjudicated facts, and have been so found, and properly appear before us in the record; that the con-

clusion of the trial court of an "emergency" which required of the defendant a line of conduct appropriate only to the single transaction in question is reviewable, because this subordinate conclusion is drawn from adjudicated facts fully and clearly found in compliance with existing law of procedure, and the trial court, in reaching the conclusion,—unless the law defining such an emergency was misapplied,—has plainly mistaken those rules of sound reasoning whose observance is essential to the validity of an inference from admitted facts.

In stating our conclusion, we have not sought to lay down a binding rule, but have merely endeavored to explain, as far as the infirmities of language will permit, the test of our decision in this case. We believe that such a test, if applied (with discrimination as to the circumstances of each case) to the whole line of our decisions where the question of reviewability of errors alleged in in-

terial substances which compose the instrumentalities themselves come up to the required standard. (See I. *supra*.)

If the master is bound at all to prescribe a certain system for the guidance of his servants, it surely can make no difference whether the object aimed at is that the instrumentalities shall be of a certain quality or that they shall be used in a certain way. In either case the obligation is referable to the general principle that he must use proper care to secure the safety of his servants, and it seems impossible to argue, with any show of reason, that one obligation arising out of that principle can be less absolute than the other. The true doctrine, we take it, is that the duty of bringing the rules to the knowledge of the servants is equally non-assignable, whatever the subject-matter may be, and that the question whether it has been performed is to be determined, not by considering the rank or number of subordinates through whom they are transmitted to the persons concerned, but by considering whether the steps taken are such that the servants, if they exercise ordinary care, cannot fail to ascertain that the rules have been framed, and that obedience to them is expected. (See XI. c. *infra*, and compare the standpoint taken in *Conway v. Belfast & N. C. R. Co.* (1877) Ir. Rep. 11 C. L. 345, Aff'g. (1875) Ir. Rep. 9 C. L. 498, the substance of which is noted in IV. *supra*.)

a. Position of employees vested with power to suspend general rules by special directions.

It is clear that the master cannot be bound by the act of an employee who undertakes to suspend a rule, unless such employee is a vice principal in respect to the work which the rule was designed to regulate. For an examination of the general principles upon which the dividing line between a mere servant and a vice principal is traced, reference must be had to treatises and to former notes in this series. The scope of the present note does not require anything more than a citation of the decisions which deal with the temporary abrogation of rules by special directions emanating from some superior officer. Far the larger part of the decisions upon this point deal with the right of an employee of a railroad company to recover for injuries resulting from the negligence of a fellow employee who, having been intrusted with the function of seeing that the trains are safely operated has thought fit to meet a special emergency by directing some of them to run at

times different from those prescribed by the regular schedule. By most of the courts in which this question has been discussed it has been treated with reference to the consideration that, as a variation from a general timetable is but a special timetable, the same duty rests upon the company in regard to bringing the latter as the former to the notice of the servants affected by it, and any employee whom he deputed to act in his stead is his agent *pro hac vice*. *Slater v. Jewett* (1881) 85 N. Y. 61, 29 Am. Rep. 627.

Agreeably to this theory, it has been held in *Chicago, B. & Q. R. Co. v. McLallen* (1876) 84 Ill. 109, that, as between the conductor and the company, the assistant superintendent to whose order the trains are all subject is the representative of the company, and that, as his orders to the conductor of a train are essentially the orders of the company, it must answer for his neglect to issue a necessary order. Compare *Pittsburgh, C. & St. L. R. Co. v. Henderson* (1882) 87 Ohio St. 549.

So, the effect of certain rules as to running trains by special orders, by one of which it is provided that all orders shall be given by a superintendent, or by a despatcher under the direction of a superintendent, and by another that superintendents are supreme in their own divisions, and responsible only to the management for such orders as they may give, is to delegate to the train despatcher the whole power of the corporation in respect to moving the trains safely, and therefore to make him the representative of the company in that regard. *Darrigan v. New York & N. E. R. Co.* (1884) 52 Conn. 285, 52 Am. Rep. 590. The court said: "It is the duty of a railroad corporation to prepare a time-table and adjust the running of its trains so as to avoid collisions. It must also devise some suitable and safe method by which to run special and irregular trains, and regular trains when off their regular time. That cannot be done by general rules. Emergencies will arise which no system of rules can anticipate and provide for, in which the company must act, and act promptly and efficiently. In this case the scheme devised was to have these trains controlled by one who knew the position and movement of every train on the road liable to be affected by them,—a train despatcher acting in the name and by the authority of the superintendent. Is there not a wide and manifest difference between the duty of such an agent and the duty of a locomotive engineer?"

ference of trial courts has arisen, will reconcile those cases, as resting on a ground substantially the same in all. This question was very carefully considered in *Farrell v. Waterbury Horse R. Co.* 60 Conn. 239. The opinion of Judge Torrance in that case touches *cum acu* the root of the difficulty; and has been our main guide in subsequent decisions. The underlying principle was there considered with special reference to contributory negligence, where the ascertained fact could not be stated in the finding, and so the inference of the trial court could not be reviewed, and remained, for all practical purposes, a conclusion of fact. In this case we consider the same principle with special reference to the question of legal liability where the adjudicated facts can be, and are, fully set forth. And the task of testing the principle is now of a somewhat different nature, and easier than it was then, by reason of further changes in procedure,

and our decisions upon the effect of such changes in enlarging the facilities for the full exercise of our jurisdiction in correcting the erroneous inferences of a trial court.

We allude to some matters suggested by the record merely to avoid any implication from a failure to mention them. It is claimed that one or two of the facts stated as found from the evidence are in reality nothing but deductions from the rules, or from other facts found, and as such erroneous. The facts referred to have too slight a relation to the controlling question to call for particular comment. As a whole, the finding is exceptionally full and clear, and furnishes proper facility for its correction in the matters complained of, were such correction necessary. It is claimed that the court erred in its conclusion that the injury resulted from the combined negligence of the brakeman, Hall, and the defendant. The Massachusetts case of *Hayes v. Western R.*

Darrigan v. New York & N. E. R. Co. (1884) 52 Conn. 285, 52 Am. Rep. 590.

A leading case to the same effect is *Lewis v. Selfert* (1887) 116 Pa. 628, where the *rationale* of the situation is explained very clearly in the following passage: "It is very plain that it was the duty of the defendant company, as between said company and its employees, to provide a reasonably good and safe road, and reasonably safe and good cars, locomotives, and machinery for operating its road. It is equally clear that it was its duty to frame and promulgate such rules and schedules for the moving of its trains as would afford reasonable safety to the operatives who were engaged in moving them. This is a direct, positive duty which the company owed to its employees, and for the failure to perform which it would be responsible to any person injured as a consequence thereof, whether such person be a passenger or an employee. It would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably, or even probably, result in collisions and loss of life. This is a personal, positive duty, and, while a corporation is compelled to act through agents, yet the agents, in performing duties of this character, stand in the place of and represent the principal. In other words, they are vice principals. If it be the duty to provide schedules for the moving of its trains which shall be reasonably safe, it follows logically that when the schedules are departed from, when trains are sent out without a schedule, such orders should be issued by the company as will afford reasonable protection to the employees engaged in the running of such trains. I am not speaking now of collisions caused by a disobedience of orders on the part of conductors and engineers, but of collisions or other accidents the result of obeying such orders. At the time of the collision referred to, Wellington Bertollette was the general dispatcher of the defendant company, and from his office in Philadelphia had the general power and authority of moving the trains. In this he was not interfered with by the company or anyone else. For the purpose of sending out the trains, he wielded all the power of the company. He could send a train out on schedule time or he could hold it back. He could change the schedule time or make new schedules as the exigency of the case required. He could send a train out without schedule, and direct its movements from his office in Philadelphia. When he issued an order the train was bound to

move as he directed. The engineer and conductor had but one duty, and that was obedience."

The same view has been adopted in New York, where a railroad company has been held liable for the negligence of a train dispatcher, the reasoning of the court being as follows: "In this case the evidence would seem to be quite conclusive that the defendant had fully discharged the duty which it owed its employees in the way of establishing and promulgating appropriate and sufficient rules and regulations for the government and operation of the various trains upon its road and its furnishing general timetables pertaining thereto. Whether the train dispatcher violated one or all of such rules is not material in the view we take of the case, because the defendant had not performed its whole duty in promulgating rules, nor is a defense made out when it is shown that, if the train dispatcher had obeyed the rules, the accident would not have occurred. If the defendant owed a duty as master to give correct orders to these trains, or at least to take due and reasonable care to give them, the failure to perform that duty is the failure of the master in his character as such, although he entrusted the performance of the duty to the train dispatcher. These trains were being run without regard to their ordinary timetables; they were several hours late, proceeding in opposite directions, and each was approaching the other in entire ignorance of the other's whereabouts. Both were necessarily dependent upon the special orders they received from Hornellsville. As was said in *Slater v. Jewett* (1881) 85 N. Y. 62, 29 Am. Rep. 627, the master had the right to vary from the regular time schedules laid down for these trains. It was part of the details incident to the operation of the road, but when a variation, or, in other words, when a special timetable is made out for two trains by which they are to run, it is the duty of the master, not alone to take reasonable care that the alteration shall be made known to the parties interested, but also to take reasonable care that the variation ordered, and by which the trains are run, shall not necessarily or probably lead to disaster when obediently carried out. Reasonable care in originating and formulating the order is necessary, and is the duty of the master. When the train dispatcher originates and promulgates such orders as were given in this case, he is acting as the master, or, as it is said, his *alter ego*, and the master is liable for the negligence of the agent he has employed to do his, the

Corp. 3 Cush. 270, apparently supports this claim. As we hold that the court erred in finding the defendant negligent otherwise than by reason of the fault of its brakeman, the question is not material, and we do not pass upon it. The court finds that "the employees of the defendant occasionally violated this rule [the one whose violation by the brakeman caused the collision], and the conductor in charge of 1411 knew this." If there were other facts in connection with this clearly showing that the rule was not enforced through the neglect of the defendant, a different question would arise in respect to its liability. The duty imposed by law upon the defendant is not fulfilled by merely adopting adequate rules. The law imposes upon it a duty in respect to the enforcement of rules necessary for the protection of the public. This question was considered in *Gerrish v. New Haven Ice Co.* 63 Conn. 9, 16, and is discussed in *Kansas City, Ft. S. & M.*

master's, particular work." *Hankins v. New York, L. E. & W. R. Co.* (1894) 142 N. Y. 416, 25 L. R. A. 396.

A train despatcher in devising a temporary timetable which, in a sudden emergency, is to take the place of the regular timetable, and in issuing telegraphic order for the operation of the trains under the new schedule, acts as a vice principal, but a telegraphic operator who merely transmits to the trainman the directions he receives from the train despatcher as to the movements of the trains is a fellow servant of the engineer. *Baltimore & O. R. Co. v. Camp* (1865) 31 U. S. App. 213, 65 Fed. Rep. 952, 13 C. C. A. 233.

The doctrine of these cases has also been applied in *Phillips v. Chicago, M. & St. P. R. Co.* (1885) 64 Wis. 475; *Hunn v. Michigan C. R. Co.* (1889) 78 Mich. 51, 37 L. R. A. 700; *Little Rock & M. R. Co. v. Barry* (1893) 58 Ark. 198, 25 L. R. A. 386; *Madden v. Chesapeake & O. R. Co.* (1886) 28 W. Va. 610, 57 Am. Rep. 695; *Smith v. Wabash, St. L. & P. R. Co.* (1887) 92 Mo. 359; *Cincinnati, N. O. & T. P. R. Co. v. Clark* (1893) 16 U. S. App. 17, 57 Fed. Rep. 125, 6 C. C. A. 281 (superintendent and train despatcher); *Galveston, H. & S. A. R. Co. v. Arispe* (1893) 5 Tex. Civ. App. 611; *Washburn v. Nashville & C. R. Co.* (1859) 3 Head, 638, 75 Am. Dec. 784; *McChesney v. Panama R. Co.* (1892) 49 N. Y. S. R. 148; *Leaky v. Canadian P. R. Co.* (1891) 83 Me. 461 (where stress was laid on the fact that the train despatcher habitually issued orders for the running of the trains, in the absence of the superintendent, with the knowledge and acquiescence of the company's controlling officers); *Chicago, B. & Q. R. Co. v. Young* (1887) 26 Ill. App. 115 (train despatcher not in the same line of employment as the trainmen); *McKune v. California Southern R. Co.* (1885) 60 Cal. 302; *Oregon Short Line & U. N. R. Co. v. Frost* (1896) 44 U. S. App. 606, 74 Fed. Rep. 965, 21 C. C. A. 186.

Robertson v. Terre Haute & I. R. Co. (1881) 78 Ind. 77, has sometimes been cited as an authority for the doctrine that the train despatcher is a fellow servant of the trainmen, but the opinion thus expressed has been recently repudiated quite emphatically by the supreme court of Indiana itself, *Louisville, N. A. & C. R. Co. v. Heck* (1898, Ind.) 50 N. E. 988, which holds that a train despatcher's disregard of a rule prescribing that an extra train despatched after a work train has already gone out on the road shall be notified to protect itself against such

R. Co. v. Hammond, 58 Ark. 324, 332. It is not raised in this case. The judgment under review is controlled by the conclusion that the collision in which Nolan was killed was caused by the legal negligence of the brakeman, Hall, in conducting the business of the defendant, and that the defendant escapes liability solely on the ground that Nolan, the victim of the wrong, as well as Hall, through whom the injury was done, was its employee. The rule which produces such a result is too firmly established as law by a multitude of decisions to be now reversed or seriously modified by any exercise of the power vested in courts.

There is error. The judgment of the superior court is set aside, and the case is remanded for assessment of nominal damages.

The other Judges concur.

NOTE.—The rule of coemployee is one deduced by a process of analogy from decisions rendered

work train is such negligence as will render the company liable for injuries caused by a collision between the two trains.

Hogan v. Missouri, K. & T. R. Co. (1895) 88 Tex. 679, is a ruling to the same specific effect as to the relation between trainmen and telegraphic operators, but the precise grounds of the decision are not stated.

The same general principle has also been applied to a different set of facts in *Moore v. Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588, where it was held that the servant of a railway company may rely on the vice principal's promise to protect him while at work on a side track, notwithstanding the existence of a rule of the company requiring servants to protect themselves by putting out flags while engaged in such work.

The decisions in which superintendents and train despatchers have been held to be mere co-servants of trainmen, are either rulings by courts in which the general doctrine of common employment was relied on and the effect of the distinction between the master's assignable or nonassignable duties was not adverted to or discussed (*Robertson v. Terre Haute & I. R. Co.* (1881) 78 Ind. 77 [overruled, as noticed *supra*]; *Millsaps v. Louisville, N. O. & T. R. Co.* (1891) 69 Miss. 423; *Wonder v. Baltimore & O. R. Co.* (1870) 32 Md. 411, 3 Am. Rep. 143); or are cases in which the negligence alleged had no relation to the operation of trains (*Norfolk & W. R. Co. v. Hoover* (1894) 79 Md. 253, 25 L. R. A. 710); or are cases which turned upon some special grounds, as that the plaintiff did not offer evidence tending to show that no co-service existed. *Blessing v. St. Louis, K. C. & N. R. Co.* (1883) 77 Mo. 410. (*Smith v. Wabash, St. L. & P. R. Co.* (1887) 92 Mo. 359, expresses the view actually adopted in *Missouri*.)

The conflict between the courts, therefore, is much less important than if it were the result of a deliberate choice of antagonistic doctrines. But in any case the weight of authority is overwhelmingly in favor of the doctrine that a train despatcher is a vice principal.

By some rules it is expressly stated that they may be suspended by the special order of some specified agent of the employers. See *Pittsburgh, C. & St. L. R. Co. v. Henderson* (1882) 37 Ohio St. 549, where the rule under discussion, which regulated the movements of freight trains, provided for its suspension by the company's super-

under a state of society very different from that of to-day, and the crystallization of such analogies into a binding rule is of comparatively modern origin. It first appeared in England in *Priestley v. Fowler*, 3 Mees. & W. 1, and in 1850 was applied to the employees of railroad companies in *Hutchinson v. York, N. & B. R. Co.* 5 Exch. 343. In 1841 it was formulated in South Carolina (*Murray v. South Carolina R. Co.* 1 McMull. L. 385, 38 Am. Dec. 268), and in 1842 in Massachusetts, in the leading case of *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339. The very able opinion of Chief Justice Shaw in the last case has largely dominated the law on the subject during the past fifty years, and contains the most plausible statement that can be given of the grounds supporting the public policy which compels a workman entering the service of a master to assume the whole risk of any injury that may be done him by the master through the misconduct of a fellow servant. The vigorous language of this statement, however appropriate it may have been at that time, has a touch of grim irony when read in the light

of existing conditions in the employment of labor. In England in 1880 the rule was changed by the employers' liability act, and is now practically abolished, as to large classes of workmen, by the workmen's compensation act, passed during the present year. The rule has been dealt with by legislation in several of our sister states. It was first formally recognized in this state in *Burke v. Norwolk & W. R. Co.* 34 Conn. 474, 479, with a strong protest against the sufficiency of the grounds for a principle deemed too firmly settled in other jurisdictions to be differently treated here. In *Darrigan v. New York & N. E. R. Co.* 52 Conn. 235, 52 Am. Rep. 590, the application of the rule was somewhat modified, and possibly cases may arise where the legitimate exercise of the duty of the court in applying established principles to novel conditions may involve some limitations of its apparent reach. But the evil is too deep-seated to be remedied by judicial action. It needs radical treatment through wise legislation.

W. H.

intendent and for the precautions to be observed during such suspension.

The right to rely implicitly upon the propriety of a special order from a train despatcher cannot be extended to cases in which the circumstances are such that a prudent man would feel bound to seek some further information as to the reason why the regular routine of the business has been in this instance departed from. In *Westcott v. New York & N. E. R. Co.* (1891) 153 Mass. 460, the conductor of a train was held to be negligent in starting a train, when he knew that, under the rules, he had no right to do so until the arrival of a certain train, without inquiring of the despatcher on that section of the road whether he had received any special information which would make it safe to leave the station.

The court said that, even supposing that it was ordinarily his duty to obey the orders of the despatcher, even if they were in violation of the rules of the road, this particular order was so obviously wrong, and was likely to involve such dreadful consequences, that it was manifestly negligent to act upon it without inquiring the reason for it.

But, where a rule requires trainmen to run in strict accordance with their written orders, the mere verbal statement of a telegraph operator that there is a worktrain on the track over which an extra freight is about to be run will not supersede an unqualified direction of the train despatcher worded in such terms that the engineer of the freight train is justified in running on the assumption that the track is clear. The company, therefore, cannot absolve itself from the charge of having failed to notify the crew of the freight train as to the presence of the work train on the track by the plea that the employees in control of the former train were the parties whose negligence was responsible for a subsequent collision between the two trains,—especially when there is another rule of such a tenor that those employees were justified in supposing that an order had previously been sent to the freight train to report at some designated place for instructions. *Louisville, N. A. & C. R. Co. v. Heck* (1898, Ind.) 50 N. E. 988.

The accepted doctrine in the majority of the American courts is that the mere possession of that authority to manage a train, with which conductors and (sometimes) engineers are invested, does not imply the possession of authority to make or unmake rules for the control of

employees. *Overby v. Chesapeake & O. R. Co.* (1803) 37 W. Va. 524.

In *Richmond & D. R. Co. v. Finley* (1894) 25 U. S. App. 16, 63 Fed. Rep. 228, 12 C. C. A. 595, an instruction implying that an engineer in temporary control of a train, in the absence of a temporary conductor, had power to waive a rule forbidding couplings to be made without coupling sticks, was held erroneous, the court saying: "There is too great a tendency to clothe subordinate employees with the power and duty of vice principals, and then to conclude that they represent the master in every respect, and as fully as if he were present. . . . Be this as it may, whatever may be the authority of a person, himself an employee on a train, over other coemployees on the same train, he and they are bound to respect and obey the general rules and regulations of their common master, whose orders press equally upon each of them, coming with the highest sanction, and each of them must know that the other cannot rescind them. The learned judge has invested the substitute of a substituted conductor with all the powers held by the highest officer of the railroad system. If this engineer, accidentally and temporarily in charge of a train, could rescind or waive or suspend a fixed rule of the company, a rule impressed in the most formal way upon a very large class of employees,—the class engaged, or likely to be called upon to engage, in coupling cars,—as a part of the contract and a condition precedent to their employment, he could revoke all rules, and govern himself and control his train at his own will, and at the risk and responsibility of his employer. Granting that, within the scope of his agency, he represents his employer, it can scarcely be supposed that it is within the scope of the agency of an engineer, or even of a conductor, to rescind the standing rules of the company, or to cancel a contract made by his employer with one of his servants antecedent to and as a condition for his employment. When the plaintiff in the action below followed the suggestion of the engineer, he knew the risk he was taking, knew that he had contracted not to take it under any circumstances, knew that the engineer could not make him take it, and he assumed the risk himself. He was injured on May 14, 1890. He had been in this same service from October 12, 1889. When he entered it, he fully understood that the rules of the company positively forbade brakemen, and him among them, from coupling and uncoupling cars except with a stick, that not only brakemen, but all other per-

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

LITTLE ROCK & MEMPHIS RAILWAY
COMPANY, *Plff. in Err.*,

v.

G. F. BARRY.

(56 U. S. App. 37, 84 Fed. Rep. 944, 28 C. C. A. 644.)

1. Telegraphic information is not, as matter of law, required to be given to those in charge of trains moving in the same direction on a single-track road as to the respective position of the trains, where the rules which have been generally adopted by railroads to govern such cases do not require it, but place the duty of looking out for the other train upon the train crews, and the rules are not shown to be palpably unreasonable or insufficient.
2. Rules adopted by railroad companies to govern the movement of trains can-

- not be regarded as unreasonable or insufficient in the absence of proof that they are so.
3. One taking service without objection or protest with a railroad whose rules to his knowledge require employees on trains out on the road to look out for other trains moving in the same direction assumes the risk incident to the operation of trains under such rules.
4. The reasonableness of rules adopted by a railroad company for the movement of trains is a question of law for the court.
5. Failure of a railroad company to notify those in charge of two trains moving in the same direction of the relative position of the trains is not the proximate cause of a collision between them where the crews in charge of them took no precautions to look out for and prevent a collision with the other train as required by the rules of the road.

(January 31, 1898.)

sions, must not go between cars, under any circumstances, for the purpose of coupling, uncoupling, or for adjusting pins, etc., when an engine is attached to such cars or train. In consideration that the company would employ and would continue to employ him, he bound himself to obey this rule, and assumed all results, not only of disobedience, but also of the infraction of the rule. When, therefore, the engineer on the engine attached to the train suggested to him to go between the cars to couple, he knew that under no circumstances, even an order from a superior, could this be done without an assumption of risk by himself; and he knew, also, that he had waived in advance any liability of the company for this infraction of the rule. He had dealt with his master immediately, and had from him his instructions in writing. He had no right to permit the suggestion of a subordinate to reverse or annul his master's express direction, a direction for the government of his conduct under all circumstances."

In *Atchison, T. & S. F. R. Co. v. Reesman* (1894) 19 U. S. App. 596, 60 Fed. Rep. 370, 9 C. C. A. 20, 23 L. R. A. 768, the court refused to concur with the doctrine that, "if the plaintiff [a brakeman] disobeyed the rules of the company, and such disobedience contributed directly to the injury, he may nevertheless recover, and cannot be held guilty of contributory negligence providing that such disobedience was with the knowledge and consent of the conductor of the train, or, in other words, that, if the conductor failed to enforce the rules of the company, the employee may knowingly disregard them, and yet in no manner be barred from recovering for injuries which would not have resulted but for such disobedience."

In *Russell v. Richmond & D. R. Co.* (1891) 47 Fed. Rep. 204, the court declined to say that the disregard of their duty by conductors could render obsolete a regulation of the company, "nor that a conductor so far represents the company as to be authorized to rescind rules made by the corporation for his guidance, and for that of the train hands."

It will be observed that these decisions virtually amount to a declaration that the status of vice principal which was attributed to conductors in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, is predicated only of the acts which he does in directing his subordinates during the ordinary routine of his usual duties, and is not to be extended so as to 43 L. R. A.

make him for all purposes the *alter ego* of the company within his own particular sphere.

The fact that a brakeman in uncoupling cars in violation of a rule requiring the use of a coupling stick was acting under the order of the conductor, who had "the right to control or direct his services," within the meaning of § 193, Miss. Const. 1890, will not enable him to recover, since he was under no obligation to obey an order to violate a rule binding on all employees, including the conductor. *Richmond & D. R. Co. v. Rush* (1894) 71 Miss. 987. The court accordingly held that it was error either to instruct the jury that the company was liable, notwithstanding the existence of the rule, if the conductor knew of and acquiesced in plaintiff's violation thereof and occasioned the injury by negligently signaling the train to start, since, even if the conductor is the superior officer of the brakeman, he could not dispense with any general rule, or to instruct them that the company was liable if the conductor ordered plaintiff to go between the cars to uncouple, having first taken from him his coupling stick, and, without knowing that he had come out, negligently signaled the engineer to move, thus causing the injury.

Sometimes, however, a rule conferring a special power upon a conductor may reasonably be construed as conferring by implication a power to relax another rule dealing with the same subject-matter as the former. Thus, in a case where the defense was that the plaintiff (a brakeman) had violated a rule forbidding him to ride on an engine, it appeared that a rule instructed conductors of freight trains to "require all of their brakemen to be on top of the train . . . while descending or ascending grades." The evidence showed that the night was intensely cold, and tended to prove that the conductor had directed plaintiff on this occasion to ride in the cab of the engine. It was held that, under the rule, the conductor had authority to direct the plaintiff in respect to his duties in being on top of the train, and that plaintiff could not be charged with contributory negligence for riding in the engine descending a grade, if he did so in obedience to directions of the conductor. *Hurlbut v. Wabash R. Co.* (1895) 130 Mo. 657.

The promise of a foreman of car repairers to protect a car repairer binds the company although a rule provided to secure the safety of such an employee has not been observed but dis-

ERROR to the Circuit Court of the United States for the Eastern District of Arkansas to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Before *Sanborn* and *Thayer*, Circuit Judges, and *Philips*, District Judge.

Messrs. U. M. Rose, W. E. Hemingway, and G. B. Rose, for plaintiff in error:

The sufficiency of rules is a question of law for the court, not a question of fact for the jury.

Kansas & A. Valley R. Co. v. Dye, 36 U. S. App. 23, 70 Fed. Rep. 27, 16 C. C. A. 604;

pensed with. *Moore v. Wabash, St. L. & P. R. Co.* (1885) 85 Mo. 588. The court said: "It being conceded, as it must be, that the company owed a duty to the men under the car to provide for their safety, can it be that the foreman had no authority in an emergency to use any other means than those adopted by the company? That the red flags, and nothing but the red flags, was the means he was to employ? If for any reason that would clearly, in a given case, have been insufficient as a warning, can it be possible that the foreman would be restricted to the use of the red flags? Or if, in such case, he had had the red flag set up, and one of the men was injured, in consequence of its insufficiency to give the warning, that the company would not be liable to the injured party? Has it discharged its duty by simply adopting a means of protection ordinarily sufficient, when the person in charge of the work knows that, in the particular case, it is not a sufficient warning? If the foreman has authority in such an emergency, that authority results from his general authority to perform the duty of the company, in protecting the employees under his control in the performance of a dangerous work for the company, and he was authorized to make the promise to the plaintiff for the company, and undertook to set out the red flags in his possession, or to adopt any other means necessary to secure the safety of the men, thereby absolving them from the duty of setting out the flag, or setting the watch."

XI. Duty of the servant in regard to the rules promulgated by his employer.

a. Generally.

As to the effect of the violation of a mere custom of the employees themselves, see III. *supra* (sub *finem*).

The duty of the servant to comply with the rules which the master has published for his guidance may be referred to the broad principle that the rules, if reasonable, may be assumed to indicate the methods of work which experience has shown to be calculated to furnish the best chance of safety, under the circumstances, both to the servant himself and to his fellow employees, and that a breach of those rules must, by consequence, charge him with that culpability which the law infers from the doing of a certain act in an unnecessarily dangerous manner.

Such seems to be the conception underlying statements like these: Where a servant willfully encounters dangers which have been pointed out to him, and does not avail himself of the rules and regulations which the master has provided to avoid and avert such danger, the mas-

Vedder v. Fellows, 20 N. Y. 126; *Illinois C. R. Co. v. Whittemore*, 43 Ill. 420, 12 Am. Dec. 138; *St. Louis, I. M. & S. R. Co. v. Adcock*, 52 Ark. 406; *Kansas City, Ft. S. & M. R. Co. v. Hammond*, 58 Ark. 334; *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea, 128; *Tracy v. New York & H. R. Co.* 9 Bosw. 396; *Hoffbauer v. Davenport & N. W. R. Co.* 52 Iowa, 342, 35 Am. Rep. 278.

The mere happening of a collision raises no presumption of negligence in a suit by a servant against his master.

Smith v. Missouri P. R. Co. 113 Mo. 70; *Stewart v. Ohio River R. Co.* 40 W. Va. 188; *Mobile & O. R. Co. v. Godfrey*, 155 Ill. 78; *Kansas P. R. Co. v. Salmon*, 11 Kan. 83; *Short v. New Orleans & N. E. R. Co.* 69 Miss.

ter is not responsible for an injury occasioned thereby. *Davis v. Nuttallburg Coal & C. Co.* (1890) 84 W. Va. 500.

"It would be most unreasonable and unjust, after imposing upon the master the duty of promulgating a rule for securing the safety of his servant, to permit the servant to recover from the master damages for injuries which the observance of the rule would have prevented. As the master is bound at his peril to make the rules, the servant should be equally bound at his peril to obey them. In such case the disaster is brought upon the servant by his own voluntary act, and he, and not the master who has discharged his duty, should bear the consequences. So it has been uniformly ruled." *Francis v. Kansas City, St. J. & C. B. R. Co.* (1892) 110 Mo. 387.

"If the employee knowingly and intentionally disobeys a reasonable rule or regulation established for his safety, unless he does so under the influence of fear produced by the appearance of sudden danger, and the act of disobedience is the proximate cause of the injury complained of, he cannot recover." *Gulf, W. T. & P. R. Co. v. Ryan* (1888) 69 Tex. 665.

Or the duty may be rested upon the more special ground that an agreement on his part to obey the rules may be implied from his acceptance or continuance of the employment with a knowledge of their provisions. See *Pennsylvania Co. v. Whitcomb* (1887) 111 Ind. 212.

Compare that class of cases which hold a servant to be guilty of contributory negligence, if he disobeys a verbal command of his superiors. *O'Brien v. Staples Coal Co.* (1896) 163 Mass. 435; *Lendberg v. Brotherton Iron Min. Co.* (1893) 97 Mich. 443; *Lyon v. Detroit, L. & L. M. R. Co.* (1875) 31 Mich. 429.

In *Lowe v. Chicago, St. P. M. & O. R. Co.* (1893) 89 Iowa, 420, it was assumed in the argument that the servant, "by receiving a copy of the rules and entering the company's service . . . became bound by contract and under obligation to obey the rules."

Compare also the language used in *Richmond & D. R. Co. v. Rush* (1894) 71 Miss. 987, to the effect that "for injury sustained through its violation an employee who knew the rule and contracted with reference to it cannot recover."

It will often happen that the servant's failure to follow the course prescribed by the rule may imply the doing of an act which may reasonably be held negligent independently of the rule itself. In this case the master may still make a successful defense, even if he cannot prove that the servant knew of the rule. But his position will then be less advantageous, for if the rule is left out of account, the question of the servant's contributory negligence must usually be left to the jury, while disobedience to a known rule

348; *East Tennessee, V. & G. R. Co. v. Maloy*, 77 Ga. 237; *Campbell v. Pennsylvania R. Co.* (Pa.) 24 Am. & Eng. R. Cas. 427; *Kincaid v. Oregon Short Line R. Co.* 22 Or. 35; *Johnson v. Chesapeake & O. R. Co.* 36 W. Va. 73; *Murray v. Denver & R. G. R. Co.* 11 Colo. 124.

Where regulations for the running of trains out of time, proper and suitable with a view to the safety of employees, are prescribed, obedience to these regulations by those having charge of a train is a matter of executive detail; and for a disobedience of them, which causes injury to a coemployee, the master is not liable.

Slater v. Jewett, 85 N. Y. 62, 29 Am. Rep. 627; *International & G. N. R. Co. v. Hall*, 78

Tex. 657; *Rose v. Boston & A. R. Co.* 58 N. Y. 217; *Wright v. New York C. R. Co.* 25 N. Y. 562; *Corcoran v. Delaware, L. & W. R. Co.* 126 N. Y. 673.

The court in instructing that in sending out special or extra trains due and sufficient notice of the movements and whereabouts of all other trains and locomotives which are liable to be met or overtaken by the special, or extra, should be given to the officers or servants in charge of such trains, not only invaded the province of the jury, but disregarded the evidence.

Illinois C. R. Co. v. Neer, 26 Ill. App. 360; *Relyea v. Kansas City, Ft. S. & G. R. Co.* 112 Mo. 86, 18 L. R. A. 817; *Kansas City, Ft. S. & M. R. Co. v. Hammond*, 58 Ark. 324;

conceded to be reasonable and expressed in definite terms must necessarily be negligence as a matter of law. *Georgia P. R. Co. v. Propst* (1887) 83 Ala. 518; *Gleason v. Detroit, G. H. & M. R. Co.* (1896) 43 U. S. App. 89, 73 Fed. Rep. 647, 19 C. C. A. 636.

Proof having been given of the servant's knowledge of the rule and of its violation by him, the only question left open and to be submitted to the jury is whether or not such negligence was the proximate cause of the injury, or concurred with the negligence of the master in producing the injury. *Lake Erie & W. R. Co. v. Craig* (1897) 47 U. S. App. 647, 80 Fed. Rep. 488, 25 C. C. A. 585, disapproving instruction which proceeded on the theory that the contract to observe the rule did not make the case different from what it would be if treated as controlled by general principles unaffected by contract.

Where a rule peremptorily requires that brakemen before making a coupling shall know that their signals are understood and obeyed by the engineer, a brakeman who is injured by a sudden and unexpected increase in the speed of the engine cannot excuse his violation of the rule on the ground that, at the time he prepared to make the coupling, the speed was not such as to endanger a person who used ordinary care. *Deeds v. Chicago, R. I. & P. R. Co.* (1887) 74 Iowa, 154.

It is not necessary that a plea setting up the defense that a servant caused his injury by disobeying a rule should aver that he "negligently" violated the rule. *Louisville & N. R. Co. v. Mothershed* (1895) 110 Ala. 143.

It is error to leave the question of the plaintiff's negligence to the jury, when the undisputed evidence shows that he was in the cab of an engine, contrary to instructions which had been given him. *Connors v. Burlington, C. R. & N. R. Co.* (1888) 74 Iowa, 383.

Yet in *Louisville & N. R. Co. v. Foley* (1893) 94 Ky. 220, it was said *arguendo*, that a written agreement by which the plaintiff stipulated that he would observe a rule requiring him to use a coupling stick was not binding on him, unless such an implement was in fact indispensable, or at least clearly necessary for security of brakemen against the danger incident to coupling cars, since the defendant had otherwise no right to require the plaintiff to use the stick, or to make habitual use of it a condition of his right to maintain an action for personal injury received while he was engaged in coupling cars.

This principle is, however, subject to a necessary modification in cases where the rule alleged to be violated is couched in terms which necessitate testing the quality of the plaintiff's acts by the standard of the general law of negligence.

Whether certain conduct on the part of a 43 L. R. A.

servant is negligence as being a violation of rules is a question of fact where the rules relied upon do not command the doing or not doing of a particular act or acts, but simply impose upon him in general terms duties calling for the exercise of judgment, skill, and diligence. *Lake Shore & M. S. R. Co. v. Parker* (1890) 131 Ill. 557, Affirming 33 Ill. App. 405.

Where a rule simply forbids the coupling of cars while they are moving at a dangerous rate, it is for the jury to say whether the rule was violated under the circumstances in evidence. *Denver, T. & Ft. W. R. Co. v. Smock* (1897) 23 Colo. 456.

In *Horan v. Chicago, St. P. M. & O. R. Co.* (1893) 89 Iowa, 328, the court expressed a doubt whether, in view of the ordinary practice of coupling by hand, a rule requiring coupling sticks to be used ought to be held obligatory.

In Texas the necessity for taking the opinion of the jury would seem to be the same whether the duty exists apart from the rule or not. A trial court is in that state forbidden to charge the jury, in the absence of a statutory declaration, that any particular act or omission constitutes negligence, and this principle, it has been held, justifies a refusal to give an instruction which, in effect, includes the proposition that it is negligence *per se* to run a train at a greater speed than that permitted by the rules of the company. *Fort Worth & D. C. R. Co. v. Thompson* (1893) 2 Tex. Civ. App. 170.

But even in Texas it was held that a verdict for the plaintiff should be set aside where evidence not contradicted except by witnesses who contradicted themselves, shows that the injury was caused by the plaintiff's violation of a rule. *Southern P. Co. v. Ryan* (1895, Tex. Civ. App.) 29 S. W. 527.

Where a rule is reasonable and susceptible of two constructions, a servant who in good faith attaches a certain meaning to it, and receives an injury in consequence, is not precluded from recovery as a matter of law. *Texas & P. R. Co. v. Leighty* (1895) 88 Tex. 604.

On the other hand, a railroad company is not liable for the death of an engineer in a collision occasioned by the misconstruction and consequent disobedience, by himself and the train conductor, of orders given, which, taken in connection with the general rules well known to both, were plain, and not misleading. *Harris v. Norfolk & W. R. Co.* (1892) 16 Va. L. J. 149.

(Cases in which the question whether the servant's right of action is barred depends upon the meaning of a rule received, are noted in VII. *supra*.)

The breach of a rule, like other kinds of contributory negligence, will preclude a minor from maintaining an action, where he may be presumed to have the capacity for comprehending

Shepard v. Boston & M. R. Co. 158 Mass. 174; *Enright v. Toledo, A. A. & N. M. R. Co.* 93 Mich. 409.

The mere fact that a servant is careless in the particular case raises no presumption that he is incompetent.

Hathaway v. Illinois C. R. Co. 92 Iowa, 337; *Gravelle v. Minneapolis & St. L. R. Co.* 10 Fed. Rep. 711; *Davis v. Detroit & M. R. Co.* 20 Mich. 105, 4 Am. Rep. 364.

The mere fact that he had never served as conductor before does not establish his incompetency. If it did, the company would be the absolute guarantor of the safety of everyone the first time any man was set to discharge the duties of a new position.

the danger resulting from his disobedience. *E. S. Higgins Carpet Co. v. O'Keefe* (1897) 51 U. S. App. 74, 79 Fed. Rep. 900, 25 C. A. 220, where a boy of fifteen was denied a remedy for an injury received in consequence of his disobedience of a rule forbidding the cleaning of machinery while it was in motion.

The fact that a fellow employee who had the right to control the plaintiff observed, prior to the time when the act which caused the injury was done, that the plaintiff was not provided with the necessary appliances for doing that act in the manner prescribed by a rule, and nevertheless suffered him to proceed without those appliances, is no excuse for a violation of that rule. *Port Royal & W. C. R. Co. v. Davis* (1894) 95 Ga. 292, where a conductor failed to stop a brakeman who, to his knowledge, was attempting to couple cars without a stick.

Where a complaint alleges that a railroad company was guilty of a breach of duty in failing to provide cars that could be coupled by hand, an answer that the contract between the employee and the company was embraced in a rule that the company would not assume any liability on account of injuries received in coupling by hand presents at least a prima facie defense which demands a replication from the plaintiff. *Pennsylvania Co. v. Whitcomb* (1887) 111 Ind. 212.

It is not necessary to plead rules of the company or any usage as to the manner of the performance of duty in order to authorize their introduction in evidence. These rules and usages are mere evidence bearing upon the question of negligence of the defendant or its employees, and the care and diligence of the plaintiff. *Henry v. Sioux City & P. R. Co.* (1885) 66 Iowa, 52; *Alcorn v. Chicago & A. R. Co.* (1891, Mo.) 16 S. W. 229.

In *Texas & N. O. R. Co. v. Tatman* (1895) 10 Tex. Civ. App. 434, the admission of certain rules was objected to by appellant on the ground that they had no application to such work as was being done at the time deceased was killed. Most of them from their own terms appeared to have no such application; and all of the witnesses testified that none of them had reference to the work in which the injury was received. The court said: "The purpose in thus introducing the rules may have been: First, to show the absence, as alleged, of any provision such as ought to have been made to guard against such casualties as that in which deceased lost his life; or, second, to show that one or more of the rules did apply, and had been violated by the servants of appellant, and that they were thus guilty of negligence; or, third, to develop that, if none of the rules applied specifically to the situation existing when Tatman was killed, still provision was made for others, wherein the risk was similar, which, by proper care and

East Tennessee, V. & G. R. Co. v. McKenoy (Tenn.) 1 S. W. 500; *Gulf, C. & S. F. R. Co. v. Compton*, 75 Tex. 687; *Hayes v. Western R. Corp.* 3 Cush. 270; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772; *Campbell v. Wing*, 5 Tex. Civ. App. 431; *Louisville & N. R. Co. v. Coniff*, 90 Ky. 560; *Texas & P. R. Co. v. Wiesener* (Tex.) 2 S. W. 687; *Ohio & M. R. Co. v. Dunn*, 138 Ind. 18; *Brown v. Southern P. R. Co.* 7 Utah, 288; *Brasil v. Western N. O. R. Co.* 93 N. C. 313; *Relyea v. Kansas City, Ft. S. & G. R. Co.* 112 Mo. 86, 18 L. R. A. 817.

The negligence charged against the defendant is that it did not embody in its train order an admonition to look out for No. 5, and

foresight, ought to have been made to apply to such states of fact as that in question. If none of the rules made such provision against the risk imposed upon Tatman as the company, in the exercise of ordinary care, should have made, the omission could be thought to appear by production of the rules, though the more direct and simpler mode of showing the absence of a rule is usually found in the testimony of those acquainted with the subject. On the other hand, if, when the rules were in evidence any of them appeared to relate to such a situation as that under investigation, it was competent for either party to show that in fact it did not so apply, or that it was adequate or inadequate for the purpose. And if, by any of the rules, safeguards were provided against the dangers arising from conditions similar to those existing when Tatman was killed, which could have been extended so as to apply to the latter, this was a fact for the jury to consider in determining what could and what should have been done by the company to protect its employees, when engaged as Tatman was when killed. We think, therefore, it was proper to inquire into all of the rules which bore upon the issues, as suggested, but in the trial below many of them were dwelt upon which seem to us to throw no light upon the questions under investigation."

In other words, a servant is not debarred from recovering by the fact that, at the time his injury was received, he was acting in intentional violation of the master's rules, unless the injury was due, in whole or in part, to such violation. *Ford v. Fitchburg R. Co.* (1972) 110 Mass. 240, 14 Am. Rep. 598.

b. *Violation of rule by plaintiff not a bar to recovery unless shown to be proximate cause of injury.*

The general principle that contributory negligence is not available as a defense unless it is shown to have been an efficient cause of the plaintiff's injury has frequently been applied in cases where the servant is alleged to have violated a rule.

On this ground it has been held that the violation by an employee of a rule of the employer forbidding employees to change their clothes before quitting time did not, under the circumstances, prevent a recovery for his death caused by the bursting of a grindstone turning at an excessive rate of speed. *Helfenstein v. Medart* (1896) 136 Mo. 595, Affirmed in Banc in 37 S. W. 829, Affirmed on Rehearing in 38 S. W. 294.

An instruction which predicates contributory negligence upon the existence of a certain rule prohibiting a particular course of action is of course properly refused where none of the defendant's rules can be construed in such a sense as to cover the circumstances in evidence.

In *Western & A. R. Co. v. Bussey* (1894) 95

that when it found that No. 5 had not reached Forrest City, it should have stopped the extra at Edmondson, and either held it there or given it further admonitions.

Granting that to be true, the accident would not have happened had the engineer of the extra not run recklessly through the cut, and had No. 5 not failed to send back a flagman. The causal connection was broken by the action of responsible agents, and their acts alone must be regarded as the proximate cause.

Washington v. Baltimore & O. R. Co. 17 W. Va. 190; *Wharton, Neg.* §§ 134 et seq.; *Shearn & Redf. Neg.* § 26; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 12 U. S. App. 381,

Ga. 584, complaint was made that the court erred in refusing to charge the jury, at the request of the defendant's counsel, as follows: "If you believe from the evidence that . . .

the engineer in charge of the train violated a rule of the defendant which was in force and effect at the time of the accident, of which . . . [he] had knowledge, which provided that, while passing switches, the speed of the train should be slackened, and this collision was occasioned in whole, or at least in large part, from his not observing this rule, and that from such collision Bussey received injuries from which he subsequently died, the plaintiffs cannot recover, although the defendant may have been negligent in not having the switches properly set." But the court said: "This request was properly refused, we think, for the reason that there was no evidence in the record to justify the instruction therein contained. The only rule of the company in which we find the expression 'slacken the speed' employed at all is rule 35, which was introduced in evidence, and which provides that 'all trains will run with great care after rains, and slacken their speed when the track is in bad order, while passing switches, and when crossing long bridges and trestle work, and, when practicable, shut off steam.' There was no evidence submitted, so far as we have been able to gather from the record, that there had been recent rains, or that the track of the railroad company was in bad order. Indeed, the contrary of the latter condition seems to be established by the evidence in the case."

A negligent disregard of rules by the superior servant who was in immediate control of the plaintiff cannot be imputed to him, but he will be debarred from recovery if he voluntarily joins his superior in breaking the rule. Thus a section man who, without hesitation or objection, gets on a hand-car after a remark of the foreman which does not amount to a command, but is a mere suggestion, put interrogatively to ascertain if the men are willing to take the car without taking the precautions prescribed by the rules to guard them against the regular trains, becomes a participator in the breach of such rules, and cannot recover for injuries caused by a collision with a special train which would have been avoided if the rules had been observed. *McGrath v. New York & N. E. R. Co.* (1885) 15 R. I. 95.

So, also, where a rule of the company prohibits generally the use of intoxicating liquors by its officers and employees, the use thereof by an employee who sues for personal injuries will not defeat a recovery, unless such use contributed in some appreciable degree to producing the injury sustained. That the violation of such rule might have done so, if it did not in fact so contribute, will not defeat a recovery. 43 L. R. A.

55 Fed. Rep. 949, 20 L. R. A. 582, 5 C. C. A. 347; *St. Louis & S. F. R. Co. v. Bennett*, 32 U. S. App. 621, 69 Fed. Rep. 525, 16 C. C. A. 300; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. ed. 259; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 52, 19 L. ed. 67; *New York C. & St. L. E. Co. v. Perriguet*, 138 Ind. 414; *Relyea v. Kansas City, Ft. S. & G. R. Co.* 112 Mo. 86, 18 L. R. A. 817; *Harvey v. New York C. & H. R. R. Co.* 32 N. Y. S. R. 817; *Whittaker v. Delaware & H. Canal Co.* 49 Hun, 400; *Mars v. Delaware & H. Canal Co.* 54 Hun, 625; *Gould v. Chicago, B. & Q. R. Co.* 66 Iowa, 590; *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.* 139 U. S. 237, 35 L. ed. 158; *Hofnagle v. New*

Western & A. R. Co. v. Bussey (1894) 95 Ga. 584.

So, also, breach of a rule requiring employees to use a safety coupler will not prevent recovery by one who, while about to couple cars, is struck by a car owing to defects in the engine which prevent the engineer from controlling its movements properly, and is thereby caused to throw his hand between the deadwoods. *Wabash & W. R. Co. v. Morgan* (1892) 182 Ind. 430.

The violation of a rule requiring employees to examine the coupling apparatus before making a coupling is not the proximate cause of an injury received by a brakeman through being struck in the eye by a silver of iron which the shock of the collision between the drawheads detached from one of them, where the uncontradicted evidence shows that immediately before the accident he had in fact ascertained that the coupling could not be made, and had desisted from the attempt to make it. *Denver, T. & Ft. W. R. Co. v. Smock* (1897) 23 Colo. 456.

In *Brown v. Louisville & N. R. Co.* (1895) 111 Ala. 275, the court used the following language: "Notice is not in such cases the equivalent of knowledge. A brakeman would have notice of a rule forbidding him to uncouple moving cars if he had information that his employer had adopted and promulgated a set of rules for the conduct of employees. This would put him on inquiry which, if pursued, would lead to a knowledge of the particular rule. Still, until the inquiry has been made and the knowledge gained, his conduct as to care or negligence cannot be measured by the rule,—a factor which did not operate upon him in the act done. He might be negligent in not pursuing the inquiry, but such negligence would be only a remote cause of the injury suffered by doing the act in a manner forbidden by the unknown rule." But this argument seems to be wholly irreconcilable with the general principle that constructive is legally equivalent to actual knowledge: (And see XI. e, *infra*.)

Upon general principles it is of course evident that the question of proximity of cause must, in cases of this type, be determined by considering whether the event which produced the injury was one of those which might reasonably have been expected to result from the servant's disobedience to the rule.

The violation of a rule requiring car repairers to put out a signal flag when they are at work is not the proximate cause of an injury received through the cars being struck by an engine which would have been brought to a standstill before reaching the car, if the lever had been in good order. *Texas & N. O. R. Co. v. Wynne* (1893, Tex. Civ. App.) 22 S. W. 1064.

A brakeman is not guilty of negligence in coupling cars without using a stick, although

York C. & H. R. R. Co. 55 N. Y. 608; *Louisville & N. R. Co. v. Kelsey*, 89 Ala. 287; *Seale v. Gulf, C. & S. F. R. Co.* 65 Tex. 274, 57 Am. Rep. 602; *Williams v. Woodward Iron Co.* 106 Ala. 254.

In order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 475, 24 L. ed. 259; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S.

252, 26 L. ed. 1071; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 12 U. S. App. 381, 55 Fed. Rep. 949, 20 L. R. A. 582, 5 C. C. A. 347; *Finalyson v. Utica Min. & Mill. Co.* 32 U. S. App. 143, 67 Fed. Rep. 512, 14 C. C. A. 492; *St. Louis & S. F. R. Co. v. Bennett*, 32 U. S. App. 621, 69 Fed. Rep. 525, 16 C. C. A. 300.

All the employees on each train were the fellow servants of plaintiff.

Northern P. R. Co. v. Peterson, 162 U. S. 346, 40 L. ed. 994; *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418; *Balch v. Haas*, 36 U. S. App. 693, 73 Fed. Rep. 974, 20 C. C. A. 151.

The disposition in his fellow servants to become careless is one of the risks which a

the rules of the railroad company require it, when the cars and coupling are in such a position and condition that the stick would be useless. *Berrigan v. New York, L. E. & W. R. Co.* (1891) 37 N. Y. S. R. 414, Reversed in (1892) 181 N. Y. 582, but not as to this point.

An engineer's violation of a rule fixing a maximum for the speed of trains will prevent recovery for an injury caused by a collision at a place which he would not have reached if that maximum had not been exceeded. *Sutherland v. Troy & B. R. Co.* (1891) 125 N. Y. 737, on second appeal in supreme court (1893) 74 Hun, 162.

Failure of an engineer to take a position on the inside of a curve on approaching it, as required by a rule of the company, will not, as a matter of law, prevent a recovery for his injuries received in a collision with another train. *Park v. New York C. & H. R. R. Co.* (1895) 85 Hun, 184.

It is for the jury to say whether there is a causal connection between the breach of a rule which required that employees who entered the blow-pit of a pulp-mill for the purpose of washing the pulp should shovel the pulp off the plank walk on which they stood while doing the washing, and an injury which one of such employees received through being forced off the walk into the pulp by a jet of steam from the blow pipe which would have been cut off by the time he came opposite the pipe if he had proceeded in the first place to shovel off the pulp. *Fickett v. Lisbon Falls Fibre Co.* (1898) 91 Me. 268.

A brakeman who, without protesting against or reporting the infraction of a known rule requiring east-bound trains to enter a certain siding from the west end, alights for the purpose of opening the eastern switch, at a distance from it much greater than that at which he would, in the ordinary course of things have alighted, if the train had been stopped before reaching the western switch, cannot recover for injuries received from falling into an open culvert at the place where he steps off the car. *West v. Southern P. Co.* (1898) 56 U. S. App. 323, 85 Fed. Rep. 398, 29 C. C. A. 219.

In *Lake Erie & W. R. Co. v. Craig* (1896) 87 U. S. App. 634, 73 Fed. Rep. 642, 19 C. C. A. 681, where a brakeman who had, in violation of a rule, attempted to couple cars while in motion, caught his foot in an unblocked frog, and was run over, the court said that the question presented was, whether the intervention of the unblocked frog was, as distinguished from the original negligence of Craig in going between the moving cars, so new and independent a cause of the injury, that it was the sole proximate cause, and proceeded thus: "Much reliance was placed by the defendant in error on the case of *Smithwick v. Hall & U. Co.* (1890) 59 Conn. 261, 12 L. R. A. 279. In that case a

workman had been warned not to go to the end of an unfenced platform, because of the danger of slipping on the ice which was there, and of falling off to the ground below. He went there, nevertheless, and while there the wall of an adjacent building fell on him and he was injured. The supreme court of errors of Connecticut held that his negligence in not heeding the warning was not contributory to the injury which happened to him. The case is easily distinguished from the one at bar. There the injury which happened proceeded from a manifestly different cause from that which he [the plaintiff] had been warned against, and, while he might have assumed the risk from the one, he did not assume the risk from the other. Here, if the jury were to find that the accident, as it happened, by the catching of the foot in the frog, was entirely different in its character from that which the plaintiff might have expected by falling over any obstruction, or by slipping, they would be at liberty to do so, and to find that his negligence in going between too rapidly moving cars was not a proximate cause of the accident. All that we hold is that the jury might reasonably have found, from the evidence in this case, that danger from the frog was not substantially different from the dangers which he had reason to anticipate, and therefore, that his negligence did contribute to the accident, as a proximate cause. Hence the question of proximate cause should have been submitted to the jury."

In *Gleason v. Detroit, G. H. & M. R. Co.* (1896) 43 U. S. App. 89, 73 Fed. Rep. 647, 19 C. C. A. 636, where a rule similar to that discussed in the case last cited had been violated, it was contended on behalf of the plaintiff that, even if the course which plaintiff took was negligence, it was not the proximate cause of the accident, because he did not know of the presence of the grade stake over which he stumbled. But the court said: "The obstruction offered by the grade stake was not different from that which was offered by the cross ties and the cross rails. It was exactly of the same character and it was of the class of dangers which the plaintiff had every reason to anticipate in going in between the rails and in front of the moving car under the circumstances. It seems to us clear, as a matter of law, therefore, that his negligence was the proximate cause of his injury."

In *Louisville & N. R. Co. v. Ward* (1894) 18 U. S. App. 688, 61 Fed. Rep. 927, 10 C. C. A. 166, the rules of the company required that coupling sticks be furnished to employees of certain classes, and the coupling of cars by hand was strictly forbidden. The defendant in error admitted his knowledge of the rules in this respect, and testified that he had been supplied with a coupling stick, that he did not use it, and that when he was hurt he was at-

man assumes in going into the service of a railroad company.

Kennelly v. Baltimore & O. R. Co. 166 Pa. 60; *Cincinnati, I. St. L. & C. R. Co. v. Darling*, 130 Ind. 376; *Wabash, St. L. & P. R. Co. v. Conkling*, 15 Ill. App. 157; *Illinois O. R. Co. v. Neer*, 31 Ill. App. 126, 26 Ill. App. 356; *McGrath v. New York & N. E. R. Co.* 15 R. I. 95; *Wright v. New York O. R. Co.* 25 N. Y. 569; *Enright v. Toledo, A. A. & N. M. R. Co.* 93 Mich. 409; *Kansas & A. Valley R. Co. v. Dye*, 36 U. S. App. 23, 70 Fed. Rep. 24, 16 C. C. A. 604; *Kansas & A. Valley R. Co. v. Waters*, 36 U. S. App. 31, 70 Fed. Rep.

28, 16 C. C. A. 609; *Lake Shore & M. S. R. Co. v. Parker*, 131 Ill. 557.

Messrs. J. M. Moore and W. L. Terry, for defendant in error:

It is the duty of a railway company to know where its trains are, and to inform its servants, and warn them of what is necessary to avoid collision.

Galveston, H. & S. A. R. Co. v. Smith, 76 Tex. 611.

A railway is not negligent toward its servants if it varies from its regular timetable in running its trains, provided it gives to its servants reasonable notice of any

tempting to make the coupling by hand. Upon these facts the trial judge was asked, but refused, to instruct that if the plaintiff was injured by reason of his neglect to use the coupling stick he could not recover. The contention of the plaintiff was that the cases laying down the rule as to the consequences of a violation of a rule were not applicable for the reason that, under the charge which the court gave, the verdict necessarily meant that the accident was caused solely by a hole in the track, into which the servant had stumbled, and that the coupling stick was in no way connected with it. The court, however, said: "While the court did instruct to the effect that, to entitle the plaintiff to recover, it should appear that the hole or depression between the ties was the sole cause of the injury, it is impossible to say that, if the further instruction asked had been given, the jury would not have found that the plaintiff's neglect to use the coupling stick, and his undertaking to effect the coupling by hand, were efficient contributory causes. The instruction asked should have been given, and if there were considerations of which, however, no suggestion has been made here tending to show that in this instance the failure of the plaintiff to comply with the rules of the company was not culpable, or did not contribute to the injury, they should have been submitted to the determination of the jury."

The question whether the breach of the rule was the proximate cause of the injury has sometimes been discussed with reference to the consideration whether the method of doing the work prescribed by the master was really such as tended to lessen the risk of accident.

In *Louisville & N. R. Co. v. Foley* (1893) 94 Ky. 220, the court, after stating that the decisive issue in the case was whether, but for plaintiff's failure to use the coupling stick at the time of the accident, it would not have occurred, proceeded thus: "It is proved that although a coupling stick was, at the time plaintiff signed the writing, delivered to him, the conductor who delivered it told him the written undertaking was required as mere form. It is further shown that in order to use the stick it is necessary for a brakeman to carry it about his person in a belt, which causes more danger of falling and being injured while running on top of a car, or climbing hurriedly on or off it, than is compensated for by any advantage or security against injury it may be. Besides, the coupling stick is proved to be generally discarded, and not used at all by brakemen on freight cars of the defendant, which fact is not only proper to be proved, as was done on trial of this case, but tends strongly to show the coupling stick does not answer the purpose for which it was apparently designed. For the opinion of brakemen in regard to utility of an implement such as a coupling stick, which they only have use for, and must necessarily know more about

than any other class of persons, is of course entitled to great weight, because their knowledge is derived from actual experience, and after an anxious effort to properly test its value; and no evidence could speak more decisively against the value of a coupling stick than the general disuse of it by brakemen. But it is competent for the jury in every case like this to consider the merit of the coupling stick in determining the question of contributory negligence, as was doubtless done on trial of this case, and we need not, therefore, consider the question further."

An instruction that if the failure to use a coupling knife contributed to the plaintiff's injury he could not recover, is rightly refused, where there is no evidence in the case to show what a coupling knife is; how it is used; whether or not the defendants had an established rule requiring it to be used; whether or not such a rule would be a reasonable rule; whether the failure to use it would have been negligence under the circumstances in this case; nor whether the failure to use the coupling knife contributed to the injury. *Bonner v. Hickey* (1893, Tex. Civ. App.) 23 S. W. 85.

A rule forbidding employees to enter between moving cars to uncouple them is irrelevant where there is no evidence that the plaintiff did enter between the cars while they were moving. *Galveston, H. & S. A. R. Co. v. Pitts* (1897, Tex. Civ. App.) 42 S. W. 255.

A servant who is shown to have been acting, at the time the injury was received, in violation of a rule, has the burden of proving that his breach of duty was not an efficient cause of the injury. *Prather v. Richmond & D. R. Co.* (1888) 80 Ga. 427.

It is proper, therefore, to give a charge to the effect that, if the plaintiff violated the rule in question, the presumption would arise that such violation contributed to produce the collision, and the burden of proof was on him to show that it did not so contribute, directly or indirectly. *Western & A. R. Co. v. Bussey* (1894) 95 Ga. 584.

An instruction to the effect that, if the plaintiff was running his engine at a forbidden rate of speed when it was derailed and injured him, he cannot recover, is erroneous both on the ground that the trial judge cannot, in Texas (see XI. a. *supra*), declare that any act or omission constitutes negligence, and on the ground that it allows the jury to find for the plaintiff irrespective of whether the excessive speed was the cause of the injury. *Gulf, C. & S. F. R. Co. v. John* (1895) 9 Tex. Civ. App. 342.

A car repairer cannot recover for an accident due partly to his own violation of a rule promulgated to secure him from injury from moving trains, and partly to the negligence of a car inspector in failing to keep a lookout as he had promised to do. *Illinois C. R. Co. v. Winslow* (1894) 56 Ill. App. 462.

From the principle that an employer cannot,

change, which if unknown to them might endanger their safety.

Northern P. R. Co. v. Poirier, 29 U. S. App. 563, 67 Fed. Rep. 890, 15 C. C. A. 52; *Sheehan v. New York C. & H. R. R. Co.* 91 N. Y. 332; *McLeod v. Ginther*, 80 Ky. 399.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation; or doing what such person under the existing circumstances would not have done.

Baltimore & P. R. Co. v. Jones, 95 U. S. 441, 24 L. ed. 507.

by any form of contract, shield himself, directly or indirectly, from liability for the consequences of his negligence. It follows that the mere failure of a railroad brakeman to comply with his express contract to use a coupling knife in coupling cars will not prevent his recovery for an injury sustained by being caught between dead-woods, if the use of the knife would not have removed the danger. *Bonner v. Bean* (1891) 80 Tex. 152.

The breach of a rule requiring an engineer to stand in "close places" is the proximate cause of an accident caused by the fact that his engine got out of his control on a high trestle, and ran over the stop block at the end. *Louisville & N. R. Co. v. Stutts* (1894) 105 Ala. 368.

c. *Servant not bound by rules not known to him.*

1. General principles stated.

To whichever of the two principles suggested at the commencement of this subdivision the duty of the servant to observe the rules is referred, it is manifest that, in so far as his negligence is predicated merely from his failure to perform that duty, he must be shown to have had knowledge of a rule before he can be held culpable on the ground of his not having obeyed it.

In other words, a servant "cannot be negligent in respect of an act which is only improper because forbidden by a rule [of the master], unless he knows of the rule." *Alabama Midland R. Co. v. McDonald* (1895) 112 Ala. 216.

This doctrine is a corollary of the general principle that "negligence can only be affirmed in respect of circumstances and conditions known to the party to whom it is imputed." *Brown v. Louisville & N. R. Co.* (1895) 111 Ala. 275.

In the case of a rule promulgated by a private person there can evidently be no presumption indulged like that which, in the case of a public statute, charges the persons affected by it with knowledge of its provisions. *Gregory v. Ohio River R. Co.* (1893) 37 W. Va. 606.

For other cases recognising the general doctrine, see *Fay v. Minneapolis & St. L. R. Co.* (1883) 30 Minn. 231; *Little Rock, M. & T. R. Co. v. Leverett* (1886) 48 Ark. 333; *Georgia P. R. Co. v. Davis* (1890) 92 Ala. 300; *Central R. & Bkg. Co. v. Ryles* (1889) 84 Ga. 420; *Covey v. Hannibal & St. J. R. Co.* (1887) 27 Mo. App. 170; *Pleart v. Chicago, R. I. & P. R. Co.* (1891) 82 Iowa, 148; *La Croy v. New York, L. E. & W. R. Co.* (1890) 57 Hun, 67, *Reversed in* (1892) 132 N. Y. 570, but merely on the ground that the evidence showed that the plaintiff had knowledge of the rule which he violated; *Sprong v. Boston & A. R. Co.* (1874) 58 N. Y. 56; *Gregory v. Ohio River R. Co.* (1893) 37 W. Va. 613; *Turner v. Norfolk & W. R. Co.* (1895) 40 W. Va. 675; *Louisville, E. & St. L. Consol. R. Co. v. Uts* 43 L. R. A.

The railroad company was remiss in its duty in sending a special train out in the charge of a new conductor, who was making his first trip.

Evansville & T. H. R. Co. v. Guyton, 115 Ind. 450.

In America it would seem that a question of negligence is always a question for the jury.

Whittaker's Smith, Neg. p. 40; *Shearm. & Redf. Neg.* § 18; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; 2 *Thomp. Trials*, p. 1208.

If the negligence of the company had a

(1892) 133 Ind. 268; *International & G. N. R. Co. v. Hinsie* (1891) 82 Tex. 623; *Bonner v. Moore* (1893) 8 Tex. Civ. App. 416; *Georgia P. R. Co. v. Propat* (1887) 83 Ala. 518; *Louisville & N. R. Co. v. Perry* (1888) 87 Ala. 392; *Louisville & N. R. Co. v. Hawkins* (1890) 92 Ala. 241, sustaining a demurrer to a plea which did not aver knowledge on the servant's part.

The rules of the master, therefore, are not admissible as evidence on the issue of the servant's negligence in violating them, unless there is also testimony going to show that he had knowledge of them. *Atchison, T. & S. F. R. Co. v. Plunkett* (1881) 25 Kan. 188; *Louisville, N. A. & C. R. Co. v. Berkey* (1893) 136 Ind. 181.

In *Parker v. Georgia P. R. Co.* (1889) 83 Ga. 539, the court approved of the admission of a rule-book as evidence, there being sufficient testimony to show that it contained the rules in force when the plaintiff was injured. The court took the ground that, as the question whether he had knowledge of them or not was one not going to their admissibility, but to their binding effect upon his conduct, there could be no objection to introducing them as one step in the defendant's case. Their verification would be a subsequent matter. But the mere fact that the plaintiff denies all knowledge of the rule which he is charged with violating is not sufficient to prevent its being put in evidence. *Memphis & C. R. Co. v. Askew* (1890) 90 Ala. 5.

A rule which relieves the employer of the obligation to give the employee notice of dangers similar to those against which rules are commonly promulgated as a safeguard stands on the same footing as any other rule. Thus, where a railroad company in an action for injuries caused by a collision with a "wild" train admits that it was run without any precaution or notice in advance that such a train was to be expected, and in order to rebut any presumption of negligence on the premises, relies upon a rule dispensing with such notice, the defense will not be allowed, unless it shows that its employees were duly informed of the rule, or had such knowledge of its usage and practice in the premises as would be equivalent to actual notice of the dangers arising from the particular occurrence which the rule was designed to obviate. *Olson v. St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117.

So far as regards the binding effect of a rule, it is immaterial how it has come to the knowledge of the employee. "Knowledge either express or such as the law will imply, without reference to the means by which it is imparted, binds the employee to compliance. Therefore a request to charge to the effect that, if the rules be written or printed, each employee should either be furnished with a copy or advised as to where he can read or hear them read, and which leaves out of the consideration all other means of acquiring knowledge, should have been denied, and the court in giving such

share in producing the injury, the company is liable, even though the negligence of a fellow servant was contributory.

Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266; *St. Louis, A. & T. R. Co. v. Triplett*, 54 Ark. 300, 11 L. R. A. 773; *Pittsburgh, C. & St. L. R. Co. v. Henderson*, 37 Ohio St. 549; *Coppins v. New York O. & H. R. R. Co.* 122 N. Y. 557.

Having, without proper safeguards, and even with misdirection, set machinery in motion that naturally resulted in injury to one of his servants because other servants did not exercise diligence to prevent it, the mas-

ter ought not to be shielded by the fact that, believing they would exercise such diligence, he could not foresee such injury.

Galveston, H. & S. A. R. Co. v. Smith, 76 Tex. 611; *Mather v. Rillston*, 156 U. S. 398, 39 L. ed. 470.

Sanborn, Circuit Judge, delivered the opinion of the court:

At about 2 o'clock in the afternoon on October 26, 1890, engine No. 5 of the Little Rock & Memphis Railroad Company ran into the rear of a freight train on the railroad of that company; and G. F. Barry, the de-

instruction erred." *Port Royal & W. C. R. Co. v. Davis* (1894) 95 Ga. 292.

Whether a servant knew of a particular rule is of course generally a question of fact for the jury. *Pleart v. Chicago, R. I. & P. R. Co.* (1891) 82 Iowa, 148; *McNee v. Coburn Trolley Track Co.* (1898) 170 Mass. 283.

2. When a servant is deemed to have knowledge of a rule.

In *La Croy v. New York, L. E. & W. R. Co.* (1892) 132 N. Y. 570, the court assumed that, if the rules of the company had been put in possession of the employees concerned, with instructions to read and observe them, the plaintiff could not have recovered.

In the above case the plaintiff's knowledge was inferred from his own testimony that, although he had not been furnished with a book of the rules, nor required to read it, he had had access to it and had actually read it.

As to the circumstances under which knowledge of the rules will be imputed to the servant the essential point to be remembered is that a servant is in this regard under a duty which is reciprocal to that of the master with respect to the promulgation. *Francis v. Kansas City, St. J. & C. B. R. Co.* (1892) 110 Mo. 387 (where the court approved a change to the effect that "it was the duty of the switchmen engaged in the service to use due care and diligence in order to acquaint themselves with such orders, rules, and regulations, if placed or posted at the usual place or places, where such orders are posted as the company had promulgated to govern, control, and regulate their conduct, and to instruct them as to the manner in which they could perform their duties") (1895) 127 Mo. 658 (where the doctrine was categorically laid down that a rule which had been duly posted in the yard and the roundhouse was admissible in evidence).

In an earlier case the same court remarked: "It would be impossible for employees properly to discharge their duties without becoming conversant with the rules relating to their obligations of service to the company. In numerous instances it has been held that passengers must equip themselves with a sufficient knowledge of the regulations of the common carrier which transports them from place to place (*Lake Shore & M. S. R. Co. v. Rosensweig*, 118 Pa. 519), and sound reasoning would seem to lay an employee under a greater stress of necessity and of duty of becoming acquainted with rules, the observance of which would promote, not only his own safety, but as well those with whom he jointly labors, and that, having sufficient opportunity therefor, the inference should be drawn that he did not remain ignorant of that which the highest promptings of duty and self interest demanded he should know; and so the point has been ruled." *Alcorn v. Chicago & A. R. Co.* (1891, Mo.) 16 S. W. 229. 43 L. R. A.

In this case the court followed the doctrine laid down in *Alexander v. Louisville & N. E. Co.* (1886) 83 Ky. 589, where it was said that the fact of the plaintiff's not having been furnished with a copy of the printed rules and being ignorant of their existence did not constitute sufficient reason for rejecting them in this case, and they were properly admitted; for it was his duty to acquaint himself with those rules which manifestly he might have done by the use of ordinary diligence.

In all cases where the testimony falls short of showing that the servant received either from his master or his master's representatives direct information as to the contents of that particular rule, the knowledge of which constitutes a material issue, the essential question to be decided is whether the servant had a reasonably sufficient opportunity to make himself acquainted with them.

Where an employee contracts with express reference to the rules of the company, there can of course be no question as to their operations upon him. *Matchett v. Cincinnati, W. & M. R. Co.* (1892) 132 Ind. 334, 340.

In one case it has been held that, in the absence of proof to the contrary, it will be presumed that the master notified the servant of the rules by which he was to be bound. *Pilkinton v. Gulf, C. & S. F. R. Co.* (1888) 70 Tex. 226. But this decision is scarcely reconcilable with the others cited in this subdivision.

The ordinary mode of promulgation is by the distribution of printed copies of the rules among the employees whom they concern with instructions to study their provisions. If this course has been adopted there will naturally be very little room for a dispute as to the fact of the servant's knowledge, and, as a matter of fact, in the great majority of cases the servant's knowledge is not a serious issue.

In *Corcoran v. Delaware, L. & W. R. Co.* (1891) 126 N. Y. 673, one of the rules provided that "every employee must acquaint himself with these rules and directions and keep a copy of them in his possession. New rules are made from time to time as occasion requires. Notice of them is given on the bulletin boards of the company at Buffalo, East Buffalo, Elmira, and Binghamton. Employees must keep themselves informed of new rules by examining these bulletin boards." It was shown that the rules were printed on the back of the timetables, and were kept for distribution at all points where the men could get them. They were kept for distribution in the office of the master mechanic and yardmaster at East Buffalo where the plaintiff was at work. Upon this state of the evidence no suggestion was made that the rules had not been properly published.

In *Sutherland v. Troy & B. R. Co.* (1893) 74 Hun, 162, it was assumed by the court that an engineer had knowledge of a rule which had been posted on one of the regular bulletins.

fendant in error, who was the fireman on this engine, leaped from it, and was injured. He sued the company for damages, and alleged that he was injured by its negligence in employing an incompetent conductor upon the train his engine drew, and in failing to give notice to its servants in charge of engine No. 5 of the whereabouts and movements of the freight train, and in failing to give notice to its servants in charge of the freight train of the whereabouts and movements of engine No. 5. The plaintiff in error, the railroad company, answered that its conductor was not incompetent, and that it was not its duty to give the conductor and engineer of either of the trains which collided notice of the movements or whereabouts of the other. Upon these two issues the testimony was conflicting, and the jury found for the defend-

ant in error. These facts, however, were uncontradicted: The railroad of the plaintiff in error extends from Hopefield, a town opposite Memphis, in the state of Tennessee, westward to Little Rock, in the state of Arkansas. The first telegraph station west of Hopefield is Edmondson, 15 miles distant, and the second is Forrest City, 47 miles distant. Argenta is a station still further west, near the city of Little Rock. The freight train was a regular train. It had left Hopefield at 3:50 A. M.; was due at Edmondson at 5 A. M., but had been so delayed that it did not leave that station until 9:40 A. M., four hours and forty minutes later than its schedule time; and while it was standing on the main track, on a curve in a deep cut outside the yard limits, about $\frac{1}{2}$ mile east of Forrest City, at about 2 o'clock in the afternoon, engine No. 5 crashed into

In *Brennan v. Michigan C. R. Co.* (1892) 98 Mich. 157, the servant's knowledge of a particular rule was proved by a writing in which he acknowledged over his signature that he had received a copy of the rules, and promised to make himself familiar with them.

In *Frits v. Missouri, K. & T. R. Co.* (1895, Tex. Civ. App.) 30 S. W. 85, no question as to the servant's knowledge was raised, where his attention had recently been called to the violated rule by a special bulletin.

In *Darracott v. Chesapeake & O. R. Co.* (1887) 83 Va. 238, the servant's knowledge of the rule was proved by the fact that he had received for a copy.

In another case no question was raised as to the servant's knowledge where he had subscribed the rules. *Ward v. Chesapeake & O. R. Co.* (1894) 39 W. Va. 46.

So, in *Finley v. Richmond & D. R. Co.* (1893) 59 Fed. Rep. 429, (1894) 25 U. S. App. 16, 63 Fed. Rep. 228, 12 C. C. A. 595, the plaintiff's knowledge was assumed where he had signed an agreement waiving all and any liability of the company to him for the results of an infraction of the rule. A like assumption was made in *Lake Erie & W. R. Co. v. Craig* (1897) 47 U. S. App. 647, 80 Fed. Rep. 488, 25 C. C. A. 585, where the servant at the time he accepted employment acknowledged the receipt of the rules and agreed carefully to study and abide by them.

Where an employer has taken the precaution of requiring an employee to sign a written statement to the effect that he has read and understands the rules, it seems clear on general principles that the employee, in the absence of evidence tending to show that his subscription was procured by fraud, cannot allege ignorance of those rules as an excuse for his violation of one of them.

In *Sedgwick v. Illinois C. R. Co.* (1887) 73 Iowa, 158, an action by a brakeman for personal injury received while attempting to uncouple cars in motion, it appeared that a contract had been signed by him in which he acknowledged that he had been made acquainted with a rule of the company, strictly forbidding any attempt to uncouple moving cars, and in which he also agreed to assume all risks of the forbidden act, and hold the company harmless for any injury he might sustain while doing it. The trial court excluded the paper on plaintiff's objection, on the ground that it was incompetent and immaterial, and was in conflict with the provisions of the statute (Code, § 1307), and in contravention of public policy. This exclusion the supreme court held to be erroneous, saying: 43 L. R. A.

"It may be that, regarding the instrument simply as a contract between the parties, some of its provisions could not be upheld; but we do not have occasion to go into that question; for, aside from its character as an agreement, there are grounds upon which we think it very clear that defendant was entitled to have it admitted in evidence. It is the agreement upon which Oakes entered its service, and it contains specific directions as to the manner in which he was expected to perform the duties of his employment. It advised him that it was regarded as a dangerous act to attempt to uncouple when the cars are in motion, and that he was expressly forbidden to attempt to do that. The article signed by him is an admission by him that he knew of that prohibition, as well as an agreement that he would assume all the risks of the forbidden act, and hold the company harmless for any injury he might sustain while doing it. . . . The fact that he contracted to hold it harmless is quite immaterial. The defendant had the right to introduce the paper in evidence, then, because it showed, not only the existence of the rule, and that it constituted one of the conditions of the employment, but that its existence was known to Oakes."

But where the express agreement simply binds the servant to ascertain the provisions of the employer's rules, it will not be construed as referring to any rules except those which the master has taken some active steps to bring to the servant's knowledge. The undertaking of an employee, entered into in writing as one of the terms of his employment, to "study the rules governing employees, carefully keep posted, and obey orders," does not extend to any unknown rules not promulgated to him. *Carroll v. East Tennessee, V. & G. R. Co.* (1889) 82 Ga. 452, 6 L. R. A. 214.

The following decisions will indicate the views which the appellate courts have taken in regard to the sufficiency or insufficiency of the evidence to establish the fact of the servant's knowledge under different circumstances.

Whether certain rules have been duly promulgated is a question for the jury where they are not included in the general printed schedule of rules, and the testimony upon which the defendant relies as showing that they were published by posting on blackboard is quite vague and indefinite. *Doig v. New York, O. & W. R. Co.* (1897) 151 N. Y. 579.

In *Seese v. Northern P. R. Co.* (1889) 39 Fed. Rep. 487, the question of the servant's knowledge of a rule was held to have been rightly submitted to the jury, where a witness testified for the defendant that the rule was in force

the rear of it. The engineer in charge of this engine had passed this freight train at Edmondson at 9:30 that morning, on his way east to Hopefield, and he knew it was late. When the superintendent of the company delivered the order, under which the train drawn by engine No. 5 was operated on this day, to its conductor, he told him to look out for this freight train, as it was still in the bottom between Edmondson and Forrest City; and the conductor repeated this warning to the engineer when he communicated the order to him before leaving Hopefield. In the early part of this day a military company, which arrived at Memphis too late for the regular passenger train, engaged of this railroad company an extra train to take it to Little Rock, and the engineer and fireman of engine No. 5 were directed to draw this train with their engine. The freight train was, as we have said, a regular train, and it was

known as "No. 5." This was the order under which the extra ran:

Little Rock & Memphis Railroad.
Telegraphic Train Order No. 5 81
Memphis, Oct. 26, 1890.
To C. & E. of Eng. 5, Hopefield
C. & E. No. 5 at Forrest City
C. & E. Eng. 4 & No. 6 Brinkley
Engine 5 will run from
Hopefield to Argenta extra
when No. 5 is overtaken pass
and run ahead of them
meet No. 6 and Eng. 4 at
Brinkley, do not pass Brinkley
Unless Eng. 3 is there.

A. J. W.

at the time that plaintiff received his injury, that it was one of those made for the information of the employees in the operating department, and that these rules were sent and distributed to the different heads, but could not testify positively that they were sent to the heads of the management of the yards at the place where the accident occurred, while, on the other hand, the plaintiff, in rebuttal, testified that the rule had never been enforced while he was at that place, and that he "never knew anything about rules whatever."

The long-continued existence of a rule or custom may be shown in order to lead up to the inference that an employee was not ignorant of it.

Thus where a brakeman is injured in trying to couple cars in motion, it is error to refuse to admit in evidence a rule forbidding this to be done, where testimony has been introduced by the defendant going to prove that it had been in force several years, that it was printed on the back of the timetables distributed to employees; and that a special copy was posted in all particularly public places along the road. *Alcorn v. Chicago & A. R. Co.* (1890) 14 S. W. 942; (1891) 108 Mo. 81.

A railroad company is responsible for an injury caused by the servant's ignorance of rules where his superior officer has failed to comply with his repeated requests to furnish him with a copy of them. *Gulf, C. & S. F. R. Co. v. Kiziah* (1893) 4 Tex. Civ. App. 356.

One who has acted as assistant station agent for eighteen months will be presumed to know the rules of the company pertaining to the duties of that position. *Helm v. Louisville & N. R. Co.* (1895) 17 Ky. L. Rep. 1004.

On the other hand, a baggage master is not presumed to know whether the rules and schedules provided for the running of the defendant's trains on its road were defective or ambiguous, inasmuch as it was not his business to run the defendant's trains, or either of them. *Georgia R. & Bkg. Co. v. Rhodes* (1876) 56 Ga. 645.

So, a servant is not affected with notice of a rule printed on the back of a timetable which is nailed with its face outward upon the wall of the office of the department to which he belongs. *Mackey v. Baltimore & P. R. Co.* (1890) 8 Mackey, 282.

It cannot be held, as a matter of law, that a servant had constructive notice of a rule which the evidence fails to show was posted during the term of his employment. *Francis v. Kansas City, St. J. & C. B. R. Co.* (1892) 110 Mo. 387.

Knowledge of a standing order not included 43 L. R. A.

among the printed rules cannot be presumed from the fact that it had been posted at some previous time, where there is no evidence going to show whether it had been torn down, or was still up during the servant's term of service. *Wooden v. Western N. Y. & P. R. Co.* (1892) 46 N. Y. S. R. 77.

In *Shenandoah Valley R. Co. v. Lucado* (1880) 86 Va. 390, the court, after quoting one of the defendant's rules, said: "These rules were in force, and had been for several years, when the accident occurred, although they had not been formally promulgated by the receiver after his appointment. They are printed, and copies of them had been duly furnished to section foremen, Jennings among the number, for the guidance of themselves and the men under their charge. The deceased had been in the employ of the company as a section hand for many months prior to the accident, and the presumption is that he was acquainted with the rule above quoted. At all events, the fair inference from the record is that he had reasonable opportunity to become acquainted with it, which, for the purposes of the present case, is equivalent to actual knowledge."

Where plaintiff has denied all knowledge of a rule requiring the use of a coupling stick, it is competent for the defendant to prove, as bearing upon the fact of the plaintiff's knowledge, the fact that he had frequently seen other employees using such sticks, but not the mere fact that the rules were frequently referred to by the employees generally in the discharge of their duties. *Memphis & C. R. Co. v. Askew* (1890) 90 Ala. 5.

The knowledge of a foreman of a gang that there is a certain rule is not imputed to his subordinates. *Covey v. Hannibal & St. J. R. Co.* (1887) 27 Mo. App. 170.

d. Validity of rules as regards employees.

The question whether particular rules are binding on employees has been discussed from two standpoints, (1) that of public policy; (2) that of reasonableness.

1. Public policy.

The rules in regard to which the consideration of public policy is material are those which purport to relieve the employer of some responsibility which the law would otherwise impose upon him. According to the weight of authority in the United States this object cannot be effected by rules any more than by the separate contracts which have sometimes been resorted to for the same purpose.

The rules of the company made this extra train inferior in grade to the regular freight train, under this order, and imposed upon its conductor and engineer the duty to keep out of the way of that freight train, which they knew was somewhere upon the single track in front of them. These rules also required the crew of the freight train, when it stopped and stood, as it did, for three quarters of an hour before the accident occurred, on the curve, in a deep cut, $\frac{1}{4}$ mile east of Forrest City, to immediately station and maintain a flagman ten or twelve telegraph poles in the rear of its train, and to place torpedoes on

the track, not less than fifteen telegraph poles behind it, for the purpose of warning and stopping approaching trains which might follow it. These rules gave the employees of the company notice that it proposed to use its railroad for the passage of trains at any time it chose, and that they must protect themselves against their approach. The engineer of the extra train, however, did not keep his engine under control, so that he could stop it when he saw the freight train, but he drove it on with such speed that it was impossible for him to prevent the collision after he came in sight of

So it is held that the duty of a master to furnish reasonably safe machinery, being nonassignable, cannot be shifted to his servants merely by the promulgation of a rule requiring them to inspect the appliances handled by them. *Ford v. Fitchburg R. Co.* (1872) 110 Mass. 240, 14 Am. Rep. 598 (decision as to a rule requiring that the driver of an engine should be held responsible for the condition of his engine, and must be sure that it is in good working order).

So, a railroad company cannot escape liability for injuries caused by the defective quality of the side stakes of a lumber car by the plea that, according to its system, the duty of loading and adjusting the stakes was imposed on the shipper. *Bushby v. New York, L. E. & W. R. Co.* (1887) 107 N. Y. 374.

The fact that there is an express statute fixing the liability of railroad companies for negligence causing death or injury to their employees has been emphasized as furnishing a particularly strong reason for declaring invalid a rule which requires an employee "to look after and be responsible for his own safety." *Louisville & N. R. Co. v. Orr* (1890) 91 Ala. 548.

This decision was followed in *Richmond & D. R. Co. v. Jones* (1890) 92 Ala. 218, where the employee had agreed especially to be bound by certain rules, one of which ran as follows: "The conditions of employment by the company are that the regular compensation paid for the services of employees shall cover all risks incurred, and liability to accident from any cause whatever, while in the service of this company. If an employee is disabled by accident or other cause, the right to claim compensation for injuries will not be recognized. Allowances, when made in such cases, will be as a gratuity, justified by the circumstances of the case, and previous good conduct of the party. The fact of remaining in the service of the company will be considered acceptance of these conditions. All officers employing men to work for this company will have these conditions distinctly understood and agreed to by each employee, before he enters the service of the company."

The effect of these decisions, however, has been somewhat circumscribed by two more recent rulings.

Commenting on the effect of a contract similar to that referred to in the case last cited, the court said: "So far as rule 140 or any other rule militates against liability imposed upon the employer or master under § 2590 [of the Code], or contravenes the principle of law which requires the employer or master to furnish and maintain suitable material and appliances for the safe prosecution of its business, and the right of the employee to presume that this has been done, will be regarded as wholly inoperative and afford no protection to the employer or master; but so far as rule 140 imposes the duty upon employees to examine for their own safety

the condition of the cars, engines, and machinery, etc., before using them or exposing themselves on or with the same so as to ascertain as far as reasonably can be done their condition and soundness, it is reasonable and proper. It cannot be expected of car conductors or brakemen to make the same careful examination, and to be able to discover defects to the same extent, as that expected and required of the employer or master, or persons intrusted generally with this duty for the public safety or safety of employees; but the character of the general duties to be performed by conductors or brakemen is such that they necessarily become more or less familiar with the appliances and machinery constantly in their use and under their supervision, and know to some extent when they are not in proper condition for safe use. To the extent of their information, and the opportunities afforded to make such examination consistently with their other duties, and the circumstances attending, they should observe and obey the rule." *Memphis & C. R. Co. v. Graham* (1891) 94 Ala. 545.

In *Louisville & N. R. Co. v. Pearson* (1892-93) 97 Ala. 211, this passage was cited with approval, and it was held that a rule of this tenor imposed, within the limits there laid down, a duty upon the servants.

The following cases, in which contracts of the above description entered into without reference to any rules have been declared invalid, may be consulted for general principles in addition to those just cited: *Kansas P. R. Co. v. Feavey* (1888) 29 Kan. 169, 44 Am. Rep. 630; *Johnson v. Richmond & D. R. Co.* (1890) 86 Va. 975; *Rose v. Des Moines Valley R. Co.* (1874) 39 Iowa, 246; *Lake Shore & M. S. R. Co. v. Spangler* (1886) 44 Ohio St. 471; *Little Rock & Ft. S. R. Co. v. Eubanks* (1886) 48 Ark. 460; *Missouri, K. & T. R. Co. v. Wood* (1896, Tex. Civ. App.) 85 S. W. 879.

Some courts, however, seem to lean towards a doctrine which, if followed to its logical conclusion, would have the effect of completely overturning the just and salutary principle that certain duties of the master are nonassignable. Thus, it has been laid down that a rule requiring brakemen to examine and know for themselves that the brakes, ladders, etc., which they are to use are in proper condition, and, if not, to put them in good condition or report them for repairs, does not add materially to the duties imposed upon them by the law, though it was also conceded that they are relieved of this duty of inspection, in so far as it is imposed on them by such a rule, where the company does not furnish them with either the appliances or the opportunities necessary for making the required inspection. *Chicago, St. L. & P. R. Co. v. Fry* (1891) 131 Ind. 819.

In the recent case of *Alabama G. S. R. Co. v. Carroll* (1896) 52 U. S. App. 442, 84 Fed. Rep. 772, 28 C. C. A. 207, the court expressed its

the regular train; and the crew of the freight train failed to give warning to the approaching extra of the presence of their train, either by torpedo or by flagman. In short, these fellow servants of the defendant in error were guilty of gross negligence, without which it is highly improbable, if not impossible, that the accident could have occurred.

One of the rules of the company, however, required all orders to be given in writing, where practicable; and counsel for the defendant in error insisted that the company was negligent because it did not insert in the written order to the men in control of the

extra train a statement that the freight train was delayed east of Forrest City, and an admonition to beware of it, and because the train despatcher did not stop the extra train at Edmondson, as it passed there, and notify its crew again that the freight had not reached Forrest City. In support of their view, three witnesses for the defendant in error, who had had experience in railroading, testified that in their opinion this course should have been pursued. On the other hand, it appeared by the evidence that this railroad was operated under the standard rules, which were prepared some years ago

opinion that a rule of the same purport as that reviewed in the Indiana case was valid, and stated as the dilemma in which the servant was placed by his disregarding it, that if an inspection of car couplings made in compliance with such a rule of which a brakeman had knowledge would have disclosed the defective character of the link, from which his injuries resulted, and he failed to make the prescribed examination, he cannot recover; while, if the defect was latent so that a proper inspection would not have disclosed it, his recovery is also barred, as the accident was an assumed risk of the service.

In another state court the position has been taken that, as an employee cannot be relieved of his duties and obligations by the fact that other employees have failed to do their duty, and a rule requiring brakemen to inspect brakes to ascertain if they are in proper condition for use imposes upon them no higher duty than is imposed by the law itself, the company is not entitled to an instruction that, if its officers in charge of freight trains habitually caused them to be made up and sent out without affording brakemen an opportunity to examine the brake that will not excuse the brakemen for their failure to perform the duty of inspection. *Chicago & A. R. Co. v. Bragonier* (1886) 119 Ill. 51.

The sinister significance of such decisions as these is, however, considerably lessened if they are construed with strict reference to the circumstances reviewed, and to the nature of the inspection which was probably that contemplated by the courts. The true meaning of the Indiana ruling is apparent from a later case which lays it down that a brakeman's contract to observe rules requiring him to inspect the appliances placed in his special charge charges him only with knowledge of defects such as are open to view or discoverable upon an ordinary inspection, though it may be that other classes of employees are subject to a more onerous responsibility in this regard. *Matchett v. Cincinnati, W. & M. R. Co.* (1892) 132 Ind. 334, 340.

The doctrine of the circuit court of appeals was enunciated in regard to a foreign car, as to which the cursory inspection made by employees *en route* is, as was said "about the only inspection practicable."

In the Illinois case the context shows that nothing more is meant than that the brakeman was still bound to perform his duty of inspection so far as was practicable, and that the lack of opportunity for such inspection before the starting of a train would not excuse him for failing to make a due examination of the brakes while the train was on the road.

The divergence between these cases and those cited above is, therefore, probably more apparent than real. But, however this may be, it is obvious that the recognized obligations of the master to conduct his business upon a safe system would very soon become the veriest fiction 43 L. R. A.

If the courts once broke in upon the principle which requires him to conduct that business in such a manner that the servant shall be able to take the precautions prescribed by the rules.

This principle alone prevents rules from being made mere provisions against the liability of the master, instead of their being, as they ought to be, regulations for the purpose of securing the safety of the servant—a consideration which points directly to the conclusion that any rule conflicting with this principle should be pronounced contrary to public policy and void. See the language of the court in *Holmes v. Southern P. Co.* (1898) 120 Cal. 357, holding that an employer is not entitled to an instruction that, provided the plaintiff would not have been injured if he had followed a certain rule, then the mere fact that such rule was impracticable or not observed will not excuse him for not following it.

In Georgia where the accepted doctrine is that a railroad company may limit by an express contract its liability for injuries caused by its own negligence (*Western & A. R. Co. v. Bishop* (1873) 50 Ga. 465; *Western & A. R. Co. v. Strong* (1874) 52 Ga. 461; *Galloway v. Western & A. R. Co.* (1876) 57 Ga. 512; *Cook v. Western & A. R. Co.* (1883) 72 Ga. 48; *Fulton Bag & Cotton Mills v. Wilson* (1892) 89 Ga. 318), the distinction is taken that the principle under which a rule is binding upon an employee whenever it is actually or constructively known to him is not applicable where the rule requires him to waive certain rights not connected with his duties as an employee. To bar his rights it must be shown that he expressly agreed to that particular rule. The mere fact that he kept a copy of the rules in his possession and remained in the service will not disable him from recovery. *Georgia P. R. Co. v. Dooley* (1890) 86 Ga. 204, 12 L. R. A. 342.

No exceptions on ground of public policy can be taken to a rule which provides that no notice will be given to trackmen of the passage of extra trains, and that they must govern themselves accordingly. Where they knew of the rule they must be taken to have assumed the risk of the passage of such trains without blowing a whistle or ringing a bell. *Jolly v. Detroit, L. & N. R. Co.* (1892) 93 Mich. 370.

Nor is a paper signed by a railroad employee, by which he "waives all liability of the company to him for any results of disobedience or infraction of a rule," a contract against public policy. It is merely a declaration on his part that the company will not be liable to him for the consequences of certain acts which the company forbids him to perform. *Russell v. Richmond & D. R. Co.* (1891) 47 Fed. Rep. 204.

2. Reasonableness.

A railroad company "has the right to make such reasonable rules as to the manner in which the operation of its trains shall be conducted

by experienced railroad men chosen for the purpose by the officers of various railroad companies, and that they had been subsequently so generally adopted, as the best in use, that, in 1888, 58,000 (and at the time of the trial many more) miles of railroad were governed and operated under them. Three witnesses of skill and experience in the operation of railroads, who were familiar with these rules, and the practice of railroads under them, testified, in effect, that in their judgment, and in the judgment of those who had prepared and adopted them, they were the best and the most conducive to safety of

any rules in use in this country; that it is more conducive to the safety of the operation of railroads to require the men in charge of a train to look out for, and protect themselves at all times against, other trains and engines, without notice of their whereabouts and movements, than it is to undertake to give them notice of these movements and whereabouts, and thus for the reason that if men receive, and come to expect, notice of approaching trains, they will invariably relax their vigilance, and rely upon the notice, rather than upon their own watchfulness, for their safety, and that in the long run

as are necessary either for its own protection or for the safety of its employees." *Sedgwick v. Illinois C. R. Co.* (1887) 73 Iowa, 158.

Hence, when the consequences of a servant's violation of a rule are in question, its reasonableness is always a preliminary issue in the case. In most instances the rules are so obviously calculated to secure the servant's safety that this issue is not directly discussed, the decision that the servant's action is barred on account of his violation of a rule being an implied declaration that it is reasonable. (This remark is applicable to the cases cited X. 5, *infra*.) But in some cases the courts have rendered specific decisions as upon the reasonableness of the rule under review as a step towards the final conclusion that its breach disabled the servant from recovering damages. Thus, the following rules have been expressly held valid:

A rule setting apart a special time for the wiping of machinery, and forbidding employees to wipe it while it was in motion. *Shanny v. Androscoggin Mills* (1876) 66 Me. 429.

A rule prohibiting the coupling or uncoupling of cars by going in between them while they are in motion. *Lowe v. Chicago, St. P. M. & O. R. Co.* (1893) 89 Iowa, 420.

Rules providing that extra trains may pass over the road at any time without previous notice, and that the foreman of gangs of track repairers must be always prepared for them, and requiring him to take various appropriate precautions for the safety of his subordinates, were held reasonable. *Criswell v. Pittsburgh, C. & St. L. R. Co.* (1888) 80 W. Va. 798.

A rule of a railroad company requiring coupling and uncoupling of cars to be done by means of a stick, and forbidding employees to go between cars when a locomotive is attached. *Richmond & D. R. Co. v. Rush* (1894) 71 Miss. 987.

A rule which prohibits jumping on a switch engine while it is in motion by standing in the middle of the track, and stepping on the foot-board. *Francis v. Kansas City, St. J. & C. B. R. Co.* (1892) 110 Mo. 387.

Rules by which it is directed that section foremen shall "carefully flag their truck and hand cars against special and extra trains or engines, which may be run at any time day or night, without previous notice to them," and that "special care must be taken in running hand cars and truck cars on all sections of the road where, by reason of fogs, sharp curves, or other circumstances, risk or danger is involved," and that "[hand] cars must always be protected by a flag when a clear track cannot be seen for a safe distance." *Kansas & A. Valley R. Co. v. Dye* (1895) 86 U. S. App. 28, 70 Fed. Rep. 24, 27, 16 C. C. A. 604.

A regulation by which it is made the duty of a track foreman to protect himself against all trains, regular and extra, and by which he is entitled to no notice of their movements, is unreasonable.

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A rule by which a servant is required to do work in a more dangerous way than is necessary ought, it would seem, to be invalid upon general principles. Yet it has been held, as a matter of law, that a master is not negligent in requiring, in accordance with a universal practice in cotton mills, a loom to be fanned for cleansing purposes while it is in motion, where by such method time is saved and the work facilitated, to the benefit of an employee who works by the piece, and no similar accident has occurred although the process has to be repeated sometimes over twice a day. *Gideon v. Enoree Mfg. Co.* (1895) 44 S. C. 442.

This decision is, we venture to think, erroneous. One purpose of rules is to protect the employees against the consequences of their own imprudence, and it is hard to see how a master can be excusable, as a matter of law, for framing a rule which is a direct inducement to employees to take additional risks for the sake of slightly increasing their earnings. The universal practice of employers in any line of business is merely one of the facts to be considered in determining whether the defendant was negligent in the particular instance (II. a, *supra*). It should, therefore, have been left to the jury to say whether the customary method of cleansing the loom was so dangerous that a prudent man would not have prescribed it.

Whether the reasonableness of a rule is a question for the court or the jury is one as to which there is much apparent conflict between the authorities. In some cases language is used which implies that it is always for the court; the reason assigned for this view being that it would otherwise be impossible to secure a uniformity of view, or to insure that a rule pronounced reasonable in one case by a jury might not be pronounced unreasonable by another jury in a subsequent case. *Kansas City, Ft. S. & M. R. Co. v. Hammond* (1894) 58 Ark. 325; *Pittsburg, Ft. W. & C. R. Co. v. Powers* (1874) 74 Ill. 341. To the same effect see *Louisville, N. & G. S. R. Co. v. Fleming* (1884) 14 Lea, 128; *State v. Overton* (1854) 24 N. J. L. 435, 61 Am. Dec. 671; *Norfolk & W. R. Co. v. Wysox*, (1886) 82 Va. 250. (Cases in which a passenger was the plaintiff.)

In *LITTLE ROCK & M. R. Co. v. BARRY* the doctrine was laid down broadly and emphatically that, when a railroad company adopts certain rules for the operation of its trains, the reasonableness and sufficiency of such rules is always a question of law for the court. Thayer, J., dissented on the ground that judges could not arrogate to themselves the power of determining such a question in a case where competent witnesses expressed different opinions upon the matter, without denying suitors their constitutional right to a trial by jury. The mere fact that greater uniformity would be secured by taking the issue out of the hands of juries did not, he thought, justify such a practice. It was also pointed out by the

they will be caught in danger more frequently, and more accidents will happen at times when it is impossible or impracticable to convey notice to them, than would occur if they were spurred to constant watchfulness by the knowledge that a train was liable to come upon them at any time without notice. These witnesses testified, in substance, that this was the theory upon which the standard rules were based, and that they did not require the superintendent or train despatcher to give the men in charge of either of these trains notice of the whereabouts or movements of the other. They also testified

that in their opinion neither the duty of the company, nor the safety of its servants, required that the crew of either train should have notice of the movements or whereabouts of the other, or that the extra train should be stopped at Edmondson, and its conductor or engineer informed that the freight was still between that station and Forrest City, where they knew it to be when they started. In this state of the evidence, it is assigned as error that the court charged the jury: "In sending out special or extra trains due and sufficient notice of the movements and whereabouts of all other trains and lo-

learned judge that all the cases cited to show that the reasonableness of rules was a question of law were, with one exception, cases in which no testimony was introduced to show whether the rule was or was not reasonable, and that the decisions were simply to the effect that, under such circumstances, the court could properly determine the reasonableness of a rule.

On the other hand, in the following cases the question is declared to be one for the jury: *International & G. N. R. Co. v. Hall* (1890) 78 Tex. 657; *Texas & N. O. R. Co. v. Echols* (1894) 57 Tex. 339.

See also the passenger cases. *South Florida R. Co. v. Rhodes* (1889) 25 Fla. 40, 3 L. R. A. 733; *Illinois C. R. Co. v. Whittemore* (1887) 43 Ill. 420, 12 Am. Dec. 138.

Other courts have enunciated an intermediate theory which seems to be more in harmony with general principles, viz., that the reasonableness of a rule is a mixed question of law and fact except in plain cases. *Bass v. Chicago & N. W. R. Co.* (1874) 36 Wis. 459, 17 Am. Rep. 495 (a passenger case); *Avery v. New York C. & H. R. R. Co.* (1890) 121 N. Y. 31 (a passenger case); *Day v. Owen* (1858) 5 Mich. 520, 72 Am. Dec. 62.

In *Pittsburgh, C. & St. L. R. Co. v. Henderson* (1882) 37 Ohio St. 549, the court said: "Whether a rule of a railroad company is or is not a reasonable rule is in many cases a question of law; but in this case it cannot be affirmed as a matter of law that the special order made by superintendent Barrett was reasonable. On the contrary, whether such order was reasonable or unreasonable was a question of mixed law and fact, proper for the determination of the jury in view of the circumstances under which the order was to be executed and under proper instructions as to the law. The jury found that the order was unreasonable under the circumstances, and we are not prepared to say that the finding was wrong."

In *Pittsburgh, C. & St. L. R. Co. v. Lyon* (1889) 123 Pa. 140, 2 L. R. A. 489 (a passenger case), it was contended that certain instructions were erroneous for the reason that they withdrew from the consideration of the jury the reasonableness or unreasonableness of the regulation under consideration, and disposed of it as a question of law. The court said: "While this position is not without the sanction of respectable authority, the better opinion appears to be that the question is generally a mixed one of law and fact. So far as the reasonableness of a given rule depends upon the existence of particular facts and circumstances, it is necessarily a question for the jury, under proper instructions from the court; but if the facts are undisputed the question is a proper one for the court."

As between a master and a servant, who has deliberately entered into his contract of employment with full opportunities for ascertaining all his duties and the rules he may be required

to comply with, and who is at liberty to withdraw from the service at any time that he finds it objectionable, it is neither for the court nor the jury to determine the reasonableness of a rule. *Wolsey v. Lake Shore & M. S. R. Co.* (1877) 33 Ohio St. 227.

Whether an order suspending a rule by which the running of certain classes of trains is reasonable or unreasonable is a question of mixed law and fact in view of the circumstances under which the order was to be executed. *Pittsburgh, C. & St. L. R. Co. v. Henderson* (1882) 37 Ohio St. 549.

e. Illustrative cases with regard to the violation of rules by the servant.

Most of the cases in which the defense adduced is a violation of a rule by the servant present no feature of special interest, as they usually involve only questions of the weight of evidence in relation to the general principles reviewed in the preceding sections. For the purposes of the present note, therefore, it will be sufficient to tabulate the decisions under headings which indicate the nature of the rules, the breach of which was alleged to be negligent. All distinctive features of special importance will be noticed in passing.

1. Disobedience to rules respecting signals.

Rule requiring car repairers or car inspectors to put out signals while at work. *Alabama G. S. R. Co. v. Roach* (1895) 110 Ala. 266; *Central R. & Bkg. Co. v. Kitchens* (1889) 83 Ga. 83; *Illinois C. R. Co. v. Winslow* (1894) 56 Ill. App. 462.

It is no excuse for the violation of such a rule that the car repairer agrees with a conductor that the latter shall not permit any of the cars in the train to come upon the repair track. *Johnson v. Cleveland, L. & W. R. Co.* (1896) 11 Ohio C. C. 553.

Rule requiring section men to guard their hand cars by certain precautions against the approach of special and wild trains. *Louisville & N. R. Co. v. Markee* (1893) 103 Ala. 160; *Kansas & A. Valley R. Co. v. Dye* (1895) 36 U. S. App. 28, 70 Fed. Rep. 24, 16 C. C. A. 604 (held to be a clear case of "special danger" requiring compliance with a rule prescribing the use of a flag where such danger existed, the collision between the hand car and the train having occurred at a place where there was a sharp curve lined with timber which obscured the view and on a heavy downward grade, and where on account of a strong wind which was blowing towards the train, the sound of an engine whistle could not be heard at any great distance).

Failure of trackmen running a hand car around a curve to follow oral instructions and a general custom to flag all curves regardless of the grade is in law equivalent to a disobedience of the rules of the company, although the printed rule merely requires them to flag all

comotives which are liable to be met or overtaken by the special or extra should be given to the officers or servants in charge of such trains. And due notice of such special or extra train should, in like manner, be given to the servants in charge of such other trains, as far as may be necessary to guard against and prevent accident. And if, from any cause, it is impracticable to give such notice, then such other precautions as are reasonably adapted to prevent danger of collision or accident should be taken. If the jury believe from the evidence that the defendant, through any default or neglect on its

part, failed to perform the aforesaid duties, and that the collision was caused by such failure, and that thereby plaintiff sustained the injuries complained of, the defendant is liable in this action."

This instruction is a plain declaration that the theory which the wisdom and experience of many of the most careful and intelligent railroad operators have deemed most conducive to the safety of their employees, their passengers, and their property, is unsound, that the rules based upon it are unreasonable, and that the operation of a railroad in accordance with it is negligence. Such a

curves in "going up grades." *Southern P. Co. v. Ryan* (1895, Tex. Civ. App.) 29 S. W. 527.

Rules requiring employees traveling on hand cars to flag trains. *McGrath v. New York & N. E. R. Co.* (1885) 15 E. I. 95.

Rule requiring employees to keep a constant lookout for signal lights on trains. *Ward v. Chesapeake & O. R. Co.* (1894) 39 W. Va. 46 (failure to look out led to a collision with the second section of a train).

Rule that imperfect display or absence of signal shall be regarded as a danger signal. *Chicavo & W. I. R. Co. v. Flynn* (1895) 154 Ill. 448.

Rule requiring an employee when coupling cars to know that the signal which he has given to the engineer has been understood and obeyed before he places himself in a position of danger relying upon such obedience. *Strong v. Iowa C. R. Co.* (1895) 84 Iowa, 380; *Deeds v. Chicago, R. I. & P. R. Co.* (1887) 74 Iowa, 154.

The conductor of a train is guilty of negligence if he relies on a signal which is not given in accordance with the rules of the company, and if he does he cannot recover for an injury received by him in consequence. *Columbus & W. R. Co. v. Bridges* (1888) 86 Ala. 448.

See also XI. e, 3, *infra*.

2. Disobedience to rules regulating the work of coupling cars.

Rule requiring the use of coupling stick. *Norfolk & W. R. Co. v. Briggs* (182, Va.) 14 S. E. 753; *Richmond & D. R. Co. v. Rush* (1894) 71 Miss. 987; *Richmond & D. R. Co. v. Finley* (1894) 25 U. S. App. 16, 63 Fed. Rep. 228, 12 C. C. A. 595; *Sloan v. Georgia P. R. Co.* (1890) 86 Ga. 15; *Richmond & D. R. Co. v. Pannill* (1893) 89 Va. 552; *Horan v. Chicago, St. P. M. & O. R. Co.* (1893) 89 Iowa, 328; *Richmond & D. R. Co. v. Free* (1892-93) 97 Ala. 231; *Central R. & Bkg. Co. v. Maltby* (1892) 90 Ga. 630; *Zumwalt v. Chicago & A. R. Co.* (1889) 35 Mo. App. 667.

Rule prohibiting coupling by hand, when it is practicable to use a stick or pin for guiding the link. *Gleason v. Detroit, G. H. & M. R. Co.* (1896) 48 U. S. App. 89, 73 Fed. Rep. 647, 19 C. C. A. 636.

Rule prohibiting the coupling or uncoupling of cars when in motion. *Baltzer v. Chicago, M. & N. R. Co.* (1892) 83 Wis. 459; *East Tennessee, V. & G. R. Co. v. Smith* (1890) 89 Tenn. 114; *Darracott v. Chesapeake & O. R. Co.* (1887) 83 Va. 288; *Schaub v. Hannibal & St. J. R. Co.* (1891) 106 Mo. 74; *Richmond & D. R. Co. v. Thomason* (1892) 99 Ala. 471; *Alabama G. S. R. Co. v. Ritchie* (1895) 111 Ala. 297; *Johnson v. Chesapeake & O. R. Co.* (1893) 38 W. Va. 206; *Lockwood v. Chicago & N. W. R. Co.* (1882) 55 Wis. 50; *Gleason v. Detroit, G. H. & M. R. Co.* (1896) 48 U. S. App. 89, 73 Fed. Rep. 647, 19 C. C. A. 43 L. R. A.

636 (in this case the act of the plaintiff was especially culpable, as he had had an opportunity of uncoupling the cars while they were at rest): *Louisville & N. R. Co. v. Reagan* (1895) 96 Tenn. 128; *Grand Michigan C. R. Co.* (1890) 83 Mich. 564, 11 L. R. A. 402 (recovery denied although the accident was directly caused by the brakeman's foot catching in an unblocked switch, and there was a statute requiring the blocking of switching).

Where the rules of the company allow the coupling of moving cars, the coupler is merely required to use ordinary care. A brakeman is not, as matter of law, guilty of contributory negligence in going between cars for the purpose of coupling them while they are moving at a rate of 3 or 4 miles an hour, which, according to the testimony of experienced railroad men, is a reasonably safe rate of speed, even though it was not necessary for him to do the coupling while the cars were moving. *Hollenbeck v. Missouri P. R. Co.* (1897) 141 Mo. 97.

In *Lake Erie & W. R. Co. v. Craig* (1896) 37 U. S. App. 654, 73 Fed. Rep. 642, 19 C. C. A. 631, a positive rule forbidding the coupling of cars while in motion was violated, but it was also decided, on general grounds, that one who goes between cars running about 5 miles an hour to uncouple them on a dark night when the ground is frozen with snow upon it, at a point where the tracks interlace and the ties project above the ground, which is usually moist and likely to be slippery,—especially when he has just given his signal to the engineer for a hard kick of the cars,—is not, as matter of law, free from contributory negligence which may prevent his recovering damages for injuries received.

Rule forbidding employees to go between cars when a locomotive is attached to them. *Richmond & D. R. Co. v. Rush* (1894) 71 Miss. 987; *Richmond & D. R. Co. v. Finley* (1894) 25 U. S. App. 16, 63 Fed. Rep. 228, 12 C. C. A. 595; *Richmond & D. R. Co. v. Pannill* (1893) 89 Va. 552.

Rule forbidding an employee to go on the track in front of a moving car for the purpose of coupling it to another. *Pryor v. Louisville & N. R. Co.* (1889) 90 Ala. 82.

Rule requiring brakeman, before entering upon the track in front of a moving train to look and see that the track is clear. *Loranger v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 80 (brakeman, while walking sideways, and attempting to reverse a crooked link stumbles against a pile of ashes lately dumped on the track).

3. Disobedience to rules regulating the operation of trains.

Rules fixing the maximum rate of speed at which trains may be run between stations. *Sutherland v. Troy & B. R. Co.* (1891) 125 N. Y. 737, second appeal before supreme court (1893)

declaration of the law ought not to be made without clear and convincing proof, nor without the most careful and deliberate consideration. The theory upon which these rules are based, the rules themselves, and the operation of railroads in accordance with them have all received the sanction of respectable authority. *Illinois C. R. Co. v. Neer*, 26 Ill. App. 356, 360, 31 Ill. App. 126, 134, 139; *Kennelly v. Baltimore & O. R. Co.* 166 Pa. 60; *McGrath v. New York & N. E. R. Co.* 15 R. I. 95, 97; *Wright v. New York C. R. Co.* 25 N. Y. 562, 569. It does not seem

unreasonable to suppose that men who are warned that other trains will pass over the railroad on which they are operating without notice to them, and that they must watch for and protect themselves against them at all times, would operate their trains with more care and fewer accidents than they would if an attempt were made to notify them of the whereabouts and movements of all trains, in view of the fact that the expectation of such notice might relax their vigilance, and that they would often be in locations where it would be impossible to give them the no-

74 Hun, 162 (collision caused through train's reaching a point where it would not have been if the proper speed had been kept); *Conger v. Flint & P. M. R. Co.* (1891) 86 Mich. 76.

Rule prescribing the speed at which trains shall approach bridges. *Norfolk & W. R. Co. v. Williams* (1892) 89 Va. 165.

Rule prescribing slackened speed in running trains over bridge. *Rittenhouse v. Wilmington Street R. Co.* (1897) 120 N. C. 544.

Rule requiring engineers to slacken speed when approaching switches. *Memphis & C. R. Co. v. Thomas* (1875) 51 Miss. 637; *East Tennessee, V. & G. R. Co. v. Kane* (1893) 92 Ga. 187, 22 L. R. A. 315.

Rule requiring engineers to run at a slower rate of speed than that specified by the time card if the track was not in good repair. *Illinois C. R. Co. v. Patterson* (1879) 93 Ill. 290.

Express command to run a train slowly at a certain curve, the consequence of disobedience being that the engine was derailed. *Robinson v. West Virginia & P. R. Co.* (1895) 40 W. Va. 583.

Rules requiring engineers to know absolutely what trains had passed at a certain station. *Frits v. Missouri, K. & T. R. Co.* (1895, Tex. Civ. App.) 30 S. W. 85 (result of disobedience was a premature starting of the train and a collision).

Rule requiring conductors not to start their trains from certain stations before the arrival of other trains as indicated by the schedule. *Wescott v. New York & N. E. R. Co.* (1891) 153 Mass. 460.

Rule requiring the sounding of a whistle and a certain rate of speed when a train is running round a curve in an obscure place. *Southern P. Co. v. Ryan* (1895, Tex. Civ. App.) 29 S. W. 527.

Rule requiring an engineer who stops his train in a cut to blow his whistle as a signal to brakemen to post themselves where they can flag approaching trains. *Culpepper v. International & G. N. R. Co.* (1897) 90 Tex. 627.

Rules requiring that, in case a train stops, the following train should be flagged. *Smith v. New York C. & H. R. R. Co.* (1895) 88 Hun, 468.

Rule regulating the passage of trains over single tracks. *Wert v. Keim* (1888, Pa.) 12 Cent. Rep. 381.

Rule requiring engineer to stand, instead of sitting, while his engine is passing "close places." *Louisville & N. R. Co. v. Stutts* (1894) 105 Ala. 368.

Rule prohibiting the shifting of cars down grade without the control of the engine. *Richmond & D. R. Co. v. Dudley* (1893) 90 Va. 304.

Rule forbidding the operation of an engine by a fireman unless the engineer is on it. *Barry v. Hannibal & St. J. R. Co.* (1888) 98 Mo. 62.

4. Disobedience to rules in regard to switching.

Rule forbidding flying switches. *Pilkinton v. Gulf, C. & S. F. R. Co.* (1888) 70 Tex. 226. 43 L. R. A.

A rule having reference to the switching of cars on grades is inadmissible in evidence where the accident occurred on a level track. *Henry v. Sioux City & P. R. Co.* (1885) 66 Iowa, 52.

5. Disobedience to rules regulating the manner of getting on or off railway cars.

Rule prohibiting employees from getting on or off trains while in motion. *San Antonio & A. P. R. Co. v. Wallace* (1890) 76 Tex. 636; *Gulf, W. T. & P. R. Co. v. Ryan* (1888) 69 Tex. 665; *Francis v. Kansas City, St. J. & C. B. R. Co.* (1892) 110 Mo. 387; *Elgin, J. & E. R. Co. v. Docherty* (1895) 66 Ill. App. 17; *Overyby v. Chesapeake & O. R. Co.* (1893) 37 W. Va. 524.

Rule forbidding employees to step on the front of approaching engines or cars. *Gleason v. Detroit, G. H. & M. R. Co.* (1896) 43 U. S. App. 89, 73 Fed. Rep. 647, 19 C. C. A. 636.

Rule forbidding employees to jump on or off trains or engines at high speed. *Ibid.*

6. Rules directing employees to do or not to do in particular places.

Rule forbidding trainmen to be on the pilot of a moving locomotive. *Louisville & N. R. Co. v. Wilson* (1890) 88 Tenn. 316.

Rule forbidding members of wrecking crews to travel on the engine. *Abend v. Terre Haute & I. R. Co.* (1884) 111 Ill. 202, 53 Am. Rep. 616; *Huribut v. Wabash R. Co.* (1895) 130 Mo. 657.

Rule requiring brakemen to be at their posts while their train is running. *Sprong v. Boston & A. R. Co.* (1874) 58 N. Y. 56.

Rule requiring trainmen to be on the top of the car while the train is in motion. *Central Trust Co. v. East Tennessee, V. & G. R. Co.* (1888) 60 Fed. Rep. 353 (plaintiff injured by striking against coal chute while on the side of a car).

Evidence that it was customary for a conductor, and sometimes his duty, to be on top of a box-car will not excuse him for violating a rule which prohibited him from taking such a position on a train which was passing through a truss bridge, where it is also in evidence that his duty only required him to be in that position when it became necessary to assist in braking, coupling, and signaling, or in making switches at stations. *San Antonio & A. P. R. Co. v. Wallace* (1890) 76 Tex. 636.

Rules forbidding railroad employees to walk between the rails. *Chicago, B. & Q. R. Co. v. Maney* (1894) 55 Ill. App. 588.

7. Disobedience to rules prescribing that appliances shall be inspected.

Rule requiring brakeman to test hand brakes before his train starts. *La Croy v. New York, L. E. & W. R. Co.* (1890) 57 Hun, 167 (1892) 132 N. Y. 570.

Rule requiring brakeman to inspect couplings. *Louisville & N. R. Co. v. Reagan* (1896) 96 Tenn. 128.

tices. If experience has proved this supposition to be in accordance with the fact, and has led to the adoption of rules which do not require, but discountenance, such notices, because the habit of giving them has been found to increase the number and danger of accidents, as the adoption of these standard rules by so many railroad companies, and the testimony of the experienced witnesses who are operating railroads under them, tend to show, it cannot be said that it was the duty of the defendant to give these notices, nor that its failure to give them was negligence. The fact is not forgotten that

the defendant in error produced three witnesses who testified that such notices should have been given. But in our opinion their testimony is insufficient, in the face of the evidence of three witnesses of equal credibility who testified to the contrary, so clearly to establish the vice of the theory, and the unreasonableness of the rules and practice which companies operating more than 58,000 miles of railroad have adopted as the best and most conducive to safety, as to warrant a court in so declaring as a matter of law. The skilled and experienced railroad operators who seem to have developed this theory

Rule requiring a brakeman to examine the cars and satisfy himself as far as he reasonably can that they are in good order. *Karrer v. Detroit, G. H. & M. R. Co.* (1889) 76 Mich. 400 (case of defective drawhead which the plaintiff could have at once observed if he had taken the trouble to look at the car when it was approaching).

Rule prohibiting going between cars to make a coupling "unless the drawhead and other coupling appliances are known to be in good order." *St. Louis, I. M. & S. R. Co. v. Rice* (1888) 51 Ark. 467, 4 L. R. A. 173.

If, by the rules of a railroad company, the duty of inspecting foreign cars is thrown upon the conductor, he cannot recover for injuries caused by a failure to make such an inspection. *Fort Wayne, C. & L. R. Co. v. Gruff* (1892) 132 Ind. 13.

8. *Disobedience to rules requiring servant to report dangers.*

Rule requiring brakeman to test brakes and either report the defects found therein or himself make the proper repairs. *Beall v. Pittsburgh, C. & St. L. R. Co.* (1893) 38 W. Va. 525.

Rule requiring miners to report dangerous places in tunnels. *Davis v. Nuttallsburg Coal & Coke Co.* (1890) 34 W. Va. 500.

9. *Disobedience to rules regulating the manipulation of machinery.*

Rule forbidding servants to wipe machinery while it is in motion. *Shanny v. Androscoggin Mills* (1876) 66 Me. 429.

Rule requiring cotton loom to be fanned for cleansing purposes while it is in motion. *Gideon v. Enoree Mfg. Co.* (1894) 44 S. C. 442.

10. *Disobedience to rules regulating personal habits of servants.*

Rule forbidding use of intoxicating liquors. *Gulf, W. T. & P. R. Co. v. Ryan* (1888) 69 Tex. 665; *Western & A. R. Co. v. Bussey* (1894) 95 Ga. 584.

1. *Waiver of rule habitually disregarded.*

1. *Doctrine of waiver stated.*

The following statements will show sufficiently the scope of the doctrine of waiver enunciated in its most general form. "There is no doubt that a person or company having authority to establish rules for the government of employees may, in any particular instance, waive obedience to the rules, or may knowingly acquiesce in a disregard of the rules so continuously and for such a length of time as to justify the inference that they are no longer in force, and that obedience will not be required." *Alabama G. S. R. Co. v. Roach* (1895) 110 Ala. 266.

"Abrogation of a rule . . . may be presumed when it is frequently and openly violated 43 L. R. A.

for such a length of time that the company [employer] could, by the use of ordinary care, have ascertained its nonobservance." *Texas & P. R. Co. v. Leighty* (1895, Tex. Civ. App.) 32 S. W. 790.

"Where a rule of the employer . . . has been habitually disobeyed since its inception, or for a long period of time, in the presence or to the knowledge of the employer, without an attempt to enforce it, or has been disregarded in such a manner and for such length of time as to raise a presumption that it was done with his knowledge and approval, the rule will be regarded as abrogated or waived." *Wright v. Southern P. Co.* (1896) 14 Utah, 383.

"A railway company cannot escape liability by showing a violation of rules which are never enforced, and which are habitually disregarded with the knowledge and apparent acquiescence of officers whose duty it is to enforce them." *Spaulding v. Chicago, St. P. & K. C. R. Co.* (1896) 98 Iowa, 205.

A railroad company cannot plead violation of rules by an employee where the work was being done in the manner in which it had been done for years. *Eastman v. Lake Shore & M. S. R. Co.* (1894) 101 Mich. 597.

A waiver of a rule may arise from constant violations of it acquiesced in by the employer. *Lowe v. Chicago, St. P. M. & O. R. Co.* (1893) 89 Iowa, 420. There the court said: "There is a conflict in the cases, some of them holding that a usage or custom cannot be shown as against a rule or contract like that under consideration, but we think it is clear that it is competent to show a usage or custom on the part of the employees of defendant at variance with, and in violation of, such a rule, when the defendant has, through its proper officers, knowledge of its violation, and their conduct shows that they acquiesced in such violation."

"If rules are made in good faith, and for the protection of the company's employees, that protection can best be obtained by compelling their observance while the party is alive for whose benefit they are made. The defendant cannot shield itself from liability by relying upon a rule which, under the evidence, it should know has been constantly violated, and where it may be properly assumed that it acquiesced therein."

An employer cannot be permitted to set up as a valid defense against injury to an employee, through his negligence, the latter's violation of a rule which the employer has knowingly permitted to be practically abandoned. *Northern P. R. Co. v. Nickels* (1892) 4 U. S. App. 369, 50 Fed. Rep. 718, 1 C. C. A. 625, where the court in commenting on the evidence said: "But in the case at bar the utter and total disregard of this rule was proved to be known to the very officer who, if any was, must have been charged with the enforcement of this rule on his division of this railroad. The disregard

and formulated these rules are undoubtedly more competent than jurors or judges to select and prepare rules most conducive to the safe, economical, and prosperous operation of railroads. The interest of the owners of these railroads, the interest and ambition of those who operate them, alike prompt them to select and use the best; and, unless the rules they adopt are clearly shown to be palpably unreasonable or clearly insufficient, railroad companies ought not to be charged with negligence on account of their adoption and use. *Vedder v. Fellows*, 20 N. Y. 126, 133; *Bright v. Toledo, A. A. & N. M. R. Co.* 93

or violation of the rule was not merely habitual, customary: it was complete. The evidence of the witnesses is that none of them ever saw one instance in which the rule was complied with on the defendant's railroad. To hold that this defendant company could make this rule on paper, call it to plaintiff's attention, and give him written notice that he must obey it and be bound by it on one day, and know and acquiesce, without complaint or objection, in a complete disregard of it by the plaintiff and all its other employees associated with him on every day he was in its service, and then escape liability to him for an injury caused by its own breach of duty toward the plaintiff because he disregarded this rule, would be neither good morals nor good law. Actions are often more effective than words, and it will not do to say that neither the plaintiff nor the jury was authorized to believe from the long-continued acquiescence of the defendant in the disregard of this rule that it had been abandoned, that it was not in force. The evidence of such abandonment was competent and ample, and the ruling and charge of the court below on this subject were right."

It is competent to show what was usually and habitually done in the running of trains, because, if the company permits a certain course of conduct, it should not be allowed to hold its employees to the very letter of its rules in order to shield itself from liability for what it had tacitly permitted. *Hunn v. Michigan C. R. Co.* (1889) 78 Mich. 526, 7 L. R. A. 500.

In *Little Rock, M. R. & T. R. Co. v. Leverett* (1886) 48 Ark. 333, an instruction was approved which told the jury that an employee is not bound by a rule of the company not brought to his attention, or which is habitually violated with the knowledge of his superior officers, and without any effort on their part to enforce it, or where the usage and practice of the company would tend to mislead him in a violation of the rule.

An employee in a paper mill is not, as matter of law, guilty of contributory negligence in attempting, on a direction by a superior, to pull the broken paper off a press at night while the lights are out, so as to prevent a recovery for an injury caused by the unexpected breaking of the paper and his failure to catch hold of a hand rail to prevent his falling, notwithstanding an order to stop the presses at night when the paper broke while the lights were out, where such order had been previously disobeyed by others. *Sawyer v. Rumford Falls Paper Co.* (1897) 90 Me. 354. The court remarked that the servant "was under no obligations to obey an order to remove broken paper while the press was in motion in the darkness, but he evidently believed that he was expected to do it, if requested by the machine tender."

To the same effect, see *Hayes v. Bush & D. Mfg. Co.* (1886) 41 Hun, 407; *Louisville & N. 43 L. R. A.*

Mich. 409. In our opinion, there was no such proof in this case; and at the close of the trial the court should have instructed the jury that the system of rules, and practice under them, which the company had adopted, was neither unreasonable nor insufficient. The defendant in error and the other servants of the company were familiar with these rules, and the theory upon which they were based. By taking service under them without objection or protest, they assumed the risks and dangers of the theory that every employee who operates trains must beware of other trains moving in the same direction,

R. Co. v. Beagan (1896) 96 Tenn. 128; *Newport News & M. V. Co. v. Campbell* (1894) 15 Ky. L. Rep. 714; *Knickerbocker Ice Co. v. Finn* (1897) 51 U. S. App. 256, 80 Fed. Rep. 483, 25 C. C. A. 579; *Georgia P. R. Co. v. Davis* (1890) 92 Ala. 300; *Atchison, T. & S. F. R. Co. v. Slattery* (1896) 57 Kan. 499; *Atchison, T. & S. F. R. Co. v. Sly* (1889) 41 Kan. 729; *Kansas City, Ft. S. & G. R. Co. v. Kier* (1889) 41 Kan. 661; *International & G. N. R. Co. v. Hinzle* (1891) 82 Tex. 623; *White v. Louisville, N. O. & T. R. Co.* (1894) 72 Miss. 12; *Chicago & W. I. R. Co. v. Flynn* (1895) 154 Ill. 448; *Boess v. Clausen & P. Brewing Co.* (1896) 12 App. Div. 366 (conductor on a freight elevator, not as matter of law negligent in allowing other employees engaged with him in handling freight to go upon the elevator, notwithstanding a notice that riding on the elevator without permission is strictly forbidden, there being evidence that employees had frequently ridden with the knowledge and consent of the employer).

A custom in violation of a rule known and acquiesced in by the employer or his representatives amounts to an abandonment of the rule to the extent to which the custom infringes the rule. *Barry v. Hannibal & St. J. R. Co.* (1888) 98 Mo. 62.

But it need scarcely be said that there can be no recovery where the only custom which the plaintiff succeeds in establishing by his evidence is one which he appears to have been disregarding equally with the rule itself. *Central Trust Co. v. East Tennessee, V. & G. R. Co.* (1888) 69 Fed. Rep. 353 (principle also assumed to be correct in *Alexander v. Louisville & N. R. Co.* (1886) 84 Ky. 589).

In *Wilson v. Michigan C. R. Co.* (1892) 94 Mich. 20, the court (p. 28) considered that the doctrine which predicates a waiver of rules from the master's knowledge of their repeated violation applies only to strangers, and limits the cases in which an abrogation of rules by a railroad company will be inferred as to an employee to those in which he is compelled by positive orders to violate such rules, or when such a system of timing the trains, or conducting the business is adopted as to make it necessary to violate rules in order to do the work required of them. But this ruling is clearly contrary to the weight of authority, and unsupported by any sound principle.

In other decisions the negative side of the doctrine is emphasized, and the servant viewed as the party upon whom rests the burden of proving certain facts before he can be permitted to escape the ordinary consequences of disobedience to a rule.

A servant who seeks to absolve himself from the imputation of contributory negligence on the ground of an habitual disregard of a rule must show that the employer acquiesced in its infraction. *Francis v. Kansas City, St. J. & C. B. R. Co.* (1892) 110 Mo. 387.

without notice of their whereabouts, and the risks and dangers of the system of rules which was based upon this theory. *Wolsey v. Lake Shore & M. S. R. Co.* 33 Ohio St. 227. When a railroad company has deliberately adopted a system of rules, which have been made familiar to its employees, and its railroad is operated under them, the reasonableness and sufficiency of these rules are questions of law, and not of fact. These questions must be determined by the court, because there is no other way in which a set of rules may ever be established or adjudicated as

either reasonable or sufficient. It may be said that trial judges often differ upon questions of this character. But the answer to this objection is that the appellate court will finally settle them, and in the end a substantial uniformity of decision as to the reasonableness and sufficiency of any set of rules in general use must eventually result, if these questions are left to the determination of the courts. If, on the other hand, they are remitted to the juries, their various findings can result in little less than confusion worse confounded. The deci-

"In order . . . that rules for the conduct of business and safety of employees may avail an employer in a suit for damages for injuries resulting from a breach thereof, they must not only have been known to the employee [servant], but also their observance must not have been waived by the employer, nor the existing conditions at the time of the injury have rendered their enforcement and obedience impracticable to perform the services required by the employer." *Wright v. Southern P. Co.* (1896) 14 Utah, 383.

Compare also *Sloan v. Georgia P. R. Co.* (1890) 86 Ga. 15; *Georgia P. R. Co. v. Davis* (1890) 92 Ala. 300; *Fay v. Minneapolis & St. L. R. Co.* (1883) 30 Minn. 231; *Overby v. Chesapeake & O. R. Co.* (1893) 37 W. Va. 524; *O'Neill v. Keokuk & D. M. R. Co.* (1877) 45 Iowa, 546; *Gleason v. Detroit, G. H. & M. R. Co.* (1896) 43 U. S. App. 89, 78 Fed. Rep. 647, 19 C. C. A. 638.

2. Acquiescence in violation, when implied from employer's knowledge.

The cases above cited show clearly that the essential element which is necessary to establish a practical abrogation of a rule is the acquiescence of the employer in its infringement. The following decisions are collected for the purpose of bringing out more distinctly this aspect of the subject.

To justify the conclusion that a rule has been abandoned "it must satisfactorily appear that notice or knowledge of such disregard, by the persons for whom they are intended, has been brought home to the principal, or to someone whose duty it is to take action and is authorized to bind the principal. The mere habit of the employee or person bound by the rule to disregard the rule, though done with the knowledge of any immediate superior less than the principal or person authorized to bind the principal by acquiescence or failure to object will not be sufficient to justify the conclusion that the rules are no longer binding. Such knowledge on the part of the principal may be shown as in other cases where it is necessary to show notice, either by direct proof or by circumstances." *Alabama G. S. R. Co. v. Roach* (1895) 110 Ala. 266.

There the court said with regard to a phrase which had been used in an earlier case,—that "custom and usage may be relied upon to excuse the violation of a rule (*Andrews v. Birmingham Mineral R. Co.* (1892) 99 Ala. 438),—that it was intended as a statement of the principle that "a principal may knowingly acquiesce in or assent to a continuous disregard of rules established and promulgated, and for such a length of time as to justify those for whom they were intended, to consider that the principal has abandoned them, and that they have ceased to be binding," and laid down the following general doctrine: "The custom and usage of prudent persons and well-regulated railroads, act-

ing independently of any rule regulating the matter, is never admissible to excuse or exempt from liability for the consequences of the violation of a rule reasonable and proper, adopted and promulgated by proper authority, for the protection of the person of employees and the property of those adopting the rule; nor will custom and usage excuse the voluntary and unnecessary risk of an obvious danger, whether a rule exist or not."

A waiver of a rule will not be implied where there has been no violation of it to the knowledge of the employer, except in occasional instances, and employees violating the rule, or saying they cannot do the work in the manner prescribed by the rule, have been promptly discharged. *Richmond & D. R. Co. v. Rush* (1894) 71 Miss. 987, as explained in *White v. Louisville, N. O. & T. R. Co.* (1894) 72 Miss. 12.

In *O'Neill v. Keokuk & D. M. R. Co.* (1877) 45 Iowa, 546, the court said: "Without considering whether the rule could be regarded as waived by any less formal or authoritative action than that by which it was adopted, it seems clear that it could not be so regarded by reason simply of a custom on the part of those for whom it was made to violate it. Acquiescence by the company in the custom of violating the rules should be shown, and this would involve the necessity of showing at least knowledge on the part of the officer or agent charged with the enforcement of the rule that it was customarily violated."

Nor is habitual violation material where the evidence shows that the rule was actually enforced by the company, and the rule itself states that the employees for whose guidance it was promulgated were in the habit of doing the forbidden act, and that its express purpose was to put an end to this practice. *Francis v. Kansas City, St. J. & C. B. R. Co.* (1892) 110 Mo. 387.

But in order to establish a waiver of a rule it is not necessary that the servant should show that it has been habitually disobeyed in the actual presence of the master or his agents. It is not material how the knowledge of the disobedience has been obtained. *Strong v. Iowa C. R. Co.* (1895) 94 Iowa, 380.

It need not appear that the officers of the defendant, who are charged with the enforcement of its rules, had actual knowledge of the custom of the defendant's employees as to violating the rule. Such notice or knowledge may be inferred from circumstances; it may be implied from the notoriety of the custom, whereby they are chargeable with notice. *Lowe v. Chicago, St. P. M. & O. R. Co.* (1893) 89 Iowa, 420.

Negligence cannot be imputed to a railroad company for its failure to discover, after a period of four months, that an employee has been guilty of an habitual violation of rules framed to secure the safety of trains at switches. *Cameron v. New York C. & H. E. R. Co.* (1895) 145 N. Y. 400.

It is error to nonsuit the plaintiff where there

sion of an appellate court becomes a precedent for the rulings of many inferior courts. But the finding of one jury is no precedent for the decision of another, and a rule that is found to be reasonable by one jury will frequently be thought to be unreasonable by another; and no criterion will ever be established by which railroad companies may measure their duties in this regard, if the reasonableness and sufficiency of their rules are to be daily submitted to new tribunals, which are governed by no precedent, and are without experience in the determination of these questions. We adhere to the

view of this question expressed by Judge Caldwell in the opinion of this court in *Kansas & A. Valley R. Co. v. Dye*, 36 U. S. App. 23, 28, 70 Fed. Rep. 24, 27, 16 C. C. A. 604, 607, which is supported by the following authorities, among others: *Vedder v. Fellows*, 20 N. Y. 126, 130; *St. Louis, I. M. & S. R. Co. v. Adcock*, 52 Ark. 406, 410; *Kansas City, Ft. S. & M. R. Co. v. Hammond*, 58 Ark. 324, 334; *Illinois C. R. Co. v. Whittemore*, 43 Ill. 420, 423, 12 Am. Dec. 138; *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea, 128; *Tracy v. New York & H. R. Co.* 9 Bosw. 396, 398, 402; *Hoffbauer v. Davenport*

is evidence that the rule which he is alleged to have disobeyed was customarily violated with the knowledge of the master. *Wright v. Southern P. Co.* (1896) 14 Utah, 383.

In *Spaulding v. Chicago, St. P. & K. C. R. Co.* (1896) 98 Iowa, 205, testimony was held relevant and competent which tended to show that it was the custom of the employees of the defendant to uncouple cars while they were in motion; that it was as safe to do so as to uncouple them when not in motion; that the decedent attempted to make an uncoupling in question in the manner usually adopted on the defendant's road; and that the officers of the defendant who had supervision and control of such matters knew of that method of doing such work, but made no objection to it, although it was in violation of printed rules which the defendant had adopted and given to its employees for their guidance. The court said: "The evidence in question tended to show that the rules upon which the defendant relies were habitually disregarded by its employees, and that the officers who were charged with the duty of enforcing them knew that the employees of the defendant customarily disregarded them, but made no attempt to enforce them. The alleged negligence of the deceased was a question of fact for the jury; and, in deciding it, the customary way of doing work he attempted to do, apparently approved by the defendant, was a proper matter for the consideration of the jury."

Instructions ignoring evidence tending to show that the master did not require obedience to the rule alleged to have been infringed, and had sanctioned its violation, are properly refused. *Louisville & N. R. Co. v. Richardson* (1893) 100 Ala. 232; *Chicago & W. I. R. Co. v. Flynn* (1895) 154 Ill. 448.

Where a master posts a written notice prohibiting employees from riding on an elevator, a practical invitation to violate such direction may be inferred from an habitual usage on the part of employees to disregard it. *McNee v. Coburn Trolley Track Co.* (1898) 170 Mass. 283 (citing the passenger cases to the same effect: *O'Donnell v. Allegheny Valley R. Co.* (1868) 59 Pa. 239; *Pennsylvania R. Co. v. Langdon* (1879) 92 Pa. 21; *Waterbury v. New York C. & H. R. R. Co.* (1883) 17 Fed. Rep. 671).

The evidence being that the plaintiff was furnished with a coupling stick, to be used until he learned how to couple without it, and that his injury was received after he had learned to couple without a stick, and had on many occasions done so, some of the instances being in the presence of his superior officers, who made no objection, it is not error to deny a request by the defendant to charge the jury that, if the plaintiff in undertaking the service was furnished with a coupling stick and directed to use it in coupling, but did not use it at the time of the injury, and attempted to make the coupling with his hand instead of the stick, and was

hurt in making such attempt, he could not recover. *Central R. & Bkg. Co. v. Maltsby* (1892) 90 Ga. 630.

The fact that the servant returned a coupling stick to the office immediately after receiving it, and never used that or any other stick, is evidence tending to show that it was not expected that the rule as to using a stick for coupling would be observed. *Horan v. Chicago, St. P. M. & O. R. Co.* (1893) 80 Iowa, 328.

The fact that an abandoned rule was not required for safety has been mentioned in one case as an additional reason for declaring it to be of no binding force as regards a servant. *Newport News & M. V. Co. v. Campbell* (1894) 15 Ky. L. Rep. 714.

The jury is entitled to infer a practical abrogation of a rule, even though there is no evidence tending to show nonobservance of it under circumstances exactly similar to those existing at the time of the accident. *Lake Erie & W. R. Co. v. Craig* (1897) 47 U. S. App. 647, 80 Fed. Rep. 488, 25 C. C. A. 585 (second appeal after new trial ordered in (1896) 37 U. S. App. 654, 73 Fed. Rep. 642, 19 C. C. A. 631). The circuit judge had assumed that habitual disregard of a rule forbidding the coupling of cars in motion would not avail a servant where the only previous disregard established was in cases where the coupling was done in the daytime and on ground free from ice and snow, whereas the injury in suit was received at night and on ground covered with ice and snow, and in cases where the coupling had been done while the cars were moving 2 miles an hour, whereas the injury was received when the cars were moving 5 miles an hour.

In *Alabama G. S. R. Co. v. Ritchie* (1895) 111 Ala. 297, the injury occurred while the plaintiff, who was a brakeman, was between moving cars. For a special plea the defendant set out a rule of the company which, among other things, prohibited employees "from getting between moving cars, while in motion, to uncouple them." To this special plea the plaintiff filed a replication, which in substance averred that, at the time and place where the injury occurred, it was the duty of the plaintiff to uncouple the cars, and that this duty could not be performed without going between the cars while they were in motion, and that it was the custom of plaintiff, acquiesced in by the defendant, to go between the cars while in motion, for the purpose of uncoupling them, whenever it was necessary to do so. To this replication the defendant demurred, assigning several grounds. The court held that the replication was defective in that it failed to state the facts and circumstances which rendered it necessary for the plaintiff to go between the cars while in motion to uncouple them in discharge of his duty, and that the defendant was accordingly not informed by the replication what facts were relied upon by the plaintiff to absolve him from

4 N. W. R. Co. 52 Iowa, 342, 343, 35 Am. Rep. 278.

Moreover, the court, in effect, told the jury by this instruction that, if they believed that the collision occurred through the failure or neglect of the railroad company to give these notices, the defendant in error might recover. It is difficult to understand what basis there is in this case, under the admitted facts, for a finding that a failure to give these notices caused this collision. If we concede that the failure to write the notice which was verbally given to the conductor and engineer of the extra train at Hope-

field, that they must look out for the freight train which was in the bottom between Edmondson and Forrest City (an unreasonable concession, except for the sake of argument), and the failure to stop the extra train at Edmondson, and notify its conductor and engineer that the freight train was still there, and the failure to send a courier from Forrest City, or some other point, to the freight train, to notify its conductor and engineer that the extra train was coming, constituted negligence, there still remains what seems to us an insuperable obstacle to a recovery on this ground. An injury that could

an observance of the rule, and could not prepare to meet the issue presented by the replication.

8. Rationale of doctrine.

There seems to be occasionally some confusion of thought as to the *rationale* of the situation resulting from the master's habitual failure to enforce the rules. Thus, in *Louisville & N. R. Co. v. Reagan* (1896) 96 Tenn. 128, we find the court first recognizing the principle that laxity in the enforcement of rules already promulgated is as much negligence as a failure to promulgate them where the circumstances demand it (compare also the language used in *Richmond & D. R. Co. v. Hissong* (1892-93) 97 Ala. 187), and then in another place remarking that "a perpetual breach and disregard of rules by the employees with the knowledge of the company amounts to a practical abrogation of them."

In other words, the right of the servant to recover, where the rule has been habitually broken to the knowledge of the master is first regarded as referable to the theory that the master's negligence is the efficient cause of the accident, and then to the consideration that, as the rule is no less nonexistent as a living ordinance if it is never enforced than if it had never been promulgated, the servant is himself guilty of no breach of duty.

The former consideration, however, seems to be quite out of place in this connection. Servants who do what they know to be prohibited, or fail to do what they know to be prescribed, cannot be less culpable because the master has failed to exercise an efficient control over their conduct.

The correct theory undoubtedly is either that the employer's intention to abolish a rule is deduced from his omission to enforce it, or that this omission amounts to a kind of estoppel *in pais*, which precludes him from relying on the defense of contributory negligence so far as it might be predicated from the servant's disobedience to orders.

Compare the statement that the master's knowledge of an habitual custom to disregard a rule may be regarded as "a practical invitation to violate it." *McNee v. Coburn Trolley Track Co.* (1898) 170 Mass. 283.

4. Express agreement to obey rules, effect of.

There is a conflict of opinion as to the effect which should be ascribed to the fact that the servant has expressly agreed in writing to obey the rule which is alleged to have been waived by the master.

On the other hand, we find it laid down, in broad terms, that the fact of the employee's having signed a stipulation which shows, not only that he had knowledge of the rule, but the dangers incident to the employment, does not furnish any reason for excepting the case from 43 L. R. A.

the operation of the general principle that a rule may be waived by its being disregarded for such a time and in such a manner that the employer or his agent is chargeable with notice. *Fish v. Iowa C. R. Co.* (1896) 96 Iowa, 702.

So, also, in *Northern P. R. Co. v. Nickels* (1892) 4 U. S. App. 369, 50 Fed. Rep. 718, 1 C. A. 625, we find the court commenting as follows on the effect of a writing by which the servant agreed to take upon himself the risk of a violation of the rules: "There is some doubt whether this writing under the evidence in this case rises to the dignity of a solemn contract made for a valuable consideration. It is styled 'Personal Record,' and consists very largely of questions and answers relative to the qualifications of the plaintiff to serve as a brakeman. It is dated November 12, 1889, and is alleged to have been made in consideration of the employment of the plaintiff by the defendant at a subsequent date, but the evidence discloses the fact that he was employed by the defendant on June 26, 1889, more than four months before this paper was signed, and that he remained in the defendant's service continually from that date until he was injured, so that it would seem that this writing could not be successfully claimed to be proof of anything more than notice to the plaintiff of the existence of the rule in this particular case. But if it was a contract, it is clear that it could not bar the plaintiff from proving a waiver or abandonment of the rule. This writing was prepared by the defendant; all that the plaintiff had to do with it was to answer the questions and sign his name. It contained in it these words: 'The company expects you and all other employees to comply strictly with its rules and regulations, and does not, and will not, in any case acquiesce in or consent to any violation of them. Do you understand that all violations of the rules of the company by you or any other employee of the company, whether habitual or otherwise, are not consented to or acquiesced in by the company? Yes.' There are at least two parties to every contract, and this provision was a representation and a contract on the part of the defendant that it did not and would not acquiesce in the violation of any of its rules. The plaintiff signed the contract and proceeded with his service. He must immediately have discovered that, if there really was any rule about the use of sticks and pins in coupling cars it was constantly violated on this railroad, and that the defendant knew of this violation and acquiesced in it. This uniform and constant acquiescence of the defendant in the violation of this rule, if such a rule were really in existence, was a violation of the contract on the part of the defendant that it did not and would not acquiesce in the violation of any of its rules, and relieved the plaintiff from further compliance therewith, and if, on the other hand, the rule was not really in force, if it had been waived or abandoned, the

not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable. An injury that is not the natural consequence of an act or omission, and that would not have resulted but for the interposition of a new and independent cause, is not actionable. *Chicago, St. P. M. & O. R. Co. v. Elliott*, 12 U. S. App. 381, 386, 55 Fed. Rep. 949, 952, 20 L. R. A. 582, 5 C. C. A. 347, 350; *Finalyson v. Utica Min. & Mill. Co.* 32 U. S. App. 143, 151, 67 Fed. Rep. 507, 512, 14 C. C. A. 492, 496; *St. Louis & S. F. R. Co. v. Bennett*, 32 U. S. App. 621, 69 Fed. Rep. 525, 16 C. C. A. 300; *Union*

P. R. Co. v. Callaghan, 12 U. S. App. 541, 550, 56 Fed. Rep. 988, 993, 6 C. C. A. 205, 210; *Missouri P. R. Co. v. Moseley*, 12 U. S. App. 601, 609, 57 Fed. Rep. 921, 926, 6 C. C. A. 641, 646; *Travelers' Ins. Co. v. Robbins*, 27 U. S. App. 547, 557, 65 Fed. Rep. 178, 184, 27 L. R. A. 629, 12 C. C. A. 544, 550. It was the duty of the engineer and conductor of the extra train to look out for and to so operate their train that their engine would not crash into the freight which they knew was on the track before them. It was the duty of the engineer of that train, who alone could see the track in front of him, to

utter disregard of the rule and the defendant's acquiescence therein were competent evidence of the abandonment. In either case the plaintiff had a right to rely on the conduct of the defendant, and to introduce his evidence in this behalf."

In Alabama the view adopted apparently is that a written undertaking of this description obliterates the legal consequences of any previous acquiescence in the violation of the rules. The rights of the parties are determined upon the assumption that these rules were in full force at the time the contract was signed, and the question whether there has been any waiver as regards the signer will depend upon whether the subsequent violations were of such frequent and long-continued occurrence as to create the presumption that the employer had assented to the disuse of the rule. In other words, a rescission of the particular contract thus entered into must be deducible from the acts of the employer before the doctrine of waiver can take effect, and the length of time which had elapsed between the execution of the contract and the accident, and the opportunities which the employer may have had for ascertaining the habitual nonobservance of the rule during that period became the material circumstances to be considered in deciding whether the servant is entitled to the benefit of that doctrine.

In *Richmond & D. R. Co. v. Hissong* (1892-93) 97 Ala. 187, the court modified its decision on the previous hearing (1890, 91 Ala. 514) where the more liberal theory of the two cases above cited had been recognized, and refused to infer a waiver where the plaintiff was injured the day after he had signed the contract.

The decision was followed in *Louisville & N. R. Co. v. Mothershead* (1895) 110 Ala. 143, where the period was nine days of service on an extensive system of railroad, during which it did not appear that the company had had time, in the regular course of business, to receive any reports as to the conduct of the employees respecting the observance of rules.

Similarly, in *Russell v. Richmond & D. R. Co.* (1891) 47 Fed. Rep. 204, the court refused to admit that a regulation recognized in writing by the plaintiff's intestate at a certain date could be held obsolete by him three weeks later.

This doctrine is based upon the general principle that parol evidence of a custom is not admissible to vary the terms of a written contract (see *Richmond & D. R. Co. v. Hissong* (1892-93, 97 Ala. 187)). It is not apparent why this principle, if it is applicable at all under the circumstances, should not preclude the inference of a waiver from what occurs after the execution of the contract as well as the inference that the habitual violations of the rule had made it a dead letter previous to such execution in such a sense that it could not be regarded as embraced by the terms of the contract. Yet in the case just cited the court admits that the 43 L. R. A.

former of these inferences may be drawn under an appropriate showing of facts. The true view seems to be that the controlling factor in these cases is not the technical rule of evidence thus relied upon, but the broader principle that, where the employer has acted in such a manner as to justify the conclusion that he no longer regards the regulation as binding, every servant whom he hires while the regulation thus remains virtually abrogated should be entitled to the benefit of the assumption that it is not in force. A doctrine which has the practical effect of requiring a servant who is bound by some particular regulation to work amongst other servants in whose favor a waiver of the same regulation may, as a result of the greater length of their service, be implied, seems to be highly anomalous and must certainly be productive of gross injustice in its actual operation.

G. Obligation of rules and other duties, effect of conflict between.

The question of the extent of a servant's duty to observe a particular rule is sometimes determined by the application of the general principle, that a person upon whom two inconsistent obligations are imposed by a contract may without culpability act upon the assumption that the less binding one may be disregarded.

A master is deemed to have waived the observance of a rule forbidding an act not necessarily negligent in itself, where the duty which his servant owes to him cannot be performed without a violation of such rule. *Brown v. Louisville & N. R. Co.* (1895) 111 Ala. 275.

In *Sedgwick v. Illinois C. R. Co.* (1887) 73 Iowa, 158, the court remarked, *arguendo*, that a servant's violation of a known rule was excusable if "there existed some necessity which imposed upon him a higher duty than that created by the rule."

Thus the fact that the plaintiff has disobeyed a rule will not, as matter of law, debar him from recovering, if the defendant conducted his business in a manner which rendered a violation of such rule necessary or probable. *Hayes v. Bush & D. Mfg. Co.* (1886) 41 Hun, 407.

So, where the evidence is undisputed that the employees of a railroad company could not obey a certain rule, and do the work incident to their positions, it will be inferred that it must have been enacted to serve some purpose other than the protection of the property of the defendant, or the proper conduct of its business, or the safety or protection of its employees. *Strong v. Iowa C. R. Co.* (1895) 94 Iowa, 380. The court remarked: "A rule which, if obeyed, would prevent the defendant from properly carrying on its business, does not commend itself to the courts as being made in good faith, and in furtherance of any legitimate purpose."

So, it is error to nonsuit the plaintiff where a rule forbids the coupling of cars while in motion, if the evidence is that there was a grade

so govern the speed of his engine that he could at any time stop it within the range of his vision. It was the duty of the crew of the freight train to place torpedoes on the track at least fifteen telegraph poles in the rear of their train when it stopped at the place of the collision, and to station a flagman ten or twelve telegraph poles behind that train. The railroad company had the right to presume that its servants on these trains would obey its rules and discharge these duties, and it had the right to act upon that assumption. It was its right to calculate the natural and probable result of its acts and omissions upon this supposition. Indeed, it could reckon upon no other, for it is alike impracticable and impossible to pred-

icate and administer the rights and remedies of men on the theory that their associates and servants will either disregard their duties or violate the laws. Now, no one who reckoned on the faithful discharge of their duties by these employees could reasonably have anticipated this fatal collision as either a natural or probable consequence of the failure to give these notices. Nor could it have been the result of such failure, had not the unforeseen negligence of the engineer of the extra train, and the gross and unexpected carelessness of the crew of the freight train, intervened to interrupt the natural sequence of events, to turn aside their course, and to prevent the safe operation of these trains, which was the natural and probable result of

in the yard which rendered it necessary for the cars to be moved while they were being uncoupled, on account of the links and pins being tightened when they were stationary. *Wright v. Southern P. Co.* (1896) 14 Utah, 383.

So, the failure to comply with a rule requiring brakemen to inspect brakes will not be deemed culpable where no reasonable opportunity is given to make the inspection. *O'Malley v. New York, L. E. & W. R. Co.* (1893) 67 Hun, 130.

Similarly, if compliance with a general rule is rendered impossible by other and inconsistent orders given by the master to his employee, negligence cannot be imputed to the employee for not following the general rule. *Hall v. Chicago, B. & N. R. Co.* (1891) 46 Minn. 439 (a case in which the plaintiff could not conform to the timetable, and at the same time keep the train "under complete control," as the rule required).

The same principle, of course, holds good where the special order is given by the employees' representative.

Hence, an employee's disregard of the general rules promulgated by a railroad company will not disable him from recovering, where compliance with them had been rendered impossible,—as where the orders given to an engineer by the governing officers of the company require him to run his train in a manner different from that prescribed in the rules. *Pennsylvania Co. v. Roney* (1883) 89 Ind. 452, 46 Am. Rep. 173.

So, the impossibility of making a coupling with a stick will relieve from the imputation of contributory negligence a brakeman who, in obedience to the order of his conductor, violates a rule forbidding him to couple cars without a stick, unless his compliance with such order threatened immediate injury. *Richmond & D. R. Co. v. Rudd* (1892) 88 Va. 648. (It should be observed that in Virginia a conductor is, as regards brakemen, a vice principal. See cases cited in *Bailey's Masters' Liability*, p. 844.)

But the recipient of a special order which has the effect of superseding a general rule is culpable in obeying the order unless he has actual knowledge that the employee who gives it is acting within his powers. Hence, where one of the rules of a railroad company provides that the conductor shall have control of all persons employed on his train, except when his directions conflict with the rules or involve risk or hazard, in which case the engineer will be held equally accountable, and another rule requires that a certain train shall remain at a specified station until the arrival of a train from the opposite direction, the engineer of the waiting train must, at his peril, detain it as so prescribed unless he actually knows that the despatcher has sent special directions that it is to proceed before the arrival of the expected train. He is 43 L. R. A.

not permitted to infer that the conductor has received information which will justify his moving his train in a manner different from that prescribed by the rules, and act on that assumption. *York v. Chicago, M. & St. P. R. Co.* (1896) 98 Iowa, 544.

The schedule of hours for the running of trains is obligatory upon both conductors and engineers, and if an engineer is injured by a collision due to the starting of his train at a time not set down in the schedule, he cannot excuse himself for his disobedience to the printed orders of his superiors on the ground that he allowed himself to be prevailed upon by the conductor to depart from the schedule time. *Georgia R. & Bkg. Co. v. McDade* (1877) 59 Ga. 73.

A conductor's infringement of one regulation requiring him to remain in the middle of his train on descending grades so as to be better able to direct his crew is not necessarily negligence where another regulation imposes on him the duty of "taking the safe side in all cases of doubt." What is the "safe side" in any given exigency is a question for the exercise of judgment. A court, therefore, cannot say, as matter of law, that a conductor would, under such circumstances, be guilty of negligence in quitting his post temporarily to warn the engineer of the possibility that he might meet some obstruction not known to, or not considered by, the company in making out the special order under which the train was running. *Somerset & C. R. Co. v. Galbraith* (1885) 109 Pa. 32.

There is no such conflict of rules as will invalidate them, where one requires that trains upon approaching a "time-table station" shall be under full control with the expectation that the main track is occupied, and another provides that the general direction and government of a train are vested in the conductor, who shall be responsible for its proper conduct, and requiring all employees on the train to yield obedience to his proper orders. *Louisville & N. R. Co. v. Mothershead* (1896) 110 Ala. 148.

So, also, a special order to a locomotive engineer to make a run in a certain time must be executed with due regard to the general rules which are not incompatible therewith, and there can be no recovery against the company if he is killed by his breach of a rule requiring him to approach a station with "great care," in view of the possibility of finding "some other train occupying the main track." *Illinois C. R. Co. v. Neer* (1889) 81 Ill. App. 126. The court said: "A special order will supersede a standing rule only where they in terms conflict, or where it is or ought to be foreseen, when given, that its execution is incompatible with the latter, or becomes so afterward by some action of the giver, taken with reasonable ground to expect that effect."

the rules and the orders which the defendant gave. It was the gross negligence of these servants, which no one could anticipate, that constituted the intervening and proximate cause, without which this collision could never have been; and it is to this, and not to the failure to give the notices, in our opinion, that this accident must be attributed, under the maxim, *Causa proxima non remota spectatur*.

There are many other errors assigned in this case, and many other questions discussed in the briefs of counsel, but the case must be retried on account of those to which we have referred. What has already been said will be a sufficient intimation of our views to guide the court in the coming trial, and it

would be unprofitable to extend this opinion by the discussion of other questions which may not again arise.

The judgment below must be reversed, and the cause remanded to the court below, with directions to grant a new trial; and it is so ordered.

Thayer, Circuit Judge, concurring:

I concur in the view that the case should be reversed for error in the instruction which is quoted above, in the opinion of the majority of the court. There was a controversy before the jury as to whether the engineer and conductor of the extra train ought to have been notified at Edmondson that freight train No. 5 had not arrived at Forrest City,

h. Injuries caused by co-servants' violation of rules, liability for.

See also *X. supra*.

1. Under common-law principles.

The consequence of connecting the doctrine of common employment with the doctrine that the violation of a known rule is negligence, is to preclude a recovery for an injury caused by such violation when the culpable party is a fellow servant of the plaintiff.

"It is the duty of a railroad corporation to prescribe, either by means of time-tables, or by other suitable modes, regulations for running their trains with a view to their safety; but it is obvious that obedience to these regulations must be intrusted to the employees having charge of the trains. Such obedience is matter of executive detail which, in the nature of things, no corporation or any general agent of a corporation can personally oversee, and as to which employees must be relied upon." *Rose v. Boston R. Co.* (1874) 58 N. Y. 217.

The principle that the execution of rules is a "matter of detail" was also relied upon in *Bryant v. New York C. & H. R. R. Co.* (1894) 81 Hun, 164.

"When the master has furnished—to be observed by those having the management of his business—such rules as may be reasonably essential to the safety of his employees in any emergency or condition which may be apprehended in the service, he has discharged his duty to them in that respect, and they assume the hazard of the observance of the regulations by those with whom the duty rests to execute them." *Tully v. New York & T. S. S. Co.* (1896) 10 App. Div. 463. See also *Drake v. New York C. & H. R. R. Co.* (1894) 80 Hun, 490.

Upon this ground the plaintiff's action was held not to be maintainable in the following cases: *Pittsburgh, C. & St. L. R. Co. v. Henderson* (1882) 37 Ohio St. 549 (trainmen injured through collision resulting from the negligence of an employee sent to flag an approaching train); *Niles v. New York C. & H. R. R. Co.* (1897) 14 App. Div. 58 (engineer ran his train past a block signal so that it came into collision with another standing on the track); *Evansville & T. H. R. Co. v. Tohill* (1895) 143 Ind. 49 (collision caused by conductor's running train past station, instead of side tracking, as required by the regulations); *Simpson v. Central Vermont R. Co.* (1896) 5 App. Div. 614 (same species of accident); *Northern P. R. Co. v. Poirier* (1896) 167 U. S. 48, 42 L. ed. 72 (collision caused by conductor's disregard of rule as to running a train closely behind another); *Ford v. Lake Shore & M. S. R. Co.* (1899) 117 N. Y. 638 (disregard by employees of rules regulating L. R. A.

lating loading of cars); *Byrnes v. New York, L. E. & W. R. Co.* (1889) 113 N. Y. 251, 4 L. R. A. 151 (railroad company not liable for the negligence of its employees in making the inspection of loaded cars which is imposed on them by its rules); *Rutledge v. Missouri P. R. Co.* (1894) 123 Mo. 121 (brakeman thrown off car by a sudden check in its movements consequent upon a fellow servant's giving a signal to the engineer in breach of the custom in use); *Denver & R. G. R. Co. v. Sipes* (1896) 23 Colo. 226 (railroad company not liable for the consequences of a conductor's negligence in failing to observe a rule of the company with respect to the closing of switches); *Davis v. Staten Island Rapid Transit R. Co.* (1896) 1 App. Div. 178 (switch left open by conductor—brakeman injured); *Moeller v. Delaware, L. & W. R. Co.* (1897) 13 App. Div. 467 (car repairer injured by fellow servant's failure to put out a signal flag); *Nolan v. New York, N. H. & H. R. Co.*; *Kennelty v. Baltimore & O. R. Co.* (1895) 166 Pa. 60 (men operating a train following another on the same track failed to keep a sharp look out, as prescribed by rule); *Enright v. Toledo, A. A. & N. M. R. Co.* (1892) 93 Mich. 409 (engineer disregarded rule requiring freight trains to approach stations under full control).

Where all the testimony shows that a special order to an engineer to run his train "two hours late" was to be read in connection with the general rules of the company, and was so understood by all the employees concerned, and that such order meant that the train was to run with reference to the schedule of all passenger trains and never to encroach upon the time of the train which it followed, the company cannot be held liable for injuries which a brakeman on the train in front received through the negligence of the engineer of the following train in running it too fast. *Kennelty v. Baltimore & O. R. Co.* (1895) 166 Pa. 60.

The whole duty of a railroad company is performed when it has promulgated rules which, if observed and followed by the subordinates who have to carry them out, will bring personal notice to everyone concerned of any special deviation from its time-table in regard to the running of its trains, and it is not liable for an injury caused to a fireman by the carelessness of operators and conductors in executing an order of the train dispatcher to stop a train at a certain station. The servant's action cannot, under such circumstances, be maintained on the theory that the order so given was a change of the rules of the road. *Slater v. Jewett* (1881) 85 N. Y. 61, 29 Am. Rep. 627.

Where a railroad company has employed a sufficient number of competent servants to shift its cars in a yard, and has promulgated proper rules for the management of the business, it is

and that they must keep a sharp lookout for the freight train between the two stations last mentioned. Three expert railroad men, who were called as witnesses for the plaintiff below, testified, in substance, that such notice ought to have been given; that as the engineer of the extra train would naturally infer that the freight train had reached Forrest City by the time the extra train reached Edmondson, since the freight train was then overdue at the former station, he ought to have been notified by the train despatcher at Edmondson that such was not the fact, and that for some unknown reason the freight train had been delayed, and was not where it would very naturally be expected to be. In other words, three railroad men expressed the opinion, in substance, that, as applied to the facts existing when the extra reached Edmondson, the standard rules were not adequate to afford protection to trainmen and passengers, but that some further precautions ought to have been taken by the train despatcher. Several witnesses for the defendant company expressed a contrary opinion, namely, that the standard

rules were sufficient to meet any and every emergency, and that no additional notice ought to have been given at Edmondson. This was one of the crucial issues in the case, to which the attention of the jury should have been more specifically directed. The instruction above quoted, which was given by the court, was couched in very general language, and was liable to be understood by the jury as meaning that it was the duty of the train despatcher, in any event, and without reference to the existence of the rules, to have given notice at Edmondson that the freight train had not arrived at Forrest City. Being too general, as applied to the issue of fact above stated, and for that reason being liable to mislead, I agree that the case should be reversed, and a new trial ordered.

Other views, however, are expressed in the opinion of the majority of the court, to which I cannot assent. It is held broadly, as I understand, that when a railroad company adopts rules for the operation of its trains, or for the management of its business, and puts them in force, the question as to the reasonableness and sufficiency of such rules

not liable for the consequences of a brakeman's failing to take his proper position on the top of moving cars. *Potter v. New York C. & H. R. R. Co.* (1892) 136 N. Y. 77, *Distinguishing Filke v. Boston & A. R. Co.* (1873) 53 N. Y. 549, 13 Am. Rep. 545.

The *rationale* of the distinction apparently is that in the earlier case the brakeman had never reported for duty at all, and that the company was responsible for the manning of the train, but not for the subsequent negligence of the men in not being at their posts.

In *Wright v. New York C. R. Co.* (1873) 25 N. Y. 568, it was sought to support the judgment on the ground of the improper arrangement of the time-tables at the point where the collision took place. The court, however, held that the time-tables were not in fault, but that the collision grew out of the carelessness of the employees in running the train not in conformity with the time-tables, and that the fault was therefore to be regarded as that of a fellow servant, and that the defendants were not responsible.

Even if it be assumed that rules for signals at crossings and as to speed are available to an employee, the negligence of the conductor and engineer of a train in failing to make such signals, and in running at excessive speed, is that of fellow servants as regards a section hand. *Wright v. Southern R. Co.* (1897) 80 Fed. Rep. 260.

The defendant is not entitled to a nonsuit where the evidence leaves it uncertain whether the injury was caused by the misconduct of the plaintiff's coservants in violating a duly promulgated rule, or whether at the time the injury was received they were acting without any regulations, and simply following a dangerous practice sanctioned by time and custom. *Doig v. New York, O. & W. R. Co.* (1897) 151 N. Y. 579.

The principles exemplified in the foregoing decisions are of course subject to the qualification that the master remains liable where the injury complained of was caused partly by a coservant's disregard of rules and partly by the negligence of the master himself or of some employee for whose omissions of duty he is responsible. *Louisville, N. A. & C. R. Co. v. Heck* (1898, Ind.) 50 N. E. 988 (collision due in 43 L. R. A.

part to the train despatcher's neglect of rules).

In estimating the effect of the decisions in the various states it is necessary to take into account the modifications which some courts may have introduced into the rigorous doctrine which imputes to a servant an assumption of the risks of the negligence of every fellow servant.

Thus, the theory that the doctrine does not extend to cases where the negligent and the injured servants are in different departments is taken for granted in the following decision: Proof that a rule of a steel company, that molds of a certain class rounding on the bottom should be laid down, was violated by leaving such a mold standing on one end with the empty molds, and that within twenty minutes after it was thus left standing it fell over on an employee, is sufficient to justify a finding that the servants of such company were guilty of negligence. *Joliet Steel Co. v. Shields* (1893) 146 Ill. 603, *Affirming* (1892) 45 Ill. App. 453.

Where the evidence is equally consistent with the theory that the injury was caused by negligence in supervising the operation of trains, and with the theory that it was caused by the fault of a coservant, the plaintiff cannot recover. *Rose v. Boston & A. R. Co.* (1874) 58 N. Y. 217. The court said: "In the case before us it appeared in proof that the train on which plaintiff's intestate was a brakeman went out within three or four minutes after another train, and was itself followed by a third train, at about the same distance of time. The injury which resulted in the death of the plaintiff's intestate was the consequence, as the jury have found, and as they might rightfully find from the evidence, of those trains being sent out so near together. By what direction they started so nearly at the same time does not appear. All the proof that relates to the point is contained in the single phrase of one of the witnesses, who, speaking, not of the time of the accident, but of the time of his testifying, says: 'The head conductor who has charge of sending out trains is Mr. Rockefeller.' What charge Rockefeller has is not shown, nor whether he, in fact, despatched the trains in question. It does not appear whether he was intrusted with any discretion upon the subject of starting trains, or whether any regulations on the subject, either

to afford protection to its employees and to the traveling public is always a question of law to be decided by the court. In my judgment, this proposition is not tenable, either upon principle or authority. When a controversy arises in a court of justice touching the reasonableness or sufficiency of a code of rules that has been adopted by a corporation or individual for the management of their business, and competent witnesses express different opinions upon that subject, an issue of fact is presented, which can only be determined by a jury, unless a trial by jury is waived. Judges cannot arrogate to themselves the power of determining such questions, on the ground that such practice insures greater unanimity of opinion, or on any other ground, without denying suitors their constitutional right of a trial by jury. The cases cited by the majority of the court in support of the proposition that the question whether a given code of rules is reasonable and sufficient is one of law (with one exception, to wit, *Illinois C. R. Co. v. Whittemore*, 43 Ill. 420, 423, 12 Am. Dec. 138) were all cases where a rule or regulation was introduced without any testimony tending to

show whether the regulation was reasonable or otherwise, and the decisions were simply to the effect that in such cases the court could properly decide as to reasonableness of the regulation. In three of the cases, and particularly in the case of *Vedder v. Fellows*, 20 N. Y. 126, 131, to which all the other cases refer as the foundation of the doctrine, it was clearly intimated that the reasonableness of a regulation is a question of fact for the jury when there is a conflict of testimony upon that issue, and it is difficult to conceive how the rule could be otherwise without ignoring fundamental principles. In the case of *St. Louis, I. M. & S. R. Co. v. Adcock*, 52 Ark. 406, 410, the court said, "The facts being uncontroverted, it was the province of the court to declare the regulations reasonable." The same remark was quoted with approval in the subsequent case of *Kansas City, Ft. S. & M. R. Co. v. Hammond*, 58 Ark. 324, 334, and in a late case in New York (*Abel v. Delaware & H. Canal Co.* 128 N. Y. 662, 666, 667), where the sufficiency of a code of rules which had been adopted by a railway company was challenged, and there was some testimony on that subject besides the rules

by a prescribed time-table or otherwise, had been made by the company. But it is obvious that the company may have prescribed proper and safe rules in respect to the starting of these trains, and that those rules may have been disregarded by the persons who actually started these trains so near each other. It may be conceded that it is the duty of a railroad corporation to prescribe, either by means of time-tables or by other suitable modes, regulations for running their trains with a view to their safety; but it is obvious that obedience to these regulations must be intrusted to the employees having charge of the trains. Such obedience is matter of executive detail which, in the nature of things, no corporation or any general agent of a corporation can personally oversee, and as to which employees must be relied upon. . . . Nothing appears in the evidence indicating that any distinction exists between the duty of the company in starting trains and in subsequently running them. In the absence, therefore, of any such proof, and of any proof showing negligence in this respect on the part of the defendants, the case must be determined by ascertaining on which party the burden of proof rests."

2. Under statutes modifying the common law.

The subjoined decisions illustrate the effect of statutes abolishing the doctrine of common employment.

The conduct of a switching crew in using a main track in violation of the company's rules for switching purposes at the very time a train is due, is such negligence as will render the company liable for injuries received by the engineer of that train as the result of its collision with the cars left on the main track. *Hall v. Chicago, B. & N. R. Co.* (1891) 46 Minn. 439. (Laws 1887, chap. 13). Where a rule of the company enjoins upon a coemployee of the plaintiff the performance of a particular duty, such coemployee is bound to exercise ordinary care in the discharge of that duty; it is not cause for reversal that the court charged the jury that, if such coemployee failed to exercise ordinary care in discharging such duty, they "ought to find the defendant company negligent 43 L. R. A.

in that regard." *Western & A. R. Co. v. Bussey* (1894) 95 Ga. 584. (Code of 1892, § 2083.)

A rule by which conductors are "cautioned as to flying switches," and directed to "avoid such switching even if it increases their work," is advisory merely, and does not forbid such switches. The fact, therefore, that a conductor orders a brakeman to make such a switch is not such negligence as will render the company liable for injuries to the latter. *Youll v. Sioux City & P. R. Co.* (1885) 66 Iowa, 346. (Code, § 1307.)

A railway engineer who, without receiving any notice from his fireman of his intention to go under the engine to clean out the ash pan, such as the well-understood custom among engineers and firemen requires shall be given, blows off the engine while the fireman is so at work under it and scalds him, is not guilty of negligence in so doing. *Crane v. Chicago, M. & St. P. R. Co.* (1896) 93 Wis. 487. (Stat. 1893, chap. 220, § 1. Custom here assumed to be equivalent to rule.)

It is not error to admit in evidence a rule from a railroad company's book of rules providing that "a lamp swung across the track is the signal to stop" where the issue involved is whether the engineer was negligent in failing to perceive upon the track an employee who had fallen down and became unconscious by reason of sickness. *Helton v. Alabama Midland R. Co.* (1893) 97 Ala. 275. (Code, § 2590.)

A railroad company is liable for the death of an engineer caused by the negligence of a conductor in failing to observe a rule that, in case of a stoppage on the main line, the train shall be protected by sending back flagmen. *International & G. N. R. Co. v. Culpepper* (1898, Tex. Civ. App.) 46 S. W. 922. (Tex. Rev. Stat. 1895, § 4560 F.)

Where it is a question whether a coemployee, for whose negligence a statute makes the master responsible, violated a rule, parol proof that the master's rules required the performance of the act which the employee is alleged to have omitted is admissible, where it does not appear that there is any better evidence of such rules. *Sobieski v. St. Paul & D. R. Co.* (1889) 41 Minn. 169. (Minn. Laws of 1887, chap. 13.)

C. B. L.

themselves, it was held that the issue presented was properly submitted to the jury. I conclude, therefore, that the reasonableness of a regulation is a question of law for the court only in those cases where no testimony is offered tending to show whether it is reasonable or otherwise, and that where, as in the case at bar, there is a conflict of testimony on such issue, the question is one of fact for the jury.

In the opinion in chief it is further held that the defendant company is not liable to the plaintiff, even if it was guilty of negligence in failing to inform those in charge of the extra train at Edmondson of the then whereabouts of the freight train. This conclusion is based on the ground that the negligence of the defendant company was not the proximate cause of the accident, but that the accident was solely occasioned by the fault of certain fellow servants of the plaintiff. I am not able to assent to this proposition. If, as the testimony for the plaintiff below tended to show, the rules were insufficient for the protection of trainmen and passengers, as applied to the conditions existing when the extra train reached Edmondson, and if at that station the train despatcher ought to have given the information last above specified to the engineer and conductor of the extra train, then, in my judgment, it was the right of the jury to determine whether such omission of duty on the part of the defendant company directly contributed to the accident. The question as to what was the proximate cause of an injury is ordinarily not one of legal knowledge, but of fact, for the jury to determine, in view of all the accompanying circumstances. *Milwaukee &*

St. P. R. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. ed. 256, 258. And in the case at bar the jury might well have reached the conclusion that a word of caution spoken at Edmondson to the engineer in charge of the extra train would have prevented the disaster. The operator at Edmondson evidently thought that the extra train ought to be warned that the freight train had not reached Forrest City, for as it came into view he said to the train despatcher, over the wire: "Here comes the special. Have you any orders for it?" The engineer of the extra train well knew that sufficient time had elapsed to enable the freight train to reach Forrest City, and he doubtless supposed that it had passed that station some time before the extra reached Edmondson. If he had been warned that it had not reached Forrest City, he would doubtless have exercised a degree of care commensurate with the conditions which actually existed, and the jury might reasonably have found that the failure to give such warning directly contributed to the injury. Moreover, the fact that certain fellow servants of the plaintiff were also guilty of negligence did not absolve the defendant company from liability for its own neglect of duty, or that of its train despatcher, since it is well settled that it is no excuse for a master, when sued by his servant, that the negligence of a fellow employee, as well as his own, contributed to occasion the injury. For these reasons I cannot concur in the views of my associates, that they have the right to determine that the negligence of the defendant company was not the proximate cause of the accident.

ALABAMA SUPREME COURT.

James DOUGLASS, *Appt.*,
v.
City Council of MONTGOMERY *et al.*

(.....Ala.....)

1. A grant of a right to construct a railway over a city park and the abandonment and discontinuance of the park by the city, which attempts to confirm the title of a reversioner, is a violation of the trust of the city for the public, where the lands were conveyed for a street or common only, with a provision for their reversion if used for other purposes, and were afterwards dedicated by the city as a public park or pleasure ground.
2. One who can look out from the front of his house, with an unobstructed view, upon a park near by, can maintain a suit to prevent the destruction of the park, although he may not be strictly an abutting owner.

(*Coleman, J., dissents.*)

(November 5, 1898.)

NOTE.—For protection of parks from forbidden uses, see also *Clarke v. Providence* (R. I.) 1 L. R. A. 725; *Church v. Portland* (Or.) 6 L. R. A. 259; *Fort Wayne v. Lake Shore & M. S.* 43 L. R. A.

APPEAL by complainant from a decree of the Chancery Court for Montgomery County in favor of defendants in a suit brought to enjoin the enforcement of certain ordinances discontinuing a public park and confirming the title in the owners of the reversionary interest. *Reversed.*

The facts are stated in the opinion.

Mr. Frederick S. Ball, for appellant:

The city council of Montgomery had no legal right, power, and authority to grant the Belt Line Railway Company the right to lay and operate a railroad track across said park.

Municipal corporations hold the title to streets, alleys, public squares, wharves, etc., in trust for the public.

15 Am. & Eng. Enc. Law, p. 1064; *Harn v. Dadeville*, 100 Ala. 199; *Webb v. Demopolis*, 95 Ala. 116, 21 L. R. A. 62; *Avondale Land Co. v. Avondale*, 111 Ala. 523; *Com. v. Rush*, 14 Pa. 186; *Ransom v. Boal*, 29 Iowa, 68, 4 Am. Rep. 195; *Warren v. Lyons City*,

R. Co. (Ind.) 18 L. R. A. 367; *Sturmer v. Randolph County Ct.* (W. Va.) 36 L. R. A. 300; and *Rowzee v. Pierce* (Miss.) 40 L. R. A. 402.

22 Iowa, 351; *Alton v. Illinois Transp. Co.* 12 Ill. 38, 52 Am. Dec. 479; *St. Paul v. Chicago, M. & St. P. R. Co.* 63 Minn. 330, 34 L. R. A. 184; *Morris v. Sea Girt Land Improv. Co.* 38 N. J. Eq. 304, note; *Methodist Episcopal Church v. Hoboken*, 33 N. J. L. 13, 97 Am. Dec. 696.

By the original deed said land was to be used only as a common or street.

By the recitals in the ordinances, the city council, as the moving or ordaining party thereto, the maker, the dedicant in the ordinance of 1877 and grantor in the two of 1897, is estopped from denying that said lot or parcel was conveyed to, and held by it, as a common or public park and in trust for the city of Montgomery and its inhabitants.

Miller v. Hampton, 37 Ala. 342.

Property which the municipal corporation holds in trust for the public, such as streets, public squares, etc., can only be used for the purpose for which it was dedicated.

15 Am. & Eng. Enc. Law, p. 1068; *Ransom v. Boal*, 29 Iowa, 68, 4 Am. Rep. 195; *Warren v. Lyons City*, 22 Iowa, 351; *St. Paul v. Chicago, M. & St. P. R. Co.* 63 Minn. 330, 34 L. R. A. 184; *Morris v. Sea Girt Land Improv. Co.* 38 N. J. Eq. 304.

The city council has only such power and authority as has been conferred upon it by the legislature as expressed in its charter, and its charter must be strictly construed.

New Orleans, M. & C. R. Co. v. Dunn, 61 Ala. 128; *Wetumpka v. Wetumpka Wharf Co.* 63 Ala. 611; *St. Paul v. Chicago, M. & St. P. R. Co.* 63 Minn. 330, 34 L. R. A. 184.

The city council cannot grant a railroad right of way over a public park except by express legislative authority in each particular case.

Jacksonville v. Jacksonville R. Co. 67 Ill. 540; *Price v. Thompson*, 48 Mo. 361; *St. Paul v. Chicago, M. & St. P. R. Co.* 63 Minn. 330, 34 L. R. A. 184.

The city council of Montgomery had no power and authority to grant said park to, or confirm the title to the same in, said Alabama Midland Railway Company.

2 Dill. Mun. Corp. 4th ed. § 650; *Webb v. Demopolis*, 95 Ala. 116, 21 L. R. A. 62; *Morris v. Sea Girt Land Improv. Co.* 38 N. J. Eq. 304; *Com. v. Rush*, 14 Pa. 186; 15 Am. & Eng. Enc. Law, p. 1064.

Trustees of towns have no authority to convey the streets, alleys, or public grounds, and such conveyances are absolutely void.

Giltner v. Carrollton, 7 B. Mon. 680; *Alton v. Illinois Transp. Co.* 12 Ill. 38, 52 Am. Dec. 479; *Morris v. Sea Girt Land Improv. Co.* 38 N. J. Eq. 304, note; *Com. v. Rush*, 14 Pa. 186; 15 Am. & Eng. Enc. Law, p. 1064.

The city council had not so violated the terms of its original purchase as to cause a reversion of said park to said Alabama Midland Railway Company as the owner of said reversionary interest.

A court of chancery has jurisdiction and may use its writ of injunction.

High, Inj. 2d ed. § 855; 2 Dill. Mun. Corp. 4th ed. § 67; *Atty. Gen. v. Goderich*, 5 Grant, Ch. (U. C.) 402; *Guelph v. Canada Co.* 4 Grant, Ch. (U. C.) 654; *Harrison, Mun.* 43 L. R. A.

Law, 5th ed. 350; *Kennedy v. Jones*, 11 Ala. 63; *Warren v. Lyons City*, 22 Iowa, 351; *Ransom v. Boal*, 29 Iowa, 68, 4 Am. Rep. 195; *Morris v. Sea Girt Land Improv. Co.* 38 N. J. Eq. 304, note; *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564.

A resident citizen, property owner, and taxpayer of the city may maintain his suit as herein.

5 Am. & Eng. Enc. Law, p. 418; *Maywood Co. v. Maywood*, 118 Ill. 61; *Princeville v. Auten*, 77 Ill. 325; *Ransom v. Boal*, 29 Iowa, 68, 4 Am. Rep. 195; *Brockman v. Creston*, 79 Iowa, 587; *Sheffield & T. Street R. Co. v. Rand*, 83 Ala. 294; *Morris v. Sea Girt Land Improv. Co.* 38 N. J. Eq. 304, note.

A resident citizen and taxpayer, living and owning property near the park, and suffering special irreparable injury in his personal or property rights, may maintain his suit to enjoin the cause of such injury.

High, Inj. § 1301; *Tift v. Buffalo*, 65 Barb. 460; *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598; *Roosevelt v. Draper*, 23 N. Y. 323; *Sheffield & T. Street R. Co. v. Rand*, 83 Ala. 294; *Morris v. Sea Girt Land Improv. Co.* 38 N. J. Eq. 304, note; *Greene v. New York C. & H. R. R. Co.* 12 Abb. N. C. 124; *Williams v. Boston Water Power Co.* 134 Mass. 406; *Perrin v. New York C. R. Co.* 40 Barb. 65, 36 N. Y. 120.

The true test is not ownership of fronting property, but injury to the party's property rights different from that of the body of the inhabitants.

Tift v. Buffalo, 65 Barb. 460; *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598; *Morris v. Sea Girt Land Improv. Co.* 38 N. J. Eq. 304, note.

The building of a railroad in a street is not a nuisance *per se*. To build it across a park may be; but certainly the conversion of a park into railroad yards is a nuisance *per se*.

State v. Mobile, 5 Port. (Ala.) 279, 30 Am. Dec. 564; *Rosser v. Randolph*, 7 Port. (Ala.) 238, 31 Am. Dec. 712; *Hoole v. Atty. Gen.* 22 Ala. 190; *Demopolis v. Webb*, 87 Ala. 659; *Reed v. Birmingham*, 92 Ala. 339.

Messrs. A. A. Wiley and Charles Wilkinson, for appellees:

The deed of Gilmer and wife to the city council of Montgomery was a deed either on condition or a conditional limitation.

1 Sharswood & B. Lead. Cas. on Real Prop. pp. 134, 135.

The effect of a nonperformance or breach of a condition subsequent is to render the estate granted liable to forfeiture at the option of the person entitled to take advantage of such breach.

1 Sharswood & B. Lead. Cas. on Real Prop. p. 136.

The reversioner has a right to declare a forfeiture.

Schlesinger v. Kansas City & S. R. Co. 152 U. S. 447, 38 L. ed. 507; *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547.

No injunction will lie to restrain a municipal ordinance, except where special and extraordinary damages are shown.

High, Inj. §§ 587, 1301.

No right is given a taxpayer to restrain a vacation or abandonment of a street or park in any event, unless he is an abutting property holder.

High, Inj. §§ 594, 1301, 1302; *Tift v. Buffalo*, 85 Barb. 460; *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598; *Hering v. Scott*, 107 Ill. 600; *McGee's Appeal*, 114 Pa. 470; *Brady v. Shinkle*, 40 Iowa, 576.

The public streets, parks, and highways in Montgomery belong to the city, and when the municipality sees fit to vacate them, the consequential loss, if any, must be borne by those who suffer it.

McGee's Appeal, 114 Pa. 470; *Stetson v. Chicago & E. R. Co.* 75 Ill. 74; *Patterson v. Chicago, D. & V. R. Co.* 75 Ill. 588.

In this case the city council of Montgomery is virtually enjoined from executing an ordinance which authorizes the construction and operation of a street railway through Gilmer park. The adoption of the ordinance in question was legislative in its character, and is fully exempted from judicial control.

Montgomery Gaslight Co. v. Montgomery, 87 Ala. 257, 4 L. R. A. 616; *Schurmeier v. St. Paul & P. R. Co.* 8 Minn. 113, 83 Am. Dec. 770; *Zabriskie v. Jersey City & B. R. Co.* 13 N. J. Eq. 314; *Booraem v. North Hudson County R. Co.* 40 N. J. Eq. 557; *Western Railway of Ala. v. Alabama G. T. R. Co.* 96 Ala. 272, 17 L. R. A. 474.

Haralson, J., delivered the opinion of the court:

It is stated in 15 Am. & Eng. Enc. Law, 1064, that "municipal corporations hold the title to streets, alleys, public squares, wharves, etc., in trust for the public; and upon principle, such trust property can no more be disposed of by the corporation than can any other trust property held by an individual." In the note to the text, many decisions are cited in support of the principle stated. So, it has been held that the trustees of a town have no authority to convey streets, alleys, or public grounds, and such conveyances are absolutely void. *Giltner v. Carrollton*, 7 B. Mon. 680; *Morris v. Sea Girt Land Improv. Co.* 38 N. J. Eq. 304, and authorities there cited; *Harn v. Dadeville*, 100 Ala. 200; *Webb v. Demopolis*, 95 Ala. 116, 21 L. R. A. 62. In the case last cited, which had reference to a public street,—over which, in general, the city has greater authority in the matter of the direction of the uses to which it may be subjected than it has over a public park,—it was said: "The city never had any alienable title to or right in the street. It could never have granted it or any part of it away, for any purpose whatever. Having no power of direct alienation it could not pass title indirectly by submitting for the statutory period to private possession, claim, and use."

Judge Dillon states the rule to be, that "municipal corporations possess the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation, of a private nature, unless re-

strained by charter or statute; they cannot, of course, dispose of property of a public nature, in violation of the trusts upon which it is held, and they cannot, except under valid legislative authority, dispose of the public squares, streets, or commons." 2 Dill. Mun. Corp. §§ 575, 650, and numerous authorities cited. Another phase of the rule should be added in this connection, as we find it stated in the Encyclopedia: "When lands held by a municipality for public use are not subject to any special trust, the legislature may authorize a municipal corporation to sell and dispose of the same or to apply them to uses different from those to which they are devoted, but, in the absence of such an authority, the municipality has no implied power to do so. . . . If, however, the lands have been dedicated by private individuals for a public park or square, the legislature has no authority to authorize any diversion from the use to which they were originally dedicated." 17 Am. & Eng. Enc. Law, p. 417, and authorities.

In this case, on the 17th of September, 1850, F. M. Gilmer and his wife, in consideration of \$300 paid to said Gilmer, by the city council of Montgomery, sold and conveyed to said city council a piece of land in said city, the subject of this suit, which is particularly described in the conveyance, and is called "Gilmer Park." The conveyance contained the condition, "said lands to be used only as a common or street; if otherwise, to revert to me or my heirs." Neither the park, nor any part of it, has ever been devoted to street purposes; but, on the 19th February, 1877, as alleged, the city council of Montgomery, by ordinance, set apart and dedicated to the public use, as a public park or pleasure ground, the lands conveyed to them by said Gilmer, known as "Gilmer Park," which ordinance is still of force. It is further alleged that shortly after the adoption of said ordinance the said city council caused the said Gilmer park to be inclosed with a fence, and caused a number of trees to be planted on or about it, and from that time down to about the 20th January, 1897, the said park remained inclosed, and was held and treated and used as a park, for the use and benefit of the inhabitants of the city of Montgomery, etc.

The said F. M. Gilmer died, leaving a widow and two children. The defendant, the Alabama Midland Railway Company, purchased from his widow and these two children, for the recited consideration of \$300, all their right, title, interest, and reversion in and to the lands known as the "Gilmer Park." This company, according to the allegations of the bill, and as appears to be true, for the purpose of promoting its terminal facilities and its connections with the Mobile & Ohio Railroad Company, induced the city council of Montgomery by ordinance to grant to the Belt Line Railway Company—a local company in the city—the right to put down and operate an additional main-line track through Gilmer park, etc.; and, also, to adopt another ordinance at the same time—both ordinances having been pre-

pared, as alleged, by the counsel of the Alabama Midland Railway Company, and induced, adopted, and approved on the same days. Manifestly, these ordinances constitute but one transaction, designed for the same purpose. The two might as well have been adopted as one. The latter ordinance, after reciting the sale by Gilmer of said park to the city; the purposes of its conveyance; the condition of its reversion to his heirs; the purchase of the reversionary interest of the heirs of Gilmer by said Alabama Midland Railway Company, contains this further recital, by way of preamble: "And whereas, the exigencies of public business and the necessity of better transportation facilities have induced the city council of Montgomery to grant to the Belt Line Railway Company the right and privilege of laying down a railway track through, over, and across said triangular park, otherwise called the 'Gilmer Park,' and to run and operate a dummy steam engine and cars thereon, thereby destroying the said parcel of land as a public park, and thereby causing a reversion of said realty to its rightful owners; Now, therefore, and for the purpose of abandoning in some public and authoritative manner, the use of said land as a public park, be it therefore ordained by the city council of Montgomery, that said city council of Montgomery hereby abandons and discontinues the use of said ground or parcel of land as a park and for all other purposes; and hereby confirms, as far as the city council of Montgomery is able to do, the right, title, claim, and interest of the said Alabama Midland Railway Company, its successors and assigns therein and thereunto forever. Adopted Jan. 13, 1897. Approved Jan. 18, 1897."

There is no disguise about these ordinances. The city authorities openly abandoned whatever trust obligation had been imposed on them by the deed of Gilmer to the park, and their own act of dedication by said ordinance of the 19th of February, 1877, by which act of abandonment, as was supposed, the title would revert to the Gilmer heirs, whose reversionary interest, if they had any, the said Midland Railway Company had bought up. The effort was to invest the railroad company with a title to the property, by means of this violation of the trust of the city. The city authorities were induced into the scheme, by what, it is stated, appeared to them to be the necessity of better transportation facilities and the exigencies of the public business. We must acquit all engaged in this scheme, of any intentional fraud upon the rights of the public; the one side, in procuring, and the other in yielding to, an abandonment of a public trust for another supposed public benefit. But, yielding to them a good and honest intention, what was accomplished, according to the authorities, was an illegal transaction and a fraud in law. The condition inserted in his deed by Gilmer, for a reversion of this property to him and his heirs, if the land should be used otherwise than as a common or street, was inserted, not as a provision to enable

the city authorities to abandon or divert it at will, if accepted for the purposes intended, but to prevent their doing so. It was not a license for the violation of the trust tendered, if assumed, but a prohibition against such a violation. It is true, the deed did not make a positive dedication of the land for the purposes named, and it is also true, that the conveyance was made for a recited consideration of \$300, and is, in form, a fee-simple title, containing the condition for reversion, if the land conveyed should be used otherwise than as a street or common. Without such condition, it may be that the price for the land would have been much greater. Certainly such a condition in any deed tended to impair the value of the lands conveyed. It was an encumbrance on a free title. We know of no rule which prevents a dedication to uses from being ingrafted on a fee-simple title conveyed for value, nor do we know of any rule which prevents the ingrafting of a conditional dedication to uses in such a conveyance; the dedication to be completed and irrevocable on the acceptance of the conveyance with the conditions imposed. If it had been recited in said deed, that the city had agreed to accept the conveyance on the conditions imposed, and had by ordinance set apart and dedicated the land to the public for the uses prescribed, as a consideration for procuring the conveyance, could it be doubted that the conveyance on such terms would have been less than a dedication, and that its charter as such would have been destroyed, because of a condition in the conveyance that if the grantee violated the terms of the deed in this regard the property should revert to the heirs of the grantor? It is not left open to doubt, that there had been negotiation on the part of the city with Gilmer for the procurement of this land, and as to the purposes for which it was to be procured. Gilmer did not desire the property ever to revert. The clause referred to in his deed was not inserted in his interest or that of his heirs, but in the interest of the public, and was as strong as he could devise to prevent, in the future, an abandonment of the trust he reposed in his trustee for uses,—the city of Montgomery. The city elected to accept the trust as and for a dedication for a public park, as is evidenced by their said ordinance to that effect, adopted the 19th February, 1877. In this said ordinance, they recited: "Whereas, some of said parcels (referring to certain small tracts or parcels of land in a triangular shape) were granted to the city on condition and in trust that they should be devoted to public use as parks or pleasure grounds, and whereas, the health and comfort of the citizens and the best interests of the city will be promoted by converting the said parcels of land into parks and pleasure grounds, therefore be it ordained," etc., followed by a dedication of said park to the public use as a park or pleasure ground. After this, the conveyance of Gilmer became as operative as a dedication, as much so as if such a use had been unconditionally ingrafted in the deed at its execu-

tion. The public became thereby invested with dedicated rights and interests. The trustee violated the trust, and aided in diverting the dedication. This was a wrong from which no right could accrue to anyone who claims in consequence of such an act.

It remains to inquire if the complainant is such a party as can maintain a bill to enjoin the abandonment and destruction of this park. He may not be an abutting owner, strictly speaking. He owns two lots on the west side of Catoma street, the first, next to and adjoining an abutting owner, who owns a small lot between him and the street in front of the park. From the front of complainant's door, diagonally across the street, on the left, to the park, it is 110 feet,—open and unobstructed. He also owns another lot, on the same side of said street, with an intervening lot between it and the first one referred to, 250 feet from said park.

Ordinarily, the city is the proper party to redress a wrong of the character here complained of; but in this instance it is the main actor in the commission of the wrongs complained of, for the abandonment and destruction of the park. It is to be presumed, it would not file a bill to declare void an act which, by solemn ordinance, it had itself just done. Individuals damaged by such action, therefore, were driven to private action for the maintenance of any rights they had in the premises.

There are authorities which hold that non-abutting property owners upon a square or park cannot complain of its being closed by municipal authority; but with such a doctrine, if necessary to decide, we might not agree. There is a marked difference between the uses and trusts as ordinarily imposed in the dedication of streets or highways in a city, and those imposed in the dedication of public squares or commons, and in the use and enjoyments of the people therein. The municipality may allow uses in the one that it cannot in the other. The uses of each are distinct, and the rights of abutting proprietors on each are different. It is allowed, generally, that such a proprietor as to a street owns to its center, but there is no such right, or anything accruing from it, in an abutter on a park. The street must be kept open, as long as used, but the park may be inclosed, improved, and ornamented for pleasure grounds and amusements, for health and recreation. 17 Am. & Eng. Enc. Law, 416. In speaking of this difference between the rights of property owners attinent to a street and a public common, dedicated to public uses, this court, in *Sheffield & T. Street R. Co. v. Rand*, 83 Ala. 294, said the rule of law was entirely different when applied to the two; that "the purpose for which such dedication is made, the use or changing uses to which it may be applied, and many other distinguishing characteristics, demonstrate that neither the rule nor the reason of the rule, on which the law of the street or highway rests, can be made applicable to a public common. The differences will naturally suggest themselves, and we need not attempt their enumeration."

43 L. R. A.

In respect to the remedy for the misuse or diversion of such property, it has been said: "If dedicated property be put to a use foreign to that contemplated by the intention and purpose of the dedication, then not only the dedicator, but any property owner, will have his remedy in equity to enforce the proper use, and inhibit an improper one." 5 Am. & Eng. Enc. Law, 418, and authorities there cited.

In *Maywood Co. v. Maywood*, 118 Ill. 61, a bill filed by the village and Small and Hubbard, residents therein, to prevent obstructions to a public park,—it was said: "The objection of multifariousness or misjoinder of complaints we do not regard as well taken to the bill. Small and Hubbard, as residents of the village, have a common interest with each other and with the village itself, in preventing any obstruction to the use of the public square for the purposes of a park." "Again, the evidence shows a threatened nuisance tending to deprive appellees and others of the full and free use of this park, as they were entitled to have it used. This is a well-recognized ground for equitable interposition." *Zearing v. Raber*, 74 Ill. 409. When a dedication of land for a public park is made by or to a town or city, it inures to the benefit of all who are at the time, or may afterwards become, citizens of the municipality, which holds in trust for the benefit of the public, with no power to convey or divert it to other uses. This right of use belongs equally, not only to lot holders of the corporation, but to all the inhabitants, in the future as well as at present, according to their various necessities or conveniences. *Macon v. Franklin*, 12 Ga. 239; *Alves v. Henderson*, 10 B. Mon. 131, 169; *Campbell County Ct. v. Newport*, 12 B. Mon. 541; *Pomeroy v. Mills*, 3 Vt. 279, 23 Am. Dec. 207; *Com. v. Rush*, 14 Pa. 186; *Carter v. Portland*, 4 Or. 346; *Alton v. Illinois Transp. Co.* 12 Ill. 38, 52 Am. Dec. 479; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Sheffield & T. Street R. Co. v. Rand*, 83 Ala. 294; 2 Beach, Inj. § 1279, and authorities cited in note 1.

It is unnecessary, perhaps, for us to decide in this case that any resident taxpayer in a city or town may maintain a bill to enjoin a diversion and abandonment of grounds dedicated for a public park, to the use of individuals and corporations for their own private use and advantage, in interference with or destruction of the rights of the public therein. It appears, however, that reason and authority are not wanting for such a holding. In these days of rapid and cheap transit in cities and towns, brought about by the applications of steam and electricity, it would seem that every resident property holder of the municipality occupies, in a sense, the position of an adjacent owner to its public parks, dedicated to public use, and is clothed with all the valuable rights and interest in such dedications, as the one whose property abuts them. These parks, by these means, are the great resorts for health and recreation by all the inhabitants of the municipality, valuable and beneficial in their

advantages to all alike. The one living remote is borne in a few minutes, at the cost of a trifle, to and from these grounds, and derives as much rest, recreation, and profit from their existence as the one in closer proximity may enjoy. When the hand of vandalism and destruction is laid upon them, by the municipality itself or by strangers, it is difficult to understand upon what principle any individual property owner, without respect to where he lives in the city or town, may not himself invoke injunctive relief against their destruction or misuse when perpetrated by the municipality, or join it for such relief, against such acts when done by others. If there ever existed any good reason why such relief should be invoked alone by an abutting proprietor, it may be that it must give way, in accommodation to the necessities and conditions of modern life, brought about by the wonderful discoveries of the present age.

But we find no difficulty in holding that the complainant in this case is in reason, and for the purposes of this case, an adjacent proprietor to the said park, and occupies such a position as entitles him to maintain this bill. He can look out from the front of one of his houses, with an unobstructed view, on to the park, a distance of only 110 feet from him. This gives him the attitude of an adjacent proprietor. From his other lot the view is obstructed, though it is only 250 feet from the park. For the purposes of aid and recreation, he has shown he has a direct and special interest against its proposed destruction.

The cause was submitted on a motion to dissolve the injunction theretofore granted, and on motion to dismiss the bill for want of equity. The court by its decree dissolved the injunction, and dismissed the bill for want of equity. In this there was error.

The decree is reversed and the cause remanded.

Coleman, J., dissenting:

This cause was submitted to the chancery court on a motion by respondents to dissolve an injunction and on a motion to dismiss the bill for the want of equity. The chancellor granted the motion to dissolve the injunction and dismiss the bill for want of equity. From the decree dissolving the injunction and dismissing the bill the present appeal was prosecuted by the complainant, and the correctness of this doctrine presents the only question for review. This court has no jurisdiction to render a final decree granting relief to complainant upon the present appeal. A motion to dismiss a bill for want of equity cannot perform the office of a demurrer. On such a motion all amendable defects will be considered as made. The material questions are: Has the bill equity? and, if the averments of the bill show a state of facts which justify relief, can the bill be maintained by the complainant? The purpose of the bill is to enjoin the respondent railroads from laying tracks upon and across a plat of land in the city of Montgomery designated as "Gilmer Park," and to set

aside and annul certain ordinances of the city, by which the respondent railroads were authorized to make such use of said plat of ground. The rule is general and well established that a municipal corporation has no power, unless specially authorized by the legislature, to sell for its own benefit, or to appropriate for the use and benefit of private persons or corporations, a public park or common; and, if this was the only question involved, we would have little difficulty in reaching a conclusion. The question presented is whether Gilmer park was held by the city of Montgomery upon such terms and conditions as to justify the application of the general rule to the case at bar; and, secondly, whether a municipal corporation, when it has once appropriated a plat of ground as a public park, is compelled to maintain it as such for all time, although, by reason of circumstances and changed conditions, it is no longer adapted to, or is useful for, such purposes. It is probable that the latter question more properly arises upon the motion to dissolve the injunction upon the denials of the answer. Francis M. Gilmer sold and conveyed to the city of Montgomery said plat of land for \$300, and the deed of conveyance provides that "said lands to be used only as a common or street, *otherwise to revert to me or my heirs.*" (We italicize.) This conveyance is not a dedication to the city, nor did the city acquire an absolute, unconditional title and estate in the land. In our opinion, the legislature would be powerless to authorize the city to sell the plat of land so as to convey a title to a purchaser. Much less, without such authority, could the city sell or appropriate it to other purposes than for a street or common. 2 Dill. Mun. Corp. § 651, and note. The land belonged to Gilmer. He had the right to dispose of it on such terms, and for such purposes, as he saw proper, not inconsistent with any law or the public good. The provision in the deed, "said lands to be used only as a common or street, otherwise to revert to me or my heirs," was as much a part of the consideration for the sale and conveyance as the \$300. A dedication, after it becomes effective, is irrevocable. An easement may be legally abandoned. The fee is then released from the burden of the easement, and the owner comes into possession as before the dedication. No court, nor the city of Montgomery, nor the legislature, has the power to eliminate from the deed of conveyance the provision which declares that, if the land is used for other purposes, "it is to revert to me or my heirs." To hold otherwise would invade the sanctity of contracts, and destroy rights reserved by solemn deed. Persons erecting improvements or making investments with reference to Gilmer park, and having notice, actual or constructive, of the terms and conditions upon which the city acquired the land, have no cause of complaint against the grantor or his heirs. He had the right, in making the sale, to contract for the conditions upon which the land should revert, and the city acquired and held the land upon these terms and conditions, and

no other. The case is different where there has been irrevocable dedication, or where the municipality purchases land, and obtains an absolute, unconditional, infeasible estate in fee. According to the averments of the bill, the city of Montgomery has abandoned the land as a park or street, and, so far as it is competent to act, has devoted the land to other purposes than "as a street or common;" but complainant's contention is, and the equity of the bill rests upon the contention, that any act of the city of Montgomery, by which the land might revert to the grantor or as provided in the deed, is null and void. The equity of the bill, summarily stated, is that the provision in the deed of conveyance of Gilmer to the city, "said lands to be used only as a common or street, otherwise to revert to me or my heirs," is without legal force, and ought to be stricken out. Certainly the parties to the deed did not so understand it, and we know of no rule of equity or justice which sustains the contention. It may be that, by some act of Gilmer, he is estopped from asserting any claim or right reserved or provided for by virtue of the deed, and the bill may be capable of amendment, so as to give it equity in this respect. We are unable to say.

The bill shows clearly that the other citizens of Montgomery will suffer like inconveniences and deprivations as himself by destruction of the park and the running of railroad engines over the land. Conceding that the bill shows that application to the city authorities for redress would be useless, has a single citizen of Montgomery, in his own name, the right to file a bill to redress what is shown to be a public wrong, if a wrong at all? Should not the bill be filed in the name of all or such as are willing to come in as complainants? To authorize a bill in the name of a single person, must it not aver, not by way of conclusion, a special injury, but the facts which show a special injury different from that sustained in common with others? 2 Dill. Mun. Corp. § 920, and note; *Church v. Portland* (Or.) 6 L. R. A. 259, and notes (18 Or. 73). These questions are not raised by demurrer, and are not before us on this appeal. We merely suggest for inquiry.

We will refer briefly to the decree dissolving the injunction. On page 38 of the record it is said: "This cause coming on to be heard on motion to dissolve the injunction, on the sworn denials of the answer, and to dismiss the bill for want of equity." We regard this as a submission upon the answers of all the defendants. Many exceptions are taken by answers which were not considered by the court. Leaving out of consideration all the averments of fact except those responsive, and such as should be considered on a motion to dissolve the injunction, under our view of the law, we are of the opinion the injunction was properly dissolved. We will reverse the decree dismissing the bill, and remand the cause, that complainant may have an opportunity to amend the bill as he may be advised. Thirty days will be allowed from the date of this decree within 43 L. R. A.

which to amend the bill, and, if not amended within the time, the court, at any regular term thereafter, shall dismiss the bill, absolutely.

J. W. WORTHINGTON *et al.*, Appts.,

v.

M. M. GWIN.

(.....Ala.....)

1. The fact that a small quantity of ore delivered under a contract providing for successive shipments of ore free from foreign substances was not free from them does not justify an abandonment of the entire contract.
2. The mere expression of dissatisfaction with an article furnished under a contract providing that it shall be satisfactory will not justify a termination of the contract, if there was not an actual dissatisfaction.
3. Declarations of the superintendent of a company when receiving ore, as to its being satisfactory, are competent evidence to show that it was satisfactory.
4. The expenditure for rails for a side track to be used in mining may be included in the damages for breach of a mining contract.
5. A witness who has testified as to dissatisfaction with the methods of a party in mining ore may be asked on cross-examination if he did not afterwards propose to contract with him for mining.

(November 5, 1898.)

APPPEAL by defendants from a judgment of the City Court of Birmingham in favor of plaintiff in an action brought to recover damages for breach of a mining contract. *Affirmed.*

The facts are stated in the opinion.

Mr. Walker Percy, for appellants:

A delivery of only a part of the quality ordered, or a failure to deliver any part of it, terminates the contract if the plaintiffs see proper to so treat and regard it.

Johnson v. Allen, 79 Ala. 391, 56 Am. Rep. 34; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366.

It was plaintiff's duty to mine and ship the ore in a manner satisfactory to the furnace company receiving the same.

A contract of hiring by which the employee guarantees to give satisfaction vests the master with full power to determine whether the work is satisfactory.

Allen v. Mutual Compress Co. 101 Ala. 574.

Messrs. Bowman & Harsh and O. W. Ward for appellee.

NOTE.—For an extensive review of the subject of the right to rescind or abandon a contract because of a default of the other party, see note to *Lake Shore & M. S. R. Co. v. Richards* (Ill.) 30 L. R. A. 33.

Brickell, Ch. J., delivered the opinion of the court:

This action was instituted by appellee to recover damages for the breach of a mining contract entered into between appellants and appellee's assignor. By the terms of the agreement, which was in the form of a written proposition by Thomas H. Dunn and the acceptance thereof by appellants, appellee was to "strip, quarry, and deliver one quarter of a mile of the outcrop [ore], commencing at a point nearest the Birmingham Mineral Railroad, at 50 cents (fifty cents) per ton of 2,240 lbs., weight to be ascertained from furnace company receiving the ore, such furnace company weighing the ore in the usual manner. Ore to be paid for on the 20th day of each month for the ore shipped on the previous month. The 50 cents per ton to be my whole compensation for mining, quarrying, and delivering said ore on board cars. You to loan what rails I need for delivering ore on board cars. Said rails to be returned when job is completed. The ore is to be stripped up to a face of from 10 to 15 feet, as I may prefer to do. I will commence work on the 8th, and put on a force of twelve or fifteen teams, and commence the delivery of the ore as soon thereafter as practicable. The said ore is to be mined and put on board the cars free of foreign substance, and in a manner satisfactory to the furnace company receiving the same." The principal breach assigned is that "defendants ordered plaintiff to cease mining ore under said agreement." There are other assignments, among which is one averring that defendants "caused the railroad company not to furnish the plaintiff with cars on which to load ore mined and to be mined under said agreement." The damages claimed consisted of the loss of profits which would have been earned if plaintiff had been allowed to carry out the contract, and also the loss sustained by reason of his purchase of a "large quantity of rails, tools, implements, and fixtures in and about carrying out said agreement." The overruling of the motions to strike out the averment by which the last-mentioned damages were claimed, and the averment that defendants had caused the railroad company not to furnish cars, did not constitute reversible error. If the averment that defendants caused the railroad company to refuse to furnish cars was insufficient as an assignment of a breach of the contract, the defect could have been taken advantage of by demurring to this assignment of breach without demurring to the whole complaint; and in such case it is discretionary with the trial court whether to strike the averment constituting the defective assignment, or to put the defendant to his demurrer, and its refusal to grant the motion to strike is not revisable on appeal, unless it affirmatively appears that defendant was prejudiced thereby. *Columbus & W. R. Co. v. Bridges*, 86 Ala. 448. The damages for the breach of a contract of this character, when its full performance is prevented by the one party without fault on the part of the other, may consist of one or the other of two items: First, the profits

that would have been realized by the full performance; and, second, if there would not have been any profits, or if the proof fails to show what would have been the amount, the reasonable expenditures made, and loss of time, less the value of the material on hand. *Danforth v. Tennessee & C. R. Co.* 93 Ala. 620; *United States v. Behan*, 110 U. S. 34, 28 L. ed. 170. Both items are not, of course, recoverable, since the profits would necessarily include the expenditures for tools, etc., less their value at the time the work on the contract ceased. Plaintiff's expenditure for tools, implements, fixtures, etc., was, therefore, a proper element of damages; and, while both the elements claimed, were not recoverable, defendants were able to protect themselves by a request for appropriate charges.

The contract contains a provision that "the said ore is to be mined and put on board the cars free of foreign substance, and in a manner satisfactory to the furnace company receiving the same." In view of the subject-matter of the contract, we think it was the manifest intention of the parties, by the use of the words employed, not to impose an obligation on the plaintiff with respect to the manner in which the ore was to be taken from the ground, or loaded on the cars, but simply to require him to furnish on board the cars ore free from foreign substance other than such as was contained in the vein of ore, and satisfactory in this respect alone to the furnace company to which it might be shipped. Thus construed, this clause of the contract was sufficiently complied with by furnishing such ore irrespective of the manner in which it was taken from the ground and loaded on the cars. The defendants sought to justify their action in causing plaintiff to cease work under the contract by a plea averring that "plaintiff failed to mine said ore and put it on board the cars free from foreign substance, and in a manner satisfactory to the furnace company receiving the same." A demurrer to this plea having been overruled, plaintiff replied thereto that he had mined ore under said contract for a period of twelve months, during which time he had delivered to defendants 18,000 tons of ore, and defendants had received and paid for the same amount without any complaint except as to a very small quantity of the ore; that, a short time after plaintiff began work under the contract, defendants complained of one car of the ore delivered, and refused to pay for the same, but plaintiff continued to furnish ore under the contract, and defendants accepted and paid for the same, for a long time thereafter, when further complaint was made; and that plaintiff was at all times ready and willing to mine and deliver ore according to said contract, and to rectify any mistake or failure on his part. The overruling of defendants' demurrer to this replication is assigned as error.

The principal question presented by these pleadings is whether the fact that a small quantity of the ore delivered by plaintiff was not free from foreign substance, and satisfactory to the furnace company receiving it,

operated as a discharge of the whole contract, and authorized defendants to terminate it. The effect of a breach of a contract upon the rights and liabilities of the parties depends upon the nature of the agreement. If the contract be entire in the sense that each and all its parts are interdependent, so that one part cannot be violated without violating the whole, a breach by one party of a material part will discharge the whole at the option of the other party; but, if the contract be severable,—susceptible of division and apportionment,—the amount to be paid by the one party depending upon the extent of performance by the other, the mere failure to perform a part of the contract in strict compliance with its terms will not of itself necessarily authorize the party injured to refuse further performance. *Wharton, Contr.* § 580; 7 *Am. & Eng. Enc. Law*, 2d ed. p. 150; *Johnson v. Allen*, 78 Ala. 391, 56 Am. Rep. 34. Whether a particular contract is entire or severable depends on the intention of the parties, to be determined from the language employed and the subject-matter. In the contract sued on, plaintiff obligated himself to mine and load on the cars all the ore within a given territory, the ore to be satisfactory to the furnace company to which it might be shipped; but the time and amount of the deliveries and the time of the completion of the contract were left unfixed, and necessarily the aggregate price to be paid for full performance was not named. No particular amount of ore was to be furnished each month, and a failure to furnish any ore in any one month would not, of itself, amount to a breach of the contract. The defendants' obligation was simply to permit plaintiff to mine all the ore within the territory named, and to pay on the 20th of each month a specified sum for each ton delivered during the previous month. There is nothing in the contract to indicate an intention of the parties that the right of plaintiff to make successive shipments of ore until the contract was completed should be dependent on the mere fact that each and every ton previously mined and shipped was free from foreign substance, and satisfactory to the furnace company receiving it, and had been accepted by defendants. The contract was, in its nature, severable, and not entire, and the rights and liabilities of the parties are to be determined according to the principles applicable to such contracts. Not every breach of such a contract by the one party will authorize the other to abandon the contract, and refuse further performance on his part. The circumstances attending the breach, the intention with which it was committed, and its effect on the other party and on the general object sought to be accomplished by the contract, must be considered in determining whether or not the breach will operate as a discharge. If the circumstances are such as manifest an intention on the part of the party in default to abandon the contract, or not to comply with its terms in the future, or if, by reason of the breach, the object sought to be effected is rendered impossible of accomplishment according to the original design of the parties, 43 L. R. A.

the breach will operate as a discharge of the whole contract unless waived; but no such result follows from a mere breach of a severable contract unattended with such circumstances or such effect. The right to claim a discharge of the whole contract depends, not on whether the act constituting the breach was inconsistent with the terms of the contract, but whether it was inconsistent with an intention to be further bound by its terms, or whether the breach was such as to defeat the purpose of the contract. The mere fact that a small quantity of the ore delivered to defendants was not free from foreign substance, and satisfactory to the furnace company receiving it, did not give defendants any right to forbid plaintiff to continue mining ore under the contract. *Blackburn v. Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159; *Cohen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Scott v. Kittanning Coal Co.* 89 Pa. 231, 33 Am. Rep. 753; *Mersey Steel & I. Co. v. Naylor*, L. R. 9 App. Cas. 434; *Lake Shore & M. S. I. Co. v. Richards*, 30 L. R. A. 33, notes (152 Ill. 59); 7 *Am. & Eng. Enc. Law*, 2d ed. p. 150. Against the natural and ordinary injury flowing from such breach defendants had an adequate protection and remedy,—the refusal to receive and pay for the unsatisfactory ore, or their action for the breach in this respect. If any extraordinary injury arose therefrom, the effect of which was to defeat the purpose of the contract, the pleadings fail to show it, and it cannot be inferred from the nature and subject-matter of the contract. It results that the demurrer to the replication was properly overruled. If the plea be construed as averring that plaintiff failed to furnish any ore that was free from foreign substance, and satisfactory to the furnace company, the replication denies the averment by alleging that defendants accepted and paid for 18,000 tons without complaint, and avers facts which negative any intention on the part of the plaintiff, in furnishing the ore complained of, to be no longer bound by the terms of the contract, and there is nothing in the pleadings or in the contract itself to indicate that defendants were so injured by the defaults admitted in the replication as to render it unjust to hold them to the obligation to accept such future deliveries as should comply with the contract.

From what has already been said, the correctness of the charges given at the request of plaintiff, and of the oral charge of the court, may be determined. Most of them assert the proposition that the mere fact that a few cars of the ore mined and shipped were not free from foreign substance, and satisfactory to the furnace company, if the circumstances showed no intention to no longer comply with the terms of the contract, did not of itself authorize the defendants to terminate the contract; and this proposition is in accord with the principles above announced. It is true, in predicated plaintiff's right to a verdict upon the insufficiency of the evidence to reasonably satisfy the jury that plaintiff intended to abandon the contract, or no longer comply with its terms, they ignore the effect the defaults may have

had upon the defendants, and the object sought to be accomplished by the contract, and would, perhaps, be erroneous on this account if the nature of the contract and its subject-matter were such that, considered in the light of the evidence, it could reasonably be inferred that the injury to defendants caused by the defaults defeated the purpose of the contract; but the record furnishes no ground for such inference. Charge 9 asserts a correct proposition. The mere expression by the furnace company of dissatisfaction with the ore would not authorize a termination of the contract. It is only the actual existence, not the mere expression, of dissatisfaction, regardless of its reasonableness, that can have this effect; and it was for the jury to say whether this dissatisfaction did exist as a fact, or whether it was expressed as a mere pretext. *Electric Lighting Co. v. Eider Bros.* 115 Ala. 138. The charges requested by appellants were properly refused. Appellee had a right, under the contract, to mine all the outcrop ore within the described territory back to a face of 15 feet, and this right was not affected by the fact that he had mined some ore beyond the territory described, or mined in some places within the territory back to a face of more than 15 feet. If there were some places within the territory not mined back to such a face, appellee had a right to mine them to the extent stipulated in the contract, notwithstanding a face of more than 15 feet was reached in other places; and this right was not exhausted by the fact that the ore mined outside the territory and beyond the stipulated face, added to that mined within the territory and the 15-foot facing, was equal in amount to all the ore that could have been properly mined in accordance with the terms of the contract.

Many of the assignments of error relate to evidence concerning the quality of the ore. If, by the questions relating to the quality of the ore, it was intended to elicit evidence as to the amount of metallic iron contained therein, they called for irrelevant testimony, and the objections thereto should have been sustained. But it does not clearly appear that such was the intention, and such evidence was not elicited by the questions. Both parties treated the last clause of the contract as meaning that the ore should be free from foreign substance, and in this respect only satisfactory to the furnace company receiving it, and the court, at the request of appellee, charged that it was immaterial what was the quality of the ore itself. These assignments of error are not, therefore, well taken. The declarations of the superintendent of the furnace company receiving the ore, made while receiving it, tending to show that it was satisfactory, were competent and material. Testimony as to the amount expended by appellee for rails for the side track was also relevant on the question of damages. The testimony tends to show that the expenditure for this purpose was necessary, and this expenditure was one element of damages recoverable in the event no loss of profits was proved. As stated above, appellant could have protected himself by re-

questing an appropriate charge. We are unable to perceive the relevancy of the testimony of McCormack, the general manager of the Tennessee Coal & Iron Company, to which all the ore was shipped, that he wanted plaintiff "to take a contract at a reduced price with the Tennessee Company, at less than 50 cents a ton." The evidence was doubtless offered on the theory that the willingness of the furnace company which had received the ore mined by plaintiff under this contract to employ him to mine ore under a contract with it at a less price was evidence tending to show that all the ore shipped by plaintiff was satisfactory to said furnace company; but we are of the opinion no such inference can reasonably be drawn from the evidence, and that the court below erred in admitting it. With this exception we find no error in the record.

An application for rehearing having been filed, the court handed down the following response:

Per Curiam:

McCormack was the defendants' witness, and had testified in their behalf to his dissatisfaction with the ore mined and delivered to his (the witness's) company by the plaintiff,—to dissatisfaction both as to the percentage of metallic iron in the ore itself, and to plaintiff's manner of mining the ore in respect of refuse left in the output. Of course, as held in the original opinion, the testimony of McCormack, elicited by the defendants, that he had proposed to plaintiff, after the time of his alleged dissatisfaction, "to take a contract at a reduced price with the Tennessee [witness's] Company to mine ore at less than 50 cents a ton," was not competent as original evidence upon any issue in the case. But we are now of opinion that coming, as it did, on the cross-examination by plaintiff of defendants' witness, it was clearly competent as weakening the force of the witness's testimony in chief as to his dissatisfaction with plaintiff's methods in the mining of ore. We therefore conclude, on the application for rehearing, that this evidence was properly received.

The judgment of reversal is set aside, and the judgment of the City Court will be affirmed.

**SOUTHERN RAILWAY COMPANY, Appt.,
v.**

Nellie P. HARRISON.

(.....Ala.....)

1. A mistake in a bill of lading by stating interstate rates less than those scheduled in accordance with the act of Congress does not preclude the carrier from recovering the full schedule rate as a condition of delivering the goods.

2. The law of the state in which a com-

NOTE.—The above case overrules *Mobile & O. R. Co. v. Dismukes* (Ala.) 17 L. R. A. 113, by virtue of the controlling authority of *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910.

tract of interstate transportation was made, and in which the performance begins, cannot govern the contract so far as it conflicts with the act of Congress to regulate commerce.

(November 5, 1898.)

APPEAL by defendant from a judgment of the City Court of Birmingham in favor of plaintiff in an action brought to recover damages for the alleged conversion of certain carriages which had been delivered to defendant for transportation. *Reversed.*

The facts are stated in the opinion.

Messrs. Smith & Weatherly, for appellant:

The case differs materially from the *Dismukes Case* in important particulars, namely:

First. The rate proposed to be collected was not unreasonable and excessive, as in the *Dismukes Case*.

Second. The point is here raised for the first time that the contract having been entered into and to be partly performed in a foreign state, and being entire, must be governed by the laws in force in the state where in it was entered into and to be partly performed.

Savannah, F. & W. R. Co. v. Bundick, 94 Ga. 775, 5 Inters. Com. Rep. 289.

The court should overrule entirely, or modify or limit, its decision in *Mobile & O. R. Co. v. Dismukes*, 94 Ala. 131, 17 L. R. A. 113, 4 Inters. Com. Rep. 200.

Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910; *Savannah, F. & W. R. Co. v. Bundick*, 94 Ga. 775, 5 Inters. Com. Rep. 289; *Baird v. St. Louis, I. M. & S. R. Co.* 41 Fed. Rep. 592.

The rights and liabilities of the parties to this contract must be governed by the law of Georgia.

Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 32 L. ed. 788; *McDaniel v. Chicago & N. W. R. Co.* 24 Iowa, 412; *Hazel v. Chicago, M. & St. P. R. Co.* 82 Iowa, 477; *Merchants' Dispatch Transp. Co. v. Furthmann*, 47 Ill. App. 561; *Meuer v. Chicago, M. & St. P. R. Co.* 5 S. D. 568, 25 L. R. A. 81; *Fonseca v. Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 340; *Potter v. The Majestic*, 20 U. S. App. 503, 60 Fed. Rep. 624, 9 C. C. A. 161, 23 L. R. A. 746; *Dyke v. Erie R. Co.* 45 N. Y. 113, 6 Am. Rep. 43.

Messrs. Gregg & Thornton, for appellee:

The question as to whether the appellee could recover in an action on the contract of shipment is immaterial. Appellee's action is in case, and is founded upon the breach of a common-law duty. The contract of shipment is set out and mentioned in the complaint only by way of inducement.

Sharpe v. National Bank, 87 Ala. 644; *Wilkinson v. Moseley*, 18 Ala. 288.

The action includes a conversion, and the appellant was responsible for all damage to the goods, while wrongfully withheld and during the conversion as an insurer.

Hooks v. Smith, 18 Ala. 338; 4 Lawson, Rights, Rem. & Pr. § 1700.
43 L. R. A.

There may be a temporary conversion of personal property.

Gray v. Crocker, 8 Port. (Ala.) 191; *Bolling v. Kirby*, 90 Ala. 215.

The action was properly brought and the allegations in the complaint present the facts properly.

Alabama Code, § 2664; *Hutchinson*, Carr. 2d ed. § 447a, 514.

Brickell, Ch. J., delivered the opinion of the court:

On February 20, 1896, appellant, a common carrier engaged in interstate commerce, received from appellee, at Atlanta, Georgia, for transportation over its road to Birmingham, Alabama, two carriages, of the alleged value of \$1,200, and delivered to appellee a bill of lading in which the rate specified was 96 cents per 100 pounds, and the weight 2,500 pounds; making the aggregate charge \$24. Upon the arrival of the carriages in Birmingham a few days later, appellee tendered that amount in payment of the charges; but the appellant refused to accept the tender or to make delivery of the carriages. The ground of this refusal was that the rate specified in the bill of lading was less than that fixed by the schedule of rates, fares, and charges established and published in accordance with the act of Congress known as the "Interstate Commerce Law," and that the agent of appellant at Atlanta had, inadvertently and by mistake, wrongfully and in violation of that law, agreed upon and specified in a bill of lading a rate of 96 cents per 100 pounds, instead of \$1.28, as said schedule required him to charge. Appellee refused to pay the extra charge, amounting to \$8; and appellant retained possession of the carriages until August 11, 1896, when it delivered them to appellee upon the payment of \$24, the stipulated charge. Appellee instituted this suit to recover the damages resulting to her from the loss of the use and hire of the carriages, the actual injury thereto, and their deterioration in value, during the period of detention.

The subject-matter of the contract, the transportation of goods from one state to another, was an act of interstate commerce and as such a subject of Federal cognizance, and governed by the act of Congress entitled "An Act to Amend an Act Entitled an Act to Regulate Commerce," approved February 4, 1887. By the provisions of § 6 of this act, every common carrier subject to the same is required to print and publicly post at each station on its route, for the inspection and information of the public, the schedule of fares, rates, and charges for the carriage of passengers and property thereon. It is further provided that "when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, or collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than is specified in such published schedule of rates, fares, and

charges, as may at the time be in force." It is further unlawful for any person, in any manner, knowingly to obtain transportation at less than the published schedule of rates; and any violation of the statute, whether by the consignor or consignee, or by the carrier, is made a highly penal offense. In *Mobile & O. R. Co. v. Dismukes*, 94 Ala. 131, 17 L. R. A. 113, 4 Inters. Com. Rep. 200, decided in 1891, we had occasion to consider a contract for the transportation of goods into this state from another state at less than the published schedule rates, and to construe the act of Congress with respect to its effect on such a contract, and on the rights of the parties thereto. In that case, as in this, the plaintiff sought to recover damages for the refusal of the carrier to deliver the goods after tender of the amount of the charges specified in the bill of lading. We then held that although the contract was illegal and void as to the carrier, because made in violation of the Interstate Commerce Law, and could not be made the basis of any action on the part of the carrier, yet, inasmuch as the consignor had not knowingly obtained the transportation at less than the schedule rates, his act was not tainted with the criminality of the carrier, and, not being *in pari delicto* with the carrier, he was entitled to invoke that principle of law which authorizes the enforcement of such a contract in behalf of the innocent party, and he could, therefore, upon the payment or tender of the charges named in the bill of lading, maintain the action, and recover damages for the failure of the carrier to deliver the goods to him. It is now insisted by counsel for appellant that the present case differed from the case cited in two particulars. First, because the schedule rate, which appellant claims to be entitled to collect, was not unreasonable or excessive, or disproportionate to the value of the goods, as in the *Dismukes Case* in which the value of the goods was \$40, the charges specified in the bill of lading \$5.44, and the schedule charges \$29.30; and second, because the contract was made in the state of Georgia, and was therefore to be governed, as to its nature, obligation, and interpretation, by the law of that state, and not by the law of Alabama, and, by the law of Georgia, a common carrier, engaged in interstate traffic, who undertakes to transport goods from one state to another at less than the published schedule rates established in accordance with the act of Congress, is not precluded from recovering the full schedule rate because by mistake a less rate was agreed upon and specified in the bill of lading, and may retain possession of the goods until the full schedule rate is paid. We are of the opinion that our ruling in the *Dismukes Case* can no longer be followed, either in this or in any similar case involving the right of a consignor or consignee of goods transported by a common carrier from one state to another to recover damages for the refusal of the carrier, after the arrival of the goods at their destination, to deliver them upon the payment or tender of the charges agreed upon and named in the bill of lading, when such charges are less than

the published schedule charges in force at the time the contract was made, established in accordance with the provisions of the Interstate Commerce Law. But neither of the particulars in which it is contended this case differs from that will justify any modification of, or departure from, that ruling. The principle on which that case was decided is not affected by the degree of disparity between the schedule rate and the stipulated rate. What was there said in this respect was, by way of illustration only, to show the wrong and injustice of permitting a carrier who may have induced a shipper, by promises of low rates, to ship his goods over its line, to recover a greater, and perhaps extortionate, rate. Nor can the ruling in that case be affected by the fact that by the law of Georgia, in which state the contract of carriage was made, the carrier may recover the schedule rate, notwithstanding a lower rate may have been agreed upon. The general rule of law, it is true, is that a contract is governed as to its nature, obligation, validity, and interpretation, by the law of the place where it is made, unless the parties have in view some other law, or unless it is to be wholly performed in some other place, in which case the law of the place of performance, or the law which both parties had in view, must govern. *Peet v. Hatcher*, 112 Ala. 514; *Cubbedge v. Napier*, 62 Ala. 518; *Donegan v. Wood*, 49 Ala. 242, 20 Am. Rep. 275. And the weight of authority is that this rule requires a contract for the transportation of goods by a common carrier from one state or country to another to be governed by the law of the place where it is made, and where the performance begins, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other state or country. *Whart. Conf. L. § 471*; *Hutchinson, Carr. §§ 140-144*; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788; *McDaniel v. Chicago & N. W. R. Co.* 24 Iowa, 412; *Hazel v. Chicago, M. & St. P. R. Co.* 82 Iowa, 477; *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Meuer v. Chicago, M. & St. P. R. Co.* 5 S. D. 568, 25 L. R. A. 81; *Fonseca v. Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 340; *Potter v. The Majestic*, 20 U. S. App. 503, 9 C. C. A. 161, 23 L. R. A. 746, 60 Fed. Rep. 625. But this rule can have no application where the subject-matter of the contract is one of national cognizance and Congress has assumed exclusive cognizance of it by enacting a law for its complete regulation. In such case the parties must be presumed to contract with reference to the act of Congress, and its effect on the subject-matter, and not with reference to the law of the state where the contract was made; and they cannot, by agreement or otherwise, make any other law the applicatory law in the determination of the nature, validity, or interpretation of the contract. No principle of comity requires the courts of one state to place the same construction upon the act of Congress, with respect to its effect on such a contract, given to it by the decisions of the supreme court of another state, in which the contract was

made. Unless the national law has been construed by the Supreme Court of the United States, the courts of the various states will follow their own judgment in determining its effect on the contract, and the rights of the parties thereto growing out of it; but, if it has received a construction from the highest national tribunal, its decision is supreme, and by it the state courts are bound. *Tubbs v. Wilhoit*, 73 Cal. 61; *State, Carly, v. Andriano*, 92 Mo. 70; *Lyman v. Central Vermont R. Co.* 59 Vt. 167; *Bressler v. Wayne County*, 25 Neb. 468. The Interstate Commerce Law has been construed by the Supreme Court of the United States, and its effect upon a contract by a common carrier to transport goods from one state to another at less than the published schedule rates, and upon the rights of the parties to such a contract, has been declared. In *Gulf, O. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, the plaintiff sued to recover damages for the refusal by the carrier to deliver goods consigned to him, after tender of payment of the stipulated charges named in the bill of lading. The goods (a lot of furniture) had been received by the carrier at St. Louis, Missouri, for transportation to Cameron, Texas, at a stipulated rate, specified in the bill of lading, of 69 cents per 100 pounds, the charges amounting to \$82.80, whereas the published schedule rate in force at the time was 84 cents, and the charges should have been \$100.80; and the plaintiff, as in this case, was ignorant of the fact that the rate obtained was less than the schedule rate. It was held, in an opinion by Brewer, J., that the plaintiff was not entitled to recover. It is true that the only question discussed in the opinion was whether or not the interstate act superseded the Texas statute which prohibited a common carrier from charging or collecting from the owner or consignee of freight a greater sum than that specified in the bill of lading, and this question was decided in the affirmative, as in the *Dismukes Case*. But this was not the only effect of the decision, and it is by its effect on the rights of the parties to such a contract, by whatever process of reasoning the

decision may be reached, that the state courts are bound. The clear effect of the decision was to declare that one who has obtained from a common carrier transportation of goods from one state to another at a rate, specified in the bill of lading, less than the published schedule rates filed with and approved by the Interstate Commerce Commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods, or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges; in other words, that, whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to the goods only by the payment or tender of payment, of such amount. Such is now the supreme law, and by it this and the courts of all other states are bound, and for this reason our ruling in the *Dismukes Case* can no longer be followed.

It results that the inquiry as to the law of the state of Georgia was entirely immaterial and irrelevant, and the court below did not err in sustaining the objection to appellant's offer of evidence on this point. But proof of compliance with the requirements of the Interstate Commerce Law, of the amount of the charges fixed by the published schedule of rates and charges, and of the other facts offered in evidence by appellant, was relevant; and the demurrers to the pleas setting up these facts should have been overruled, and under such pleas evidence of these facts should have been admitted. Upon uncontradicted proof of these facts, if they had been in evidence, in connection with the other evidence in the case, the defendant would have been entitled to the general charge in its favor.

The judgment of the City Court must be reversed, and the cause remanded for further proceedings in conformity to this opinion.

CALIFORNIA SUPREME COURT.

Annie O'DONNELL, *Appt.*,

v.

Charles W. SLACK, Judge of Superior Court of City and County of San Francisco.

(.....Cal.....)

1. The disposal of the body of a person who has not made any testamentary provision therefor cannot be taken away from his widow and given to a stranger to his blood.
2. Neither the court in probate nor the

personal representative has any right to the body of a deceased person who has made no testamentary provision on the subject, nor any right to control the manner of disposing of the remains, or to dictate the place of interment.

(January 13, 1899.)

APPPLICATION by petitioner for a writ to review the action of the Superior Court of the City and County of San Francisco awarding the custody of the remains of petitioner's deceased husband to Matthew Mar-

NOTE.—As to rights and duties in regard to the disposition of a dead body, see note to *Larson v. Chase* (Minn.) 14 L. R. A. 85; see also 43 L. R. A.

Hackett v. Hackett (R. I.) 19 L. R. A. 558; *Choplin v. Dauphin* (La.) 33 L. R. A. 123; and *Thompson v. Deeds* (Iowa) 35 L. R. A. 54.

tin for removal to Ireland for interment.
Order annulled.

The facts are stated in the opinion.

Messrs. Stafford & Stafford for petitioner.

Henshaw, J., delivered the opinion of the court:

This is an application for a writ of review. Roger O'Donnell, husband of petitioner, died testate. His will was admitted to probate in the city and county of San Francisco. It contained no provision or direction for the disposition of his body. During the course of administration the widow filed a petition setting forth that the deceased had expressed a last wish that his remains should be buried beside those of his father and mother, at Finn Town, Ireland, and praying for an order enabling her to fulfill this request. The court made its order, authorizing and directing the executor "to pay over to Annie O'Donnell, the widow of the deceased, the sum of \$700, out of the funds of the estate, to be used and expended by Annie O'Donnell in defraying the expense of removing from the city and county of San Francisco to Finn Town, Ireland, and there suitably interring, the body of Roger O'Donnell, deceased." The final account subsequently filed by the executor showed payment to Annie O'Donnell of the \$700 for the purposes named. The account was allowed and settled, and a decree of distribution was entered; but on the same day the court made the following order: "Good cause appearing therefor, it is hereby ordered that the fund of \$700 heretofore, by order herein dated February 1, 1897, allowed out of said estate for the purpose of defraying the expense of the removal of the body of deceased to Ireland, and there interring the same, and which fund, less the sum of \$65 already expended in preliminary preparations for the removal of said body, is now in the possession of John A. Percy, Esq., be retained by said John A. Percy, Esq., in his possession, subject to the further order of the court." On April 26th the court made its decree finally discharging the executor. On August 13th John A. Percy, who had been the attorney for Annie O'Donnell, filed a petition stating that he still retained in his possession the funds set apart for the transportation and burial of the body of the deceased, and prayed an order appointing some suitable person to execute the order of court. The court fixed a date for the hearing of this petition, and ordered service of notice upon all interested parties. The widow appeared, and by verified pleading set up that she had been sick, and therefore unable to take the body to Ireland; that she had recovered, and was willing, and would be ready within three weeks, to remove the body,—and asked that Percy be directed to pay to her the moneys in his hands. She objected to the payment of the money to anyone else, objected to any other person being empowered to remove the body, denied the jurisdiction of the court to modify its original order, and "respectfully informs the court that she does not and will not consent

to the removal of the body of her deceased husband to Ireland or elsewhere by any other person than petitioner herself." After the hearing the court made its order commanding that the body be immediately removed to Finn Town, Ireland, and giving Matthew Martin authority, and directing him, to execute the order, and further directing Percy to pay over to Martin the money in his hands, or so much thereof as might be necessary for the indicated purposes. Martin is a stranger in blood to the deceased.

By this writ there is sought to be annulled the order last above mentioned, directing Martin to transport the body of the deceased to Ireland, and there supervise its interment. The validity of the original order, by which the \$700 was ordered set apart to and paid over to Annie O'Donnell, the widow, for the same purpose, is not called in question. The single proposition which is seriously argued is whether the court in probate did or did not exceed its jurisdiction in attempting to deliver to one not of kin to the deceased his body, and in directing a particular disposition to be made of that body by this stranger. It is also further contended that the order is in excess of jurisdiction, because the moneys directed to be paid under the original order had in fact been paid; that the executor had complied with the directions of the court as to payment, and had entered the payment as a credit to himself in his final account; that his final account had been allowed, and final distribution of the estate decreed, and the control of the property had therefore passed from the court. *Ex parte Smith*, 53 Cal. 204; *Wheeler v. Bolton*, 54 Cal. 302. The last proposition, which involves a consideration of the court's jurisdiction and control of the burial fund after entry of the decree of distribution, we do not think it necessary to consider, for the reason that the court exceeded its jurisdiction in attempting to award the custody of the body of the deceased to a stranger to his blood, to the exclusion of the next of kin; indeed, that it exceeded its jurisdiction in attempting to make any award of the custody, or to direct any disposition to be made of the body.

The body of one whose estate is in probate unquestionably forms no part of the property of that estate. It is recognized that the individual has a sufficient proprietary interest in his own body after his death to be able to make valid and binding testamentary disposition of it. The court in probate and the personal representative acquire jurisdiction from the last testament to see that its provisions in this regard, as in all others, are duly executed; but where, as in this case, the will is silent, the court in probate has no such power. The duty of the burial of the dead is made an express legal obligation (Pen. Code, § 292); but, aside from the obligation, there is a right, well-defined and universally recognized, that in disposing of the body of deceased the last sad offices belong of right to the next of kin, within which phrase, as here employed, is included the surviving husband or wife. This right had its

origin in sentiment, in affection for the dead, in religious belief in some form of future life. It therefore early became a subject of cognizance by the ecclesiastical courts. But while thus having its origin in affection and religious sentiment, it soon came to be recognized as a strictly legal right; and the next of kin, while not, in the full proprietary sense, "owning" the body of the deceased, have property rights in the body which will be protected, and for a violation of which they are entitled to indemnification. Thus, if the right is interfered with, damages will be awarded. *Smiley v. Bartlett*, 6 Ohio C. C. 234. "That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted, yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty, imposed by the universal feelings of mankind, to be discharged by someone towards the dead, a duty, and we may also say a right, to protect from violation, and a duty on the part of others to abstain from violation; and it may therefore be considered as a sort of quasi property, and it would be discreditable in any system of law not to provide a remedy in such a case." *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667. The whole question is learnedly considered in *Ruggles' Report*, 4 Bradf. 503, Appx. The conclusions there reached are those which have been generally adopted by the courts of the land. One of those conclusions is "that the right to bury a corpse and to preserve its remains is a legal right, which the courts of law will recognize and protect." Another is

that "such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin." And another, that "the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure." In employing the phrase "next of kin," Mr. Ruggles explains that it was not used for the purpose of denying or even questioning the legal right of a surviving husband to bury his wife's remains. *Hackett v. Hackett*, 18 R. I. 155, 19 L. R. A. 558. The same right belongs to the surviving wife. *Hackett v. Hackett*, 18 R. I. 155, 19 L. R. A. 558; *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 85; *Perley*, Mortuary Law, 27; *Hadsell v. Hadsell*, 7 Ohio C. C. 196; *Durell v. Hayward*, 9 Gray, 248, 69 Am. Dec. 284. Therefore, in a case such as this, neither the court in probate nor the personal representative has any right to the body of the deceased, nor any right to control the manner of disposing of the remains, nor to dictate the place of interment. The proper expenses of such disposition may well be a charge against the estate, but the duty and right of burial are quite different things from the duty and right of auditing and paying the expenses of such burial. It is concluded, therefore, that the court exceeded its jurisdiction in intrusting the body of the deceased to Matthew Martin, and in directing that by him the body should be taken to Finn Town, Ireland, and there interred.

The order is therefore annulled.

We concur: **Beatty**, Ch. J.; **Garoutte**, J.; **Temple**, J.; **Harrison**, J.

DISTRICT OF COLUMBIA COURT OF APPEALS.

Edward CLARK, *Appt.*,
v.

MUTUAL RESERVE FUND LIFE ASSOCIATION.

(.....D. C.....)

1. Mere allegations of the effect and operation of the charter or by-laws of a corporation are not facts that are admitted by a demurrer.
2. An allegation as to what constitutes a contract of insurance in a mutual company is simply the statement of a conclusion of law, which is not sufficient, as against a demurrer, when by-laws, rules, regulations, and circulars referred to are not set out.
3. The constitution and by-laws of a mutual insurance association are binding upon the members, whether they have actual knowledge thereof or not.
4. A foreign insurance company is not made a corporation of the District of

Columbia by having an agency and doing business in the District, in compliance with the act of Congress of 1887, chap. 46, § 4, which subjects it to process when served on the agent.

5. A suit to enjoin a foreign insurance company to which all assessments are payable at its home office, but which has an agency and carries on business within the jurisdiction of the court, against collecting from a resident therein any excessive and illegal assessments, and against forfeiting his policy for nonpayment of such assessments, while seeking also an accounting and a discovery of the books and papers of the corporation, and a determination of the true basis of assessments, is beyond the power or jurisdiction of a court of equity, as the relief sought would require the control, direction, and revision of the internal affairs of the corporation.

(February 7, 1899.)

NOTE.—For refusal of court to interfere with management of a foreign corporation, see also *Republican Mountain Silver Mines v. Brown* (C. C. App. 8th C.) 24 L. R. A. 776; and *Madden v. Penn Electric Light Co.* (Pa.) 38 L. R. A. 638. For effect of by-laws of a corporation as notice, see *note to Moyer v. East Shore Terminal Co.* (S. C.) 25 L. R. A. 48. 43 L. R. A.

A PPEAL by complainant from a decree of the Supreme Court for the District of Columbia dismissing a bill to enjoin defendant from changing the rate of assessment upon plaintiff's insurance certificate from that indorsed thereon when the certificate was issued. *Affirmed.*

The facts are stated in the opinion.

Messrs. Richard C. Thompson and Charles L. Fralley, for appellant:

The court below has jurisdiction to entertain the bill of complaint.

The acts complained of in the bill do not affect the complainant solely in his capacity as a member of the Mutual Reserve Fund Life Association, and in such a case the court has jurisdiction to entertain the action.

Guilford v. Western U. Teleg. Co. 59 Minn. 332; *Prouty v. Michigan S. & N. I. R. Co.* 1 Hun, 655; *Babcock v. Schuylkill & L. Valley R. Co.* 31 N. Y. S. R. 643; *Ives v. Smith*, 19 N. Y. S. R. 556.

The right of the appellee to do business in the District of Columbia appears to rest upon the principle of comity.

If, then, the New York courts will take jurisdiction of actions involving contract obligations of foreign corporations, even though certain corporate matters have to be inquired into, it certainly seems reasonable and proper and in accordance with the law of comity that when a citizen of this jurisdiction proceeds to have his contract with a New York corporation enforced in our courts, or a breach of said contract prevented, the same rights should be accorded him here as would be accorded a New York litigant in a New York court in an action brought there against a Washington corporation, even though the suitor here be a member of the New York corporation.

The rights of a member of a mutual insurance company as a party insured are separate and distinct from his rights and privileges as a member of the corporation.

Fire Ins. Co. v. Connor, 17 Pa. 137; *Rosenberger v. Washington Mut. F. Ins. Co.* 87 Pa. 207; *Cohen v. New York L. Ins. Co.* 50 N. Y. 610.

The relief asked for is such as the court has power to afford; but jurisdiction will be exercised even though a part only of the relief can be granted.

Singer Sewing-Mach. Co. v. Union Button-Hole & E. Co. Holmes, 253; *Ervin v. Oregon R. & Nav. Co.* 62 How. Pr. 490; *Western U. Teleg. Co. v. Union P. R. Co.* 3 Fed. Rep. 423.

The bill of complaint states a cause of action.

A breach of contract is clearly set forth in the bill.

When a table of rates of assessment has been made a part of the contract of insurance assessments must be strictly in accordance therewith.

Beach, Priv. Corp. § 592; *York County Mut. Aid Asso. v. Myers*, 11 W. N. C. 541; *Niblack, Mut. Ben. Soc.* § 250, p. 475.

No by-law, and much less a mere resolution of the governing body of an association, passed without the consent of or without notice to the policy holder, can alter or impair the obligation of the contract of insurance or take away a vested right.

Fire Ins. Co. v. Connor, 17 Pa. 137; *Martin v. Mutual F. Ins. Co.* 45 Md. 52; *Stewart v. Lee Mutual F. Ins. Asso.* 64 Miss. 499; *Great Falls Mut. F. Ins. Co. v. Harvey*, 45 43 L. R. A.

N. H. 292; *Bliss, Life Ins.* p. 767; 11 Am. & Eng. Enc. Law, 2d ed. p. 96, and cases cited.

And this rule is applicable to the contracts of a mutual company.

Elkhart Mut. Aid Benev. & Relief Asso. v. Houghton, 98 Ind. 149; *Bacon, Ben. Soc. ed.* 1894, § 180; *Cluff v. Mutual Ben. L. Ins. Co.* 99 Mass. 325.

An assessment in violation of the contract of insurance is void.

Joyce, Ins. §§ 1253, 1391; *Stewart v. Lee Mutual F. Ins. Asso.* 64 Miss. 499; *Mutual Endowment Assessment Asso. v. Essender*, 59 Md. 403; *Underwood v. Iowa L. of H.* 66 Iowa, 134; *Baker v. Citizens' Mut. F. Ins. Co.* 51 Mich. 243.

Even if a person pays illegal assessments in a mutual company he is not estopped from denying the right of the company to levy such assessments, nor from questioning their legality and in all respects claiming his rights under the contract of insurance.

Niblack, Mut. Ben. Soc. § 143; *Farmers' Mut. Ins. Co. v. Knight*, 162 Ill. 470; *Schultz v. Citizens' Mut. L. Ins. Co.* 59 Minn. 308.

The bill alleges fraud and mismanagement.

The bill alleges a discrimination among the policy holders which is in direct violation of the policy of insurance. Such discrimination renders the assessment void.

Joyce, Ins. §§ 350, 368.

Messrs. Frank R. Lawrence, George Burnham, Jr., and Gordon T. Hughes, with **Mr. A. A. Lipsecomb**, for appellee:

The supreme court of the District of Columbia has no jurisdiction over the subject-matter of the bill, no authority to grant the relief prayed for, and no power to enforce a decree granting such relief.

The courts of one jurisdiction will not interfere in controversies relating to the internal management of the affairs of a corporation organized in another jurisdiction.

6 Thomp. Corp. § 7904; *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151; *Wilkins v. Thorne*, 60 Md. 253; *Smith v. Mutual L. Ins. Co.* 14 Allen, 336; *Wilkinson v. Michigan S. & N. I. R. Co.* 13 Allen, 400; *Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co.* 135 Mass. 34, 46 Am. Rep. 439; *Madden v. Penn Electric Light Co.* 181 Pa. 617, 38 L. R. A. 638; *Bank of Virginia v. Adams*, 1 Pars. Sel. Eq. Cas. 534; *Gregory v. New York, L. E. & W. R. Co.* 40 N. J. Eq. 38; *Stafford v. American Mills Co.* 13 R. I. 310; *Hovell v. Chicago & N. W. R. Co.* 51 Barb. 378; *Berford v. New York Iron Mine*, 24 Jones & S. 236; *Fisher v. Charter Oak L. Ins. Co.* 20 Jones & S. 179; *House v. Cooper*, 30 Barb. 157; *Chase v. Vanderbilt*, 5 Jones & S. 334; *Cumberland Coal & I. Co. v. Hoffman Steam Coal Co.* 30 Barb. 159; *Dela-ware, L. & W. R. Co. v. New York, S. & W. R. Co.* 12 Misc. 230; *Leary v. Columbia River & P. S. Nav. Co.* 82 Fed. Rep. 775; *Murfree, Foreign Corp.* § 226.

The present bill and the relief prayed for in it call upon the court below to interfere in the internal affairs of the association.

North State Copper & Gold Min. Co. v. Field, 64 Md. 151; *Wilkins v. Thorne*, 60 Md. 253; *Berford v. New York Iron Mine*, 24

Jones & S. 236; *Fisher v. Charter Oak L. Ins. Co.* 20 Jones & S. 175; *Madden v. Penn Electric Light Co.* 181 Pa. 617, 38 L. R. A. 638; *Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co.* 135 Mass. 34; *Leary v. Columbia River & P. S. Nav. Co.* 82 Fed. Rep. 775.

Those who insure in mutual associations are members of the corporate body.

May, Ins. 2d ed. § 548; *Lake v. Minnesota Masonic Relief Asso.* 61 Minn. 96; *Biddle, Ins.* §§ 47, 48; *Cooke, Life Ins.* § 8.

Legislation of various states in regard to foreign corporations may be divided into two classes.

In the first class fall all statutes which impose upon foreign corporations seeking to do business within the borders of the enacting state the condition that they shall, in substance, become domestic corporations of that state.

The second class includes all statutes which simply recognize foreign corporations and their continuance in existence as such, and permit them, as foreign corporations, to conduct their operations upon complying with certain conditions, relating generally to the appointment of a resident agent upon whom process may be served.

Whether a given statute relating to the status of a foreign corporation falls within the first or the second class is purely a question of legislative intent, to be decided as a matter of construction.

Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. ed. 354; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83; *Uphoff v. Chicago, St. L. & N. O. R. Co.* 5 Fed. Rep. 545; *James v. St. Louis & S. F. R. Co.* 46 Fed. Rep. 47; 6 Thomp. Corp. § 7890.

The common example of the second class is an act permitting a foreign corporation to do business within the state upon condition that it appoint a resident agent for the service of process upon the foreign corporation as such.

Goodlett v. Louisville & N. R. Co. 122 U. S. 391, 30 L. ed. 1230; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83; *Smith v. Mutual L. Ins. Co.* 14 Allen, 336; *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151.

The act of 1887, relating to the appointment of agents within the District, simply recognizes foreign insurance companies as such, and permits them as such to carry on their business within the District upon condition that they appoint an agent for the service of process.

Manhattan L. Ins. Co. v. Warwick, 20 Gratt. 614, 3 Am. Rep. 218; *Continental Ins. Co. v. Kasey*, 25 Gratt. 268, 18 Am. Rep. 681; *Connecticut Mut. L. Ins. Co. v. Duerston*, 28 Gratt. 630; *Cowardin v. Universal L. Ins. Co.* 32 Gratt. 445; *North Star Copper & Gold Min. Co. v. Field*, 64 Md. 151; *Guilford v. Western U. Teleg. Co.* 59 Minn. 332; *Smith v. Mutual L. Ins. Co.* 14 Allen, 336; *Williston v. Michigan, S. & N. I. R. Co.* 13 Allen, 400; *Kimball v. St. Louis & S. F. R. Co.* 157 Mass. 7; *Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co.* 135 Mass. 34, 46 43 L. R. A.

Am. Rep. 439; *Stafford v. American Mills Co.* 13 R. I. 310; *Madden v. Penn Electric Light Co.* 181 Pa. 617, 38 L. R. A. 638.

The courts of New York have refused to interfere with the internal affairs of foreign corporations.

Fisher v. Charter Oak L. Ins. Co. 20 Jones & S. 179; *Howell v. Chicago & N. W. R. Co.* 51 Barb. 378; *Ives v. Smith*, 19 N. Y. S. R. 556; *Babcock v. Schuykill & L. Valley R. Co.* 31 N. Y. S. R. 643; *Berford v. New York Iron Mine*, 24 Jones & S. 236; *Delaware, L. & W. R. Co. v. New York, S. & W. R. Co.* 12 Misc. 230; *Chase v. Vanderbilt*, 5 Jones & S. 334; *Gibbs v. Queen Ins. Co.* 63 N. Y. 114, 20 Am. Rep. 613; *Barbour v. Paige Hotel Co.* 2 App. D. C. 174.

The bill does not state such a case as would entitle the appellant to the relief prayed for.

The legal effect of an instrument is not admitted by demurrer.

Dillon v. Barnard, 21 Wall. 430, 22 L. ed. 673; *Swan v. Mutual Reserve Fund Life Asso.* 20 App. Div. 256, Affirmed 155 N. Y. 9.

The constitution and by-laws of such a corporation are part of the contract of insurance between it and its members.

Hass v. Mutual Relief Asso. 118 Cal. 6; *Supreme Commandery K. of G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Barbot v. Mutual Reserve Fund Life Asso.* 100 Ga. 681; *Sulz v. Mutual Reserve Fund Life Asso.* 145 N. Y. 563, 28 L. R. A. 379.

By becoming a member of a mutual association, one is conclusively presumed to know its constitution and by-laws; it is one of his duties to acquaint himself with them; and if he fails to do so, he cannot escape their force by setting up his lack of knowledge; nor by showing they were not mentioned in his certificate.

Davidson v. Old People's Mut. Ben. Soc. 39 Minn. 303, 1 L. R. A. 842; *Simeral v. Dubuque Mut. F. Ins. Co.* 18 Iowa, 319; *Treadway v. Hamilton Mut. Ins. Co.* 29 Conn. 68.

The courts will not permit a member to set up ignorance in fact of the statutes which are the very foundation and which constitute the fundamental law of the association.

Stohr v. San Francisco Musical Fund Soc. 82 Cal. 557; *Wanschaff v. Masonic Mut. Ben. Soc.* 41 Mo. App. 206; *M'Cracken v. Hayward*, 2 How. 608, 11 L. ed. 397; *Fry v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 197; *Weingartner v. Charter Oak L. Ins. Co.* 32 Fed. Rep. 314; *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Asso. v. Robinson*, 147 Ill. 138; *Cooke, Life Ins.* § 11; *Joyce, Ins.* § 194.

Members of a mutual insurance association are bound by the statutes of the state of incorporation, whether they reside in that state or elsewhere.

Fry v. Charter Oak L. Ins. Co. 31 Fed. Rep. 197; *Weingartner v. Charter Oak L. Ins. Co.* 32 Fed. Rep. 314; *Bookover v. Life Asso. of America*, 77 Va. 85; *Swan v. Mutual Reserve Fund Life Asso.* 155 N. Y. 9.

The charter is part of the executory agreement between the association on the one hand and its members on the other.

Supreme Lodge K. of P. v. Knight, 117

Ind. 489, 3 L. R. A. 409; *Simeral v. Dubuque Mut. F. Ins. Co.* 18 Iowa, 319; *Supreme Commandery K. of G. E. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Hellenberg v. District No. 1, I. O. of B. B.* 94 N. Y. 580.

Appellant fails to allege any effort made by him to obtain redress within the association itself.

Bailey v. Birkenhead L. & C. Junction R. Co. 12 Beav. 433; *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827; *Dunphy v. Traveller Newspaper Assn.* 146 Mass. 495; *Swan v. Mutual Reserve Fund Life Assn.* 155 N. Y. 9.

If the assessment levied upon him is for an excessive amount, he may tender the proper amount, and if the association refuses to accept it, and declares his certificate of membership forfeited, the member may at once bring an action at law for damages for breach of the contract of insurance.

Hancock v. New York L. Ins. Co. 4 Bigelow, Life & Acci. Ins. Cas. 488; *Cohen v. New York Mut. L. Ins. Co.* 50 N. Y. 610; *Smith v. Charter Oak L. Ins. Co.* 1 Cent. L. J. 76, and note; *Union Cent. L. Ins. Co. v. Poettiker*, 5 Bigelow, Life & Acci. Ins. Cas. 449; *McKee v. Phoenix Ins. Co.* 28 Mo. 383, 75 Am. Dec. 129; May, Ins. 3d ed. §§ 350, 568, and notes; Bliss, Life Ins. 2d ed. §§ 386, 394; Joyce, Ins. § 1659.

Alvey, Ch. J., delivered the opinion of the court:

The bill in this case was filed by the appellant, Edward Clark, of the District of Columbia, against the Mutual Reserve Fund Life Association, a corporation created under the laws of the state of New York, for the purpose of having enjoined the defendant association from enforcing or attempting to enforce certain assessments made upon the plaintiff, a member of the association, and to have adjudged and declared as null and void certain changes and increase in the rate of assessment, from the rate fixed in the policy or certificate of membership issued to the plaintiff, and for other relief prayed.

The defendant association is a mutual life insurance corporation, conducting the business of life insurance upon the co-operative or assessment plan. It was incorporated under the law of the state of New York, and its home office is in the city of New York. It has a numerous membership, and its funds amount to very large sums. The plaintiff became a member, for the benefit of his wife, on the 14th of March, 1882, and he claims to be entitled to an insurance, by virtue of the certificate issued to him on the date just named, for \$10,000, at certain fixed rate of assessment, according to a table of rates indorsed on the certificate.

In the certificate of membership it is stated that, in consideration of the statements, representations, and warranties, contained in his application, and of the admission fee paid, and of the dues for expenses to be paid, etc., "and of all mortuary assessments, payable at the office of the association within thirty days from the date of each notice," etc., the plaintiff was admitted as a member of the association. And by this certificate it was agreed and covenanted, that in the event of

the decease of a member holding a certificate, and the death fund is insufficient to meet the existing claims by death, an assessment upon the entire membership for such a sum as had been established, by the board of trustees, according to the age of each member, as per table indorsed thereon, at the date of entry,—that is, the date upon which the plaintiff became a member of the association,—shall be made; and from the sum received from such assessment, the defendant association shall have the right to set aside 25 per cent of the amount so received as a reserve fund; and that the balance shall be paid, at the office of the association in the city of New York, to the wife of the plaintiff, or, if she be dead, to his legal representatives, within ninety days after the receipt of satisfactory evidence of the death of the plaintiff, from the death fund at the time of said death, the sum so to be paid, however, not to exceed the sum of \$10,000; and no claim shall be otherwise due or payable, except from the reserve fund as thereafter provided. The certificate contains various other provisions in regard to the maintenance of a reserve fund, and a death fund, but which provisions are not material to be stated here, as the questions presented do not involve their consideration.

It is one of the provisions of the certificate that no alteration of the terms of the contract shall be valid, and no forfeiture shall be waived, unless such alteration or waiver shall be in writing, and signed by the president and one other officer of the association. And it is further provided that the certificate is issued and accepted subject to the express condition that if any of the payments above stipulated shall not be paid when due, at the office of the association in the city of New York, or to an agent of the association furnished with a receipt signed by its president or secretary, the said certificate shall be null and void, and all payments made thereon shall be forfeited to the association.

It is alleged in the bill that the plaintiff has regularly paid all dues, and all assessments made upon him down to 1898. That the rate of assessments for the death fund, fixed at the time of issuing the certificate of membership to the plaintiff, was \$2.50 per thousand dollars, the plaintiff then being fifty-nine years of age, making the annual amount of \$28 upon his policy of \$10,000. The table of rates of assessment is printed on the back of the certificate of membership.

It is alleged that, from the date of the policy or certificate until August 15, 1895, the plaintiff paid assessments when called upon at the rate stated in the table indorsed on the back of the certificate for a person of fifty-nine years of age,—that is, \$2.80 per thousand dollars. But in 1895 the defendant association changed its method of computing the amount of its assessments, disregarding entirely the table on the back of the policy issued to the plaintiff, which, by the terms of the policy was made part thereof, and assessed the plaintiff with the sum of \$112.80 every two months; and that such sum was arrived at in the following manner: To the plaintiff's age at the date of the policy, to

wit, fifty-nine years, was added one half of the number of years from January 1, of that year, that is, 1882, to January 1, 1895,—counting the fractions of a year as a whole year,—thus making an arbitrary age of sixty-six years as a basis of assessment. That a new table of assessments was used; which gave a much larger rate per thousand than was used in the old or original table, and it was according to this new and higher rate table that the plaintiff was assessed as of the age of sixty-six years; that this new table of rates contained rates for ages up to eighty years; that the plaintiff had never received any notice of the adoption of this new table of rates, and it was used without his knowledge or consent. That he paid these enhanced assessments because of the forfeiture clause in his policy or certificate of membership.

It is further alleged that, about the 1st of February, 1898, the defendant association, by a resolution of its board of directors and its executive committee, without notice to the plaintiff, and without his consent, assessed and called upon him to pay an assessment of \$235.90, a sum over eight times the original amount called for in the table on the back of his policy. That this call had printed upon it the new table of rates to which reference has just been made, in connection with the last assessment, and the sum of \$235.90 represented the amount called for therein, from a person of the present age of the plaintiff,—that is to say, of the age of seventy-five years, on a policy of ten thousand dollars. That the plaintiff paid such last-mentioned assessment under protest, because of the fear that in case of nonpayment of the same his policy might be forfeited. That about the 1st of April, 1898, another call or notice was sent to the plaintiff, requiring him to pay the same amount: and that this call had the new table of rates, and notice was given the plaintiff to the effect that the bimonthly calls would thereafter be based thereon. That, according to the latter table of rates, the plaintiff would have to pay at the age of seventy-six years \$1,533 for that year, and at seventy-seven \$1,665.90, and each succeeding year a larger amount, until at eighty his bimonthly assessments for that year would aggregate the sum of \$2,167.10 on his policy of \$10,000.

It is also charged in the bill that the reserve fund authorized to be raised and maintained, according to the statement of the defendant association, purporting to be made on or about March 18, 1898, amounted to the large sum of \$3,306,779.29, and that such reserve fund has for a long period of time, to wit, for twelve years, exceeded the sum of \$100,000 over and above outstanding bonded obligations. It is also charged that the administration of the affairs and funds of the association has been reckless and extravagant; that the enhanced assessments are illegal and fraudulent, and have been made and enforced as a part of a scheme on the part of the officers and directors of the association, to force the plaintiff and other members, either to pay such fraudulent and excessive rates for their insurance during

the remainder of their lives, after having been lured into the association by its specious promises and representations of insurance at low rates, or to drive them out of the association in their old age, when it is impossible for the plaintiff and many others to obtain any insurance at all from other companies, and thereby compel them to forfeit all the money that they have paid and contributed to the defendant association for so many years past.

Upon the allegations of the bill the plaintiff prays:—1. For an injunction to restrain the defendant, its agents and attorneys, from collecting any sum upon said call No. 97, dated April 1, 1898, and upon any subsequent call in excess of the rate in force at the date of the plaintiff's becoming a member of the association, or such sum as the court upon hearing of the case may deem just and proper; and to restrain and enjoin the defendant, during the pendency of this suit, from in any manner declaring lapsed and void, or in anywise annulling or canceling, the policy or certificate issued to the plaintiff, and commanding the defendant to retain the plaintiff as a member and policy holder in good standing, during the pendency of this suit, with the same force and effect as if he had paid said calls or assessments. 2. That the court, if it be deemed necessary, may cause the defendant association to discover to the plaintiff its books and accounts, showing losses, mortality, expenses, and particularly the salaries of each individual officer, assessments, and matters and things incidental thereto, since the time when the plaintiff became a member of the association, or for such a period of time as the court may deem necessary for the proper ascertainment of the plaintiff's rights in the premises, whereby the correct and true assessments and amounts which should have been at all times levied upon the plaintiff and the other members may be ascertained, and an accounting had between the plaintiff and the defendant in that regard. 3. That the court determine the true and proper amount of assessment or payment to be made on said call, No. 97, together with the subsequent calls hereafter to be made, and that it also determine the amount the plaintiff has already paid in excess of the rate of assessment that should have been levied upon him, and that the defendant may be compelled to refund the same, or apply the same upon calls hereafter to be made. 4. That the defendant may be decreed to apply the reserve fund, mentioned in the certificate of membership issued to the plaintiff, in so far as the said reserve fund may be in excess of \$100,000 over and above sums represented by outstanding bonds, to the payment of claims in excess of the American Experience Table of Mortality, and to making up any deficiency which may exist in the death fund, as provided in the plaintiff's certificate of membership; and, 5. For process of subpoena to be issued to the defendant, and for such other relief as the nature of the case may require.

The defendant appeared and entered a demurrer to the bill, upon the ground, as stated in the demurrer, that the bill states

no such matter as will authorize a court of equity in this jurisdiction to grant the relief prayed as against the defendant, a foreign corporation. Upon hearing in the court below this demurrer was sustained, and the bill was dismissed, upon the ground as set forth in the decree, "that the court had no jurisdiction of the subject-matter of the bill, and no power to interfere with the internal management of the defendant, a foreign corporation, and that the injunction heretofore issued is hereby dissolved; but this being without prejudice to the plaintiff's right to sue in any court having jurisdiction." It is from this decree that the plaintiff has appealed.

As we have seen, it is alleged in the bill that the defendant is a New York corporation, incorporated under the laws of that state, and that it is a mutual life insurance corporation, doing business on the co-operative or assessment plan, and that its home or principal office is in the city of New York; though it has an agent duly appointed in this district, and a place of business therein. But though a foreign corporation, and a mutual insurance company, and therefore necessarily dependent to a large extent upon its charter or articles of association and by-laws made in pursuance thereof, for the definition of its powers, and the rights and duties of its members, neither the charter or articles of association, nor the by-laws, are exhibited with the bill; and the court, therefore, is left without knowledge in regard to them. The mere allegations of the effect and operation of the charter or by-laws of the defendant are not facts that are admitted by the demurrer, but conclusions of law merely. A demurrer never admits the mere averments of the pleader, or the construction of an instrument; nor does it admit as true the conclusions or inferences drawn by the pleader from facts alleged, or which should have been alleged, in the bill. As said by the Supreme Court, in the case of *Dillon v. Barnard*, 21 Wall. 437, 22 L. ed. 676, "a demurrer only admits facts well pleaded; it does not admit matters of inference and argument, however clearly stated; it does not admit, for example, the accuracy of an alleged construction of an instrument, when the instrument itself is set forth in the bill, or a copy is annexed, against a construction required by its terms; nor the correctness of the ascription of a purpose to the parties when not justified by the language used. The several averments of the plaintiff in the bill as to his understanding of his rights, and of the liabilities and duties of others under the contract, can, therefore, exert no influence upon the mind of the court in the disposition of the demurrer." See also case of *Swan v. Mutual Reserve Fund Life Assn.* 155 N. Y. 9.

It is alleged in the bill that the contract of insurance between the plaintiff and the defendant association is made up of the application for insurance, the certificate issued to the plaintiff upon such application, the printed rules and regulations contained therein, together with the representation by the defendant, in the circulars and other-

wise as set forth in the bill. This allegation as to what constitutes the contract is simply the statement of a conclusion of law, and is of no force or effect upon the demurrer, especially as the by-laws, rules, and regulations, and the circulars referred to, are not set out as part of the bill.

The contract of insurance here involved is of a mutual character, as its title imports; and the plaintiff became a member of the association by obtaining the certificate of membership, and as such member we may suppose that he was entitled to certain rights in the administration of the affairs of the corporation. To determine what those rights were or are, the constitution or articles of association and the by-laws should have been exhibited as part of the bill, for they are required to be consulted and construed in determining the nature of the contract, and the rights and duties of the parties thereto. And though such constitution and by-laws may not be referred to in the certificate of membership, yet they are binding upon the members of the association, and constitute a part of the contract of membership. By becoming a member of a mutual association, such as the defendant in this case, one is conclusively presumed to know its constitution and by-laws; and if he fails to acquaint himself with them, he cannot escape their force and operation by setting up his want of actual knowledge of them, nor by showing that they were not referred to in the certificate held by him. This principle is established by many well-considered cases, a few of which will be sufficient to refer to in this connection. *Hass v. Mutual Relief Assn.* 118 Cal. 6; *Barbot v. Mutual Reserve Fund Life Assn.* 100 Ga. 681; *Supreme Commandery K. of G. R. v. Ainsworth*, 71 Ala. 436, 443, 46 Am. Rep. 332; *Sulz v. Mutual Reserve Fund Life Assn.* 145 N. Y. 563, 568, 28 L. R. A. 379.

The rights and liabilities of parties in a mutual co-operative insurance company are essentially different from the rights and liabilities in a stock insurance company. This difference is remarked upon by Mr. May in his work on Insurance, § 146. He says: "Mutual insurance, it is truly observed, is essentially different from stock insurance, and much of the litigation that has grown out of this species of insurance has been owing to inattention to this difference. Its original design was to provide cheap insurance by means of local associations, the members of which should insure each other. Such associations are in their nature adapted only to local business. They need many by-laws and conditions that are not required in stock companies; and it is necessary and equitable that each person who gets himself insured in them should become subject to the same obligations toward his associates that he requires from them towards himself. If the officers have discretionary power as to the terms of the contract or even as to its form, it is obvious that different parties may become members upon different terms and conditions, and thus the principle of mutuality will become completely abrogated." And so again, in § 548, the author says: "The principle which lies at the foundation of mu-

tual insurance, and gives it its name, is mutuality,—in other words, the intervention of each person insured in the management of the affairs of the company, and the participation of each person in the profits and losses of the business, in proportion to his interest. Each person insured becomes a member of the body corporate, clothed with the rights and subject to the liabilities of a stockholder. He is at once insurer and insured."

And in Niblack on Mutual Benefit Societies, § 136, the same principle is stated with the authorities for its support. The author says: "An ordinary life insurance policy contains the whole contract of insurance; but the certificate of membership in a mutual benefit society is only part of the written evidence of the contract. . . . The charter, constitution, and by-laws of such societies are made to contain the whole plan of insurance, designating who shall be the beneficiaries of its members, fixing the amount of the benefit fund, and setting forth the terms of the entire contract. In such cases membership in the society carries with it a specified amount of life insurance."

With these well-settled principles in view, it would clearly not be safe and proper to proceed upon the presumption that the certificate of membership exhibited with the bill contains the entire and exclusive evidence of the contract, in the absence of the constitution or articles of association and the by-laws of the corporation. The certificate of membership having been issued and accepted subject to the provisions and conditions of those articles and by-laws of the association, the certificate must be construed in reference and in subordination to such articles and by-laws; and it may be that some of the articles or by-laws may have a very material bearing in the construction of the certificate; and hence they should have been made part of the case as stated by the bill.

But apart from this defect in the bill, in considering the case on demurrer, there is a broader and more insuperable objection to the bill than that just referred to, and that is the want of power and jurisdiction in the court to extend its remedial processes to restrain and control the internal affairs and administration of corporate duties and functions of the defendant, a foreign corporation. It was upon this ground that the court below acted in sustaining the demurrer and dismissing the bill.

The principal ground of complaint appears to be the alleged or supposed illegal enhancement of the rate of assessment levied and collected, or attempted to be collected, of the plaintiff, over and above the rate specified in the table of rates indorsed on the certificate of membership. This increased rate of assessment would appear to be the result of a change of policy on the part of the defendant association, founded upon a supposition that it was inequitable and unjust that the assessment should be based upon the age of the member at the time he obtained his certificate of membership and that the just and more equitable rule would be to make the assessment with reference to the age of

the member at the time the call is made. This may, and certainly would appear to, work great hardship upon the older class of members. But the question is, Has a court of equity in this district, the power or jurisdiction to correct the wrong, if it be one? If this were an action to recover money due on the policy, or an action by the defendant association to recover of the plaintiff money due for assessments, or any money of one party to the other, then, in all such cases, and others that might be suggested, instituted in the courts of this District, the jurisdiction of a court of equity here might be invoked to prevent injustice and wrong. In all such cases, the party aggrieved has the right to sue and obtain effective remedy against foreign insurance companies, having an agency here and doing business in this District. This is provided for by the act of Congress of 1887, chap. 46, § 4 (25 Stat. at L. p. 369). That act provides for the due appointment of an agent in this District as a condition upon which a foreign insurance company is allowed to do business here,—the agent being made competent to receive service of process in suits against the company appointing him. But that act, manifestly, does not contemplate or apply to a case such as the present. It does not contemplate suits here against foreign insurance companies, the object and effect of which would be to restrain their home administration, and to ransack and overhaul their internal affairs, in order to determine whether their proceeding has been in all respects legal and in accordance with the law of their creation, and of their by-laws, as they may affect their individual members. It is clear, the act of 1887 does not attempt to make foreign insurance companies, doing business here under this statute, corporations of this District. For as said by the Supreme Court, in the case of *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 296, 30 L. ed. 83, 87: "To make such a company a corporation of another state, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state, or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the state conferring such powers." The act of 1887 contains no language that could imply creation or adoption of these foreign insurance corporations, but only the grant of privileges or powers to existing corporations of other jurisdictions, upon complying with certain conditions. The class of laws granting such privileges and powers, say the Supreme Court, in the case just referred to, "are common in authorizing insurance companies, banking companies and others to do business in other states than those which have chartered them." Such acts do not extend the jurisdiction of the courts of one state and authorize them to reach over their territorial limits into the jurisdiction of another state, and bring into review and revision the corporate acts and internal affairs of the lo-

cal corporations of the latter states. Such a power, if attempted to be exercised, would be futile and ridiculous. Indeed, neither the legislatures of the states, nor the Congress of the United States, could confer such powers.

In this case, it is proper to observe the prayer of the bill. The prayer is, that an injunction may issue to restrain the defendant and its agents from collecting any sum upon call No. 97, dated April 1, 1898, and upon all subsequent calls in excess of the rate in force at the date of the certificates of membership issued to the plaintiff, and from in any manner declaring lapsed or void the policy or certificate held by the plaintiff, and commanding the defendant to retain the plaintiff as a member and policy holder in good standing during the pendency of this suit, with the same force and effect as if he had paid all said calls or assessments.

Now, in the first place, all assessments and dues, required to be paid by the certificate holder, as also the amount of the policy itself by the defendant, are payable and are required to be paid, at the home office of the defendant in the city of New York. And this being so, it is a little difficult to imagine how a court in this district could restrain and direct the action of the corporation at its home office in the city of New York. Suppose the injunction to be issued as prayed, and to be served upon an agent in this District, and the board of directors of the corporation were to refuse to recognize it, and proceed to forfeit and declare null and void the certificate or policy of the plaintiff, for default of payment of assessments, as according to the terms of the certificate they are authorized to do. How would or could the court in this District deal with such conduct? For the disregard or violation of an injunction the ordinary remedy is a proceeding and punishment for contempt. But how could that be made effectual as against parties beyond the jurisdiction of the court, and who claim to be proceeding in accordance with what may be legal authority derived from their own state? It is very clear, therefore, that this prayer for an injunction could not be granted.

The next prayer is, that the defendant be required to discover to the plaintiff its books and accounts, showing losses, mortality, expenses, and particularly the salaries of each individual officer of the association, assessments, and matters and things incident thereto, since the plaintiff became a member of the association, etc., whereby correct and true assessments and amounts which should have been at all times levied upon the plaintiff and the other members of the association, may be ascertained, and that an accounting be had between the plaintiff and the defendant.

It is hardly necessary to say that a court of equity in this District has no such power or jurisdiction over the affairs of a foreign corporation as to require such discovery and accounting as are prayed for by this bill. Upon such a theory as is here propounded, no corporation could ever venture to conduct business beyond the limits of the state of its

creation. According to the principle of this prayer, any business transaction of an insurance company, which might take place in a state other than that of a company's creation, and which could be alleged to affect the assets of the company, and the interest of its members, would furnish the ground for calling for discovery the production of books, and for a general accounting. Upon any such principle, it would be very perilous for any insurance company to attempt to do business beyond the limits of the state of its creation. It might have half a dozen courts, in as many different states, requiring discovery, and demanding the production of its books, and directing the statement of accounts, all at the same time. There is no principle that would justify such proceeding.

Then, again, it is prayed that the true and proper amount of assessments to be made be determined, and that it also be determined what amount the plaintiff has already paid in excess of the rate of assessment that should have been levied upon him, and that the defendant be compelled to refund the same; and that there be directed and required to be made a proper application of the reserve fund, in accordance with the requirements of the certificate of membership.

This prayer, like the preceding, requires a complete overhauling and scrutiny of the entire administration of the internal affairs of the corporation, from the time that the plaintiff became a member down to the present time; and that nothing short of a full and complete account would enable the court to decree in accordance with the prayer.

It is thus apparent from the statement of the facts alleged in the bill, and from the several prayers based thereon, that the relief sought, if it could be granted, would require the control, direction, and revision of the internal affairs of the corporation, by a court of equity in this District. This we think, upon the clearest authority, cannot be done. The law would seem to be too well settled to admit of such a question, that where the acts complained of affect the plaintiff in his rights of corporator, or stockholder, or as a member of a mutual benefit insurance company, or other corporation, and the acts are those of the corporation, done and performed in the course of the administration of the corporate affairs, and especially when claimed to have been done and performed, or authorized to be done, by virtue of authority derived from its by-laws, the courts of another state or jurisdiction will not interfere or attempt to exercise jurisdiction, to direct, control, or revise corporate action. To assume jurisdiction over the affairs of a foreign corporation would inevitably lead to conflicting decisions, resulting in confusion and needless litigation, and the making of orders and decrees simply to be contemned, because not capable of being enforced. The court, if it were to undertake to act in such cases, has no power, and therefore cannot bring the officers, or the corporate books or the assets of the corporation within its jurisdiction, to be subject to its process. Its decrees could only be enforced by proceedings for contempt, and yet there would be no per-

son here, subject to that process, to be coerced to act for the corporation. The mere local agent, clearly, would not be such person. It may well be said, therefore, as was said by the court, in the case of *Leary v. Columbia River & P. S. Nav. Co.* 82 Fed. Rep. 775, on an application very analogous to the present that "the authorities cited by counsel for the defendant corporation show clearly and strongly that courts having jurisdiction to enforce their decrees in the state where the corporation has its home office should be resorted to in all cases where it is necessary to inquire into and regulate the internal affairs of the corporation," and not to courts of a different state or jurisdiction. And without stating the facts of each particular case, we deem it sufficient to refer generally to some few of the leading and more important cases upon this subject, in support of

the conclusion we have stated. And for this purpose we refer to *Fisher v. Charter Oak L. Ins. Co.* 20 Jones & S. 175; *Howell v. Chicago & N. W. R. Co.* 51 Barb. 378; *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151; *Wilkins v. Thorne*, 60 Md. 253; *Smith v. Mutual L. Ins. Co.* 14 Allen, 336; *Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co.* 135 Mass. 34, 46 Am. Rep. 439; *Pierce v. Equitable L. Assur. Soc.* 145 Mass. 56; *Kimball v. St. Louis & S. F. R. Co.* 157 Mass. 7; *Stafford v. American Mills Co.* 13 R. I. 310; *Madden v. Penn Electric Light Co.* 181 Pa. 617, 38 L. R. A. 638.

For the reasons we have stated, we shall affirm the decree of the court below, but without prejudice to the right of the appellant to sue and maintain his action in any proper court having jurisdiction of the subject-matter; and it is so ordered.

GEORGIA SUPREME COURT.

J. H. MOHRMANN, *Plff. in Err.*,

v.

STATE of Georgia.

(.....Ga.)

- *1. The mere fact that the selling and drinking of intoxicating liquors was "only an incident, and not the main object," of the incorporation of a social club, will make the place where such liquors are dispensed and drunk none the less a tippling house, within the meaning of the statute making penal the keeping open of such houses on the Sabbath day.
2. A person who is the manager, and also a member and officer, of such a social club, and who exercises a general superintendence over the affairs of the club, including the bar from which intoxicating drinks are furnished, is amenable to the statute above referred to.
3. That "only members" are permitted in the rooms of a social club will not take such an organization out of the statute prohibiting the keeping open of tippling houses on the Sabbath day.

(November 16, 1898.)

ERROR to the City Court of Richmond County to review a judgment convicting defendant of keeping open a tippling house on the Sabbath day contrary to the provisions of a statute. *Affirmed.*

The facts are stated in the opinion.

Mr. E. B. Baxter, for plaintiff in error:

The home of a bona fide social club is not a tippling house.

The question is whether or not such an organization can reasonably be considered as having been aimed at by our statute.

Williams v. State, 100 Ga. 527, 39 L. R. A. 269.

*Headnotes by COBB, J.

NOTE.—As to the sales of intoxicating liquors by clubs, see *note* to *People v. Adelphi Club* (N. Y.) 31 L. R. A. 510; also *Klein v. Livingston* (Pa.) 34 L. R. A. 94.
43 L. R. A.

The fact that the legislature placed the keeping open of a tippling house in the same category, and on the same level, with such other offenses as are named in the statute, is strong evidence that the mere act of keeping a decent place of social gathering, like a bona fide club, open on Sunday, cannot be reasonably held to have been aimed at by our statute.

Minor v. State, 63 Ga. 321; *Hussey v. State*, 69 Ga. 59.

Mr. C. Henry Cohen, for the State:

The manager of a social organization, chartered by the courts, was the right party to indict for keeping a gaming house if gaming went on in the establishment.

Cochran v. State, 102 Ga. 631.

In a large majority of the states the courts have held that clubs were liable for violation of the Sunday or liquor laws just as individuals.

State v. Lockyear, 95 N. C. 633; *State v. Mercer*, 32 Iowa, 405; *Marmont v. State*, 48 Ind. 24; *Martin v. State*, 59 Ala. 34; 22 Am. & Eng. Enc. Law, p. 810; *Kentucky Club v. Louisville*, 92 Ky. 309.

To keep a tippling house open on Sunday is indictable without proof that liquor was sold.

Hall v. State, 3 Ga. 18; *Holland v. State*, 34 Ga. 457; *Bethune v. State*, 48 Ga. 510.

The sale of liquor is not necessary to constitute a tippling house.

Minor v. State, 63 Ga. 318.

It makes no difference what the place may be called, if it be a place where liquor is sold on the Sabbath, with a door of entrance so that anybody can push it open and enter and drink, the proprietor is guilty of an offense.

Hussey v. State, 69 Ga. 54; *Harvey v. State*, 65 Ga. 568.

Selling domestic wine in a building within the curtilage of the dwelling house constitutes a tippling house.

Thomason v. State, 92 Ga. 456.

A bar and restaurant with an open door is a tippling house.

Cooper v. State, 88 Ga. 441; *Harmon v. State*, 92 Ga. 455.

If the owner keep it open but for a moment it is a violation.

Monses v. State, 78 Ga. 110; *Lucas v. State*, 92 Ga. 454.

Whenever it was shown that the house was a tippling house, that defendant was the owner, and that it was kept open, the offense is made out.

Sanders v. State, 74 Ga. 82; *Nixon v. State*, 75 Ga. 862.

Cobb, J., delivered the opinion of the court:

Mohrmann was arraigned in the city court of Richmond county, charged with the offense of keeping open a tippling house on the Sabbath day. At the trial the following facts were agreed to: (1) The rooms for keeping open which the defendant was indicted were kept open on the day named in the indictment. (2) Said rooms were used as a rendezvous where the Grabemax Social Club did gather on the Sabbath day named in the indictment, and other days, and drink, from a bar kept in the said rooms, intoxicating liquors. (3) They were kept open with the defendant's knowledge on the Sabbath day, as alleged. (4) Said rooms were rented by the Grabemax Social Club, which is incorporated, and which is an organization composed of some one hundred citizens of Augusta. All that is in them belongs to said corporation, which pays taxes thereon. The stock of liquors therein is the property of said club, and drinks therefrom were sold to members of said club on the days mentioned in the indictment. That the selling of liquor on Sunday [was] only an incident, and not the main object, of the organization. (5) Defendant is manager of the said club, and receives a salary for his services. He was an employee and officer of the said club, with designated duties, one of which was to see that the bar in the club was properly conducted and kept open for the use of the members, from which drinks were sold. It was his business to look after the general conduct and running of the club, but he was in no sense, other than the above, the proprietor or owner of said rooms, nor had he any authority or control over them. He acted under orders, and was strictly amenable to the governing board of the said club. His authority to do all that he did do flowed wholly from his employment, and only members are permitted in the said club rooms on Sunday or any other day." On the above facts the presiding judge, sitting without a jury, found the accused guilty. His motion for a new trial on the general grounds was overruled, and he excepted. An examination of the statement of facts above quoted will show that the Grabemax Social Club was distinguished from an ordinary tippling house in three particulars: (1) The selling of liquor on Sunday was incidental to, and not the main object of, the organization. (2) The accused was an employee and officer of the club, and not the owner thereof. It was

his duty, acting under orders of the governing board of the club, to see that the bar was properly conducted and kept open for the use of the members, and to exercise a general superintendence over the club. (3) "Only members are permitted in the said club rooms on Sunday or any other day." We are called upon to decide whether these three distinguishing characteristics of this social organization take it out of that class of liquor-selling establishments commonly denominated "tippling houses."

1. We are of opinion that the incidental selling of liquor will make a place none the less a tippling house than if that was the main object of its establishment. The evil intended to be corrected by the statute is the keeping open on the Sabbath day of houses where liquor is furnished and drunk; and it makes no difference, we think, for what purpose the house is being operated, if the fact remains that intoxicating liquors are furnished on the Sabbath day, to be drunk on the premises where they are supplied. It certainly can be no reply to the statute that the persons guilty of keeping open a house where liquors are sold and drunk had some other business in view, as the primary object of its operation, and that the selling of such liquors is merely an incident to this object. A person keeping a grocery store, but who kept, as incidental to his grocery business, a bar in one corner of the store, about which his friends were accustomed to gather on the Sabbath day and partake with him of intoxicating drinks, might as well make this plea as the plaintiff in error. The fact that the main purpose of the one was social pleasure, and of the other the realization of profit from his grocery business, can make no difference. In both the selling was merely incidental to, and not the main object of, the business. In the case of *Harris v. People*, 1 Colo. App. 289, the accused was convicted of "keeping open a tippling house on the Sabbath." It appeared from the evidence that he was a grocer, and kept the usual stock of goods in that line of business, and in addition kept on hand intoxicating liquors. Reed, J., in the opinion, uses this language: "The object of the statute, evidently, was to prevent places where intoxicating liquors were sold from keeping open and pursuing their traffic upon the Sabbath. It requires such places to be closed, and parties cannot evade the law by carrying on two kinds of business in the same room, and claiming that the sale of groceries was the principal, and the sale of liquors only an incident." In *Williams v. State*, 100 Ga. 511, 39 L. R. A. 269, it was held that where a person, "in her dwelling house, sold whisky, by retail to different persons, and on each occasion permitted the same, or a portion thereof, to be drunk on the premises," she was guilty of keeping open a tippling house. The selling of whisky was certainly incidental to the purpose for which she occupied the house. And yet the fact that it was her dwelling did not shield her. See also *Harvey v. State*, 65 Ga. 568. While furnishing intoxicating drinks might have been a mere incident to

the purposes for which the Grabemax Social Club was established, it does not appear but that its members, or some of them, went to the rooms of the club for the sole purpose of procuring and drinking intoxicants. A person who carries on in connection with some other employment a business which is a violation of the law is just as guilty as he who carries on such business alone.

2. The second point is controlled by the principle announced in the case of *Oochran v. State*, 102 Ga. 631. It was there held that "evidence showing that the accused was an officer of a social club, that gaming with cards for money was carried on in a room thereof, that portions of the losses in the games played were appropriated to the use of the club, and that the accused, knowing these facts, collected and received the same for its benefit, was sufficient to warrant a verdict finding him guilty of keeping a gaming house." See also *State v. Mercer*, 32 Iowa, 405.

3. Is a social club which furnishes intoxicating liquors to its members only, to be drunk by them on the premises where sold, a tipping house, within the meaning of § 390 of the Penal Code, which provides that "any person who shall be guilty of open lewdness, or any notorious act of public indecency, tending to debauch the morals, or of keeping open tipping houses on the Sabbath day, or Sabbath night, shall be guilty of a misdemeanor"? Keepers of tipping houses have sought in various ways to evade the effect of this statute, and escape the punishment which it prescribes. Some of the methods resorted to are strikingly unique, and this court has not looked with favor upon violators of this law, and has, in every instance where it could possibly do so, upheld convictions thereunder. It has been held that "it makes no difference as to whether any liquors be sold or not, the offense consists in its being open, not in selling, or offering to sell, or giving it away." *Harvey v. State*, 65 Ga. 568. See also *Klug v. State*, 77 Ga. 734; *Monsee v. State*, 78 Ga. 110; *Seyden v. State*, 78 Ga. 105. In the case of *Hussey v. State*, 69 Ga. 54, no authoritative ruling was made on the question as to whether a club which furnished liquors to its members only was a tipping house within the meaning of the statute. True, the court uses this language: "It makes no difference, in law, whether the place be called a barroom, or a glee-club resort, or a parlor, or a restaurant; if it be a place where liquor is retailed and tipped on the Sabbath day, with a door to get into it, so kept that anybody can push it open and go in and drink, the proprietor of it is guilty of keeping open a tipping house on Sunday. It makes no difference if the drinking be done standing or sitting,—at a bar or around a table; it is tipping, and the place where it is done is a tipping house; and, if anybody wishing to drink can have access thereto,—if ingress and egress be free to all comers,—it is a tipping house kept open on Sunday." The court was in that case dealing with a public resort, and in so far as any language in the headnotes of the opinion

indicates that any other character of resort would not be a tipping house, it is, of course, merely *obiter*. We think, however, that the first part of the language quoted will show that in the opinion of the court a house of the character now under consideration would be a tipping house. In the case of *Minor v. State*, 63 Ga. 318, an organization known as the "Albany Glee Club" was under investigation. Resolutions and by-laws for the government of the club were in evidence. From these it appeared that the main and controlling purpose of the organization was to engage in selling and drinking liquors on the Sabbath day. It was not in a strict sense a public resort, for it was provided that "no member shall invite an outsider that has not paid his quota to the benefit of the club, without the consent of two thirds of the members present." This club was held to be a tipping house. We can see, however, some difference between the Albany Club and the club under consideration in the present case; for the latter club, according to the evidence, was thoroughly exclusive, and under no circumstances could persons other than those enjoying membership therein partake of its benefits. It does not appear, however, from the evidence, that any limitation was put upon its membership. The object of the general assembly in passing this statute, as was said by Warner, J., in *Hall v. State*, 3 Ga. 18, "was to remove all temptation to idle and dissolute persons who might be disposed to congregate at such places and violate the Sabbath by any improper conduct." It was said in *Sanders v. State*, 74 Ga. 82, that "the purpose of the act was not only to close up such establishments on Sunday, in deference to the finer and better feelings of orderly and well-disposed people, but to remove this incitement to graver and more dangerous violations of the law." It is rather difficult to embrace within one comprehensive definition every class of resort which could properly be called a tipping house. Judge Bleckley, in *Minor v. State*, 63 Ga. 318, says that "it is something easier for an offender to baffle the dictionary than the Penal Code, for the former is perplexed with verbal niceties and shades of meaning, while the latter grasps, in a broad, practical way, at the substantial transactions of men. The Code offers no definition of a tipping house. It deals with them as establishments too well known to need description, and simply prescribes a penalty for keeping them open on the Sabbath day or Sabbath night." According to Black's Law Dictionary, a tipping house is "a place where intoxicating drinks are sold in drams or small quantities, to be drunk on the premises." Anderson says it is "a place of public resort where spirituous, fermented, or other intoxicating liquors are sold and drank in small quantities, without a license therefor," also, "a public drinking house where intoxicating liquor is either sold by drams to the public, or else is given away, and imbibed." Anderson, Law Dict., *Tipping House*. The house under consideration in the present case comes within the letter of the definition first quoted, and within the spirit, at least, of the

last. See also *Black, Intoxicating Liquors*, § 20. But, as Judge Warner, quoting from Chief Justice Marshall, says in *Hall v. State*, 3 Ga. 18, "although penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature." And in *Sanders v. State*, 74 Ga. 82, we find the following: "Courts are not very astute in shielding violators of this provision from punishment by resorting to the niceties of verbal criticism, such as would be intelligible only to grammarians and fastidious scholars, but would utterly fail to impress less cultivated minds and tastes, in order to provide for them a way to escape."

Even if a sale is necessary before a place where liquors are furnished can be characterized as a tipling house, the weight of modern authority seems to be that such a furnishing as the evidence in the present case discloses is a sale. In the case of *State v. Lockyear*, 95 N. C. 633, 59 Am. Rep. 287, a number of persons organized a club for social and literary purposes, and became duly incorporated. Incidental to the main purpose of the organization, the members, but no other persons, were permitted to purchase from the defendant, its steward, liquors and other articles, which were furnished by the club at a price fixed by its officers, sufficient to cover the cost, but not for the purpose of profit. It was there held that the furnishing of liquors to the members of the club under these circumstances was a sale, in violation of the local option act. In the opinion, Mr. Chief Justice Smith uses this language: "There can be no question that, in a strict legal sense, the transaction described in the verdict is a sale of spirituous liquors. All the elements of an executed contract are present. The corporate body, a legal entity, and the owner of the liquor, through its servant, the defendant, delivers it to the purchaser at his call, and receives a fixed compensation in money therefor. The property in the goods passes and vests in the purchaser, and the money paid is received for, and becomes the property of, the club. Can there be any doubt that a corporation may make contracts and deal with a corporator precisely as with a stranger, and valid obligations, capable of enforcement, be thus formed between the parties? And is not this dealing with the prohibited subject directly within the terms of the statute, and does it not open the door to the mischiefs intended to be suppressed? It is not necessary that the vendor should be authorized to sell to any applicant, as an ordinary retailer. He is not allowed to sell to anyone, and the fact that customers must be members of the association does not relieve him from criminal responsibility under the mandatory statute." In the opinion will be found several citations of authority supporting the ruling there made. See also *State v. Neis*, 108 N. C. 787, 12 L. R. A. 412, and authorities cited in note in the *Southeastern Reporter*. Substantially the same ruling has been made in New York. *People v. Si-*

nell, 34 N. Y. S. R. 898; *People v. Bradley*, 33 N. Y. S. R. 562. At the conclusion of his opinion in *State, Newark, v. Essex Club*, 53 N. J. L. 99, Van Syckel, J., says that "it is wholly immaterial whether the sale is made in open view to all who apply, or in the most secluded place, to which only the trusted few can gain admittance. The penalty of the statute is denounced against the sale without license, whether in public or private. The prohibited act is the sale without license, and in my opinion the admitted facts show that such sale was made by the defendant below in contravention of the law." See also *Martin v. State*, 59 Ala. 34; *People v. Soule*, 74 Mich. 250, 2 L. R. A. 494; *Kentucky Club v. Louisville*, 92 Ky. 309; *State v. Horacek*, 41 Kan. 87, 3 L. R. A. 687. There are cases which hold that the furnishing of liquors under circumstances similar to those in the present case is not a sale, and we do not attempt to reconcile them. We think, however, that the better view is the one supported by the authorities above cited, the reasoning of which seems to be conclusive.

In this state a sale is not necessary, as has been shown, to make out the offense of keeping open a tipling house on the Sabbath. Does the statute, fairly construed, embrace within its terms a house of the character described in the present case? We think so. The statute intended that all places where persons are accustomed to congregate and drink intoxicating liquors should be closed on the Sabbath day. The fact that liquors are furnished to 100 designated persons, and no others, makes the place where such liquors are supplied none the less a tipling house. It is still a place where men congregate for the purpose of drinking intoxicants. There is no limitation placed upon the membership of the club over which the plaintiff in error exercised a general superintendence. It is 100 now, and next year may be 500. It is not unfair to assume that some, at least, of its membership, are accustomed to congregate at the club rooms on the Sabbath day for the sole purpose of procuring intoxicating drinks. To hold that such a place was not a tipling house would be doing violence to the statute, and would defeat, in a large measure, the very object for which it was enacted; that is, to prevent persons congregating and imbibing intoxicants on the Sabbath day. It was claimed by counsel for plaintiff in error in his brief that the Grabemax Social Club of Augusta was "a respectable place, to which the public has not access, in which members of a club owning the resort meet for social ends, and merely drink as an incident of being there." This may be true; it is nevertheless a tipling house, within the meaning of the statute, and must be closed on the Sabbath day.

Judgment affirmed.

All the Justices concur, except **Simmons**, Ch. J., absent, and **Lumpkin**, P. J., absent on account of sickness.

CENTRAL OF GEORGIA RAILWAY COMPANY, *Plff. in Err.*,

v.

Mrs. John S. PRICE.

(.....Ga.....)

*Where, through the negligence of the conductor of a railway company, a passenger on its cars has been carried beyond the point of her destination, such conductor, in the absence of express authority so to do, cannot constitute the proprietor of an hotel, who is entirely unconnected with the company, its agent for the purpose of providing safe and comfortable lodgings for the passenger until she can return on the company's train to her destination. It follows, therefore, that the company is not liable for any injuries or damage such passenger may have sustained while at the hotel, in consequence of any negligence on the part of its proprietor.

(December 14, 1898.)

ERROR to the Superior Court for Macon County to review a judgment in favor of plaintiff in an action brought to recover damages for injuries received at a hotel where she was compelled to go because of defendant's negligence in carrying her past her station while a passenger on defendant's train. *Reversed.*

The facts are stated in the opinion.

Mr. William D. Kiddoo, for plaintiff in error:

The damages from the injury received in the hotel are too remote from the contract of carriage to be the basis of recovery against the plaintiff in error.

6 *Rapalje & Mack's Digest of Railway Law*, § 43, p. 793; *Ohio & M. R. Co. v. Engerer*, 4 Ind. App. 261; *Kistner v. Indianapolis*, 100 Ind. 210.

Damages traceable to the act of negligence, but not to its legal or natural consequence, are too remote and contingent.

Civil Code, § 3911; *Montgomery & W. P. R. Co. v. Boring*, 51 Ga. 582; *Perry v. Central R. Co.* 66 Ga. 746; *Georgia R. Co. v. Hayden*, 71 Ga. 518, 51 Am. Rep. 274; *Hardwick v. Georgia R. & Bkg. Co.* 85 Ga. 507; *Jamison v. Chesapeake & O. R. Co.* 92 Va. 327; *McClary v. Sioux City & P. R. Co.* 3 Neb. 44, 19 Am. Rep. 631; *Texas & P. R. Co. v. Beckworth*, 11 Tex. Civ. App. 153; *Sickles v. Missouri, K. & T. R. Co.* 13 Tex. Civ. App. 434; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790; *Hollenbeck v. Johnson*, 79 Hun, 499; 6 *Rapalje & Mack's Digest of Railway Law*, §§ 43, 46, 48, 49, pp. 793, 794, 796, 797; *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L. R. A. 794; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 12 U. S. App. 381, 55 Fed. Rep. 949, 5 C. C. A. 347, 20 L. R. A. 582; *Seale v. Gulf, C. & S. F. R. Co.* 65 Tex. 274, 57 Am. Rep. 602; *Gilliland v.*

Chicago & A. R. Co. 19 Mo. App. 411; *White v. Conly*, 14 Lea, 51, 52 Am. Rep. 157, notes; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653; *Toledo, W. & W. R. Co. v. Muthersbaugh*, 71 Ill. 572.

It is not possible that human foresight could have foreseen or provided against the explosion of the lamp, or that the conductor could have foreseen that the hotel proprietor would have furnished a defective lamp, and therefore it is impossible to make the omission of the defendant in court below to foresee and guard against such facts the basis of a recovery.

Longmeid v. Holliday, 6 Exch. 761; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 12 U. S. App. 381, 55 Fed. Rep. 949, 5 C. C. A. 347, 20 L. R. A. 582; *West Mahanoy Twp. v. Watson*, 112 Pa. 574, 56 Am. Rep. 336.

Messrs. M. Felton Hatcher and Guerry & Hall for defendant in error.

Simmons, Ch. J., delivered the opinion of the court:

In the view we take of this case, it is unnecessary to deal with the many special grounds of the motion for a new trial. The record discloses that Mrs. Price was a passenger on a train of the defendant company, and that her destination was Winchester, Georgia. Through the negligence of the conductor, she was not put off at Winchester, but was carried on to Montezuma. Upon her arrival at the latter place, the conductor advised her to go to the hotel and spend the night, he agreeing to carry her back to Winchester in the morning when his train made the return trip. He accompanied her to an hotel, where a room was assigned her, the conductor agreeing with the proprietor to pay her expenses. She was taken to her room by the proprietor or his servants, and furnished with a kerosene lamp, which she left burning after she had retired to bed. Some time during the night, the lamp, she claims, exploded, and set fire to a mosquito net which covered the bed, and, in her efforts to extinguish the flames, her hands were badly burned. She sued the railway company for damages, and, under the charge of the court, the jury returned a verdict in her favor for \$400. A motion for a new trial was made, and was overruled by the trial judge. To this the company excepted.

The contention of the plaintiff in the court below was that when the conductor carried her to the hotel in Montezuma, and asked her to remain there until his return the next morning, he thereby made the proprietor of the hotel the agent of the railway company, and that, if the plaintiff was injured by the negligence of the proprietor or his servants in furnishing her a defective lamp, the railway company was liable, the contract of carriage not having been fully executed, and the plaintiff being still a passenger. The trial judge, in his charge, took this view of the law, and in substance so instructed the jury. We, however, think this was error. A conductor on a passenger train of a railway company is the agent of the company, and the company is bound by all of his

*Headnote by *SIMMONS*, Ch. J.

NOTE.—As to authority of an agent or representative of a railroad company to employ medical services for a passenger or other third person, see *Hanscom v. Minneapolis Street R. Co.* (Minn.) 20 L. R. A. 695, and *note*. 43 L. R. A.

acts within the scope of his employment. His business is to superintend the running of the train, look after the comfort and safety of the passengers, and do such other work, in and about the running of the train, as is imposed upon him by the rules of the company or by law. Being only an agent, he had no authority without express power conferred by the company, to appoint a subagent. He could not delegate to another, an agent of his own appointment, the powers conferred upon him. Civil Code, § 2999. It was not within the scope of his business to constitute the proprietor of an hotel the agent of the company for the purpose of taking care of the plaintiff during the night. We are aware that several of the courts have held that, where a passenger is injured by the negligence of a railway company, such company is liable for the compensation of a surgeon employed by the conductor or station agent for attendance upon the injured passenger. These rulings are put upon the ground of humanity and public policy in cases of such emergency, but so far as we can ascertain, no court has ever held that the company would be liable to the injured passenger for the negligence or malpractice of a surgeon so employed.

It is argued that, whether or not the proprietor of the hotel was the agent of the company, the contract of carriage was not completed, and it was the duty of the company, by its agents, safely to care for the passenger until they had delivered her at her destination. Admitting, for the sake of the argument, that this is true, we still think that the company would not be liable for the con-

sequences of the landlord's negligence. The negligence of the company consisted in passing the station where the passenger desired to alight, without giving her an opportunity to get off. Taking her version of the manner in which she was injured, the injury was occasioned by the negligence of the proprietor of the hotel or his servants in giving her a defective lamp. The negligence of the company in passing her station was therefore not the natural and proximate cause of her injury. There was the interposition of a separate, independent agency,—the negligence of the proprietor of the hotel, over whom, as we have shown, the railway company neither had nor exercised any control. Civil Code, §§ 3912, 3913; *Perry v. Central R. Co.* 86 Ga. 746; *Macon v. Dykes* (Ga.) 31 S. E. 443; *South Side Pass. R. Co. v. Trich*, 117 Pa. 390; *Wood v. Pennsylvania R. Co.* 177 Pa. 300, 35 L. R. A. 199; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653; *Sira v. Wabash R. Co.* 115 Mo. 127; *Gulf, C. & S. F. R. Co. v. Shields*, 9 Tex. Civ. App. 652; *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279.

The injuries to the plaintiff were not the natural and proximate consequences of carrying her beyond her station, but were unusual, and could not have been foreseen or provided against by the highest practicable care. The plaintiff was not entitled to recover for such injuries, and the court erred in overruling the motion for new trial.

Judgment reversed.

All the Justices concur.

ILLINOIS SUPREME COURT.

Katheryne S. SMITH, *Appt.*,

v.

Edward O. SMITH *et al.*

(174 Ill. 52.)

1. The proceeds of a decedent's land sold for partition are not personally subject to be transmitted to the administrator appointed at his domicile in another state and there distributed to creditors whose claims have not been allowed by the courts in whose jurisdiction the land was situated.
2. Heirs who appear in the courts of the state of their ancestor's late domicile to contest the making of a family allowance to his widow are not estopped by a judgment making the allowance from contesting its payment out of land which descended to them in another state, since the judgment is not against them personally.
3. A judgment by the courts of the state of the late domicile of a decedent making a family allowance to his widow out of his assets according to the laws of that state

is not binding upon his lands in another state whose laws do not recognize such an allowance.

4. The aid of equity to enforce a claim against a decedent's estate cannot be sought until the claim has been established at law.
5. An admission in an agreed statement of facts that under the laws of another state a claim has been allowed by its courts against a decedent's estate does not admit that the claim is valid and enforceable under the laws of the state where it is sought to be enforced against real property belonging to the estate.

(June 18, 1898.)

APPEAL by complainant from a judgment of the Appellate Court, Third District, affirming an order of the Circuit Court for Macon County disallowing a claim against the estate of Edward O. Smith, deceased. *Affirmed.*

Statement by **Magruder, J.:**

This is an appeal from an order of the circuit court refusing to direct payment to the appellant of an amount allowed her for "family allowance" by the superior court of Santa Clara county, California, which order

NOTE.—As to the effect of judgments in other states against executors or administrators, see *note* to *Braithwaite v. Harvey* (Mont.) 27 L. R. A. 101.
43 L. R. A.

was entered, upon an agreed state of facts, in a partition proceeding instituted by appellees, as heirs of one Edward O. Smith, against the appellant, widow of said Edward O. Smith and others, upon the application of appellant to have her claim for such allowance paid out of the proceeds of the sale of a part of the property, reported by the commissioners as incapable of division in said proceeding for partition and assignment of dower. An appeal was taken to the appellate court from the order refusing payment of appellant's claim. The appellate court has affirmed the order of the circuit court, and the present appeal is prosecuted from such judgment of affirmance. 63 Ill. App. 534.

Edward O. Smith died intestate on March 8, 1892, in Santa Clara county, California, where he was then residing. He left, him surviving, his widow, Katheryne S. Smith, and ten children, to wit, one daughter, Katheryne J. Smith, his child by appellant, and the appellee Edward O. Smith, and the other appellees, his children by a former wife. The appellant, Katheryne S. Smith, was appointed, on April 1, 1892, by said superior court of Santa Clara county, California, administratrix of the estate of said Edward O. Smith, deceased, in California, the said superior court having probate jurisdiction under the laws of California. On May 16, 1892, David S. Shellabarger was appointed administrator of the estate of Edward O. Smith in Illinois by the county court of Macon county, Illinois. Said Edward O. Smith, at the time of his death, owned land in Illinois, to wit, 1,000 acres of farm land, and a property in the city of Decatur known as the "Old Opera House." The appellees, heirs of Edward O. Smith, commenced in the circuit court of said Macon county, Illinois, the proceeding above referred to for the partition of said real estate, and for the assignment of the appellant's dower therein. Such proceedings were had in said partition and dower suit, that 267.62 acres were set off to the appellant as her dower, and most of the lands were divided among the heirs, but, the commissioners having reported that the opera-house property in Decatur could not be divided, the same was sold by the master in chancery, who, after paying appellant the amount allowed her for her dower interest therein, as hereafter stated, had in his hands \$13,072.73. The appellant, as widow of the deceased intestate, consented to the sale of said opera-house property, and received out of the proceeds of such sale, as the value of her dower, the sum of \$5,481.36. The appellant also received one third of the rents of the real estate from the time of the death of said Smith to the time of the assignment of her dower. A receiver, named George W. Bright, was appointed in the proceeding and has in his hands \$320.13 arising from the collection of rents. Shellabarger, the administrator, has in his hands \$340.43. The total amount in the hands of the master, the receiver, and the Illinois administrator is \$13,733.29. The costs of the administration and receivership in Illinois, and the debts due to the creditors

in Illinois, have been fully paid. All the moneys on hand have proceeded from the sale and rental of the real estate owned by the said Edward O. Smith in Macon county Illinois. Claims were presented and allowed against the estate of Smith in the state of California. The assets in California were not sufficient to pay the California creditors. Upon the agreed statement of facts, hereinafter set forth, the circuit court of Macon county was asked to apply the moneys in the hands of the master and receiver, so far as should be necessary, to the payment of the claims against the estate of the intestate, as allowed by the court in California. A number of these claims have been paid by the master with the consent of the heirs, but the claim of the appellant for her "family allowance," as heretofore and hereinafter mentioned, was objected to by the heirs.

The agreed statement of facts set forth the death of Edward O. Smith, the appointment of his widow as administratrix in California, the appointment of Shellabarger as administrator in Illinois; and further sets forth that under the laws of California there was set off to the appellant herein, as such widow, as and for her homestead, in fee simple, certain land in California, valued at \$8,468.35; that under and by virtue of the laws of California there was allowed to the said Katheryne S. Smith by the said superior court of Santa Clara county certain household and kitchen furniture in said homestead, valued at \$2,992; "that under and by virtue of the laws of California said superior court of Santa Clara county allowed the said Katheryne S. Smith, out of the estate of said deceased, as and for her 'family allowance,' the following sum, to wit, from the date of the death of said Edward O. Smith, on the 8th day of March, 1892, to the 8th day of August, 1892, five months, at \$250 per month, \$1,250, and from the 8th day of August, 1892, until the further order of said court, at the rate of \$200 per month; that the same be paid to her out of the estate of said Edward O. Smith, deceased, in preference to all other claims against said estate, except funeral expenses and the expenses of administration"; that said court, on September 8, 1893, ordered that said allowance cease, and that the amount thereof under the orders of said court is \$3,850. The agreed statement of facts further sets forth that a large number of claims were allowed by the superior court of Santa Clara county, California, against the estate in that state. A list of said claims is attached to the agreed statement of facts. Copies of the orders of said superior court making the above allowance to the widow, and setting off the homestead to her, are also attached to said agreed statement of facts; and it is therein agreed that said copies shall be taken as evidence that said order making said allowance was entered, and that the persons heretofore mentioned are the children and heirs of the deceased. The agreed statement of facts also admits the facts hereinbefore stated, not specifically mentioned as being contained therein. It is

also agreed therein that the administratrix, Katheryne S. Smith, has no funds in her hands to pay the said allowance of \$3,850 made to her by the California court, or to pay the expenses of the administration of said estate in California. It is therein agreed that the parties plaintiff or defendant may appeal, or prosecute a writ of error, from the order of court made upon such agreed statement of facts.

Mr. W. C. Johns, for appellant:

The allowance for the support of his widow is a debt.

Cal. Stat. §§ 11464-11467.

The funds in the hands of various officers of court must be regarded as personalty, converted into such for the purpose of paying debts.

3 Pom. Eq. Jur. § 1150; *Re Simmons*, 55 Ark. 485; *Foster v. Foster*, L. R. 1 Ch. Div. 588; *Cooke v. Dealey*, 22 Beav. 196; *Oberly v. Lerch*, 18 N. J. Eq. 346; *Heydock's Appeal*, 7 N. H. 496; *Cronise v. Harrit*, 47 Md. 433; *Davis v. Estey*, 8 Pick. 476; 2 Woerner, Law of Administration, §§ 481, 562; *Porter v. Heydock*, 6 Vt. 374; 2 Kent, Com. p. 433; *Steed v. Preece*, L. R. 18 Eq. 192; *Robinson's Appeal*, 62 Pa. 213; *Emerson v. Cutler*, 14 Pick. 118.

The administration in California is principal, and the administration of the funds in Illinois, whether conducted by an administrator or by a court of equity, is ancillary.

Young v. Wittenmyre, 123 Ill. 307; *Heyer v. Alexander*, 108 Ill. 386; *Young v. Young*, 2 Misc. 381; *United States, Mackey, v. Coxe*, 18 How. 106, 15 L. ed. 301; 3 Redf. Wills, *26 et seq.; *Churchill v. Boyden*, 17 Vt. 319; 3 Wms. Exrs. p. 1664.

Personalty is governed in distribution by the law of the domicile.

Parsons v. Lyman, 20 N. Y. 112; *Despard v. Churchill*, 53 N. Y. 197; *Young v. Wittenmyre*, 123 Ill. 307; *Stevens v. Gaylord*, 11 Mass. 256; *Fay v. Haven*, 3 Met. 114; *Davies v. Boylston*, 9 Mass. 337, 6 Am. Dec. 72; *Jennison v. Hapgood*, 10 Pick. 79; *Wheelock v. Pierce*, 6 Cush. 288; *Richards v. Dutch*, 8 Mass. 514; *Heydock's Appeal*, 7 N. H. 496.

After domestic creditors are paid, property should be remitted to the place of principal administration.

Young v. Wittenmyre, 123 Ill. 307; *Stevens v. Gaylord*, 11 Mass. 256; *United States, Mackey, v. Coxe*, 18 How. 106, 15 L. ed. 301; 3 Redf. Wills, *26 et seq.; *Churchill v. Boyden*, 17 Vt. 319; *Fay v. Haven*, 3 Met. 109; *Wheelock v. Pierce*, 6 Cush. 288; *Richards v. Dutch*, 8 Mass. 514; 3 Wms. Exrs. p. 1664; *Walker v. Welker*, 55 Ill. App. 123; *McDonald v. McDonald*, 96 Ky. 209; *Mayo v. Equitable Life Assur. Soc.* 71 Miss. 590; *Cross v. United States Trust Co.* 131 N. Y. 330, 15 L. R. A. 606; *Despard v. Churchill*, 53 N. Y. 197.

A question determined by the courts of a sister state, so far as to become *res judicata* between the parties, cannot be reopened by the same parties in another state.

Davies v. Head, 3 Pick. 128; 1 Woerner, Law of Administration, §§ 158, 167 et seq. 43 L. R. A.

Messrs. Crea, Ewing, & Walker also for appellant.

Messrs. Bunn & Park and Outen & Roby, for appellees:

The attempt to have the same paid out of the proceeds of the sale of lands in Illinois in this case is an attempt to distribute the real estate in Illinois according to the laws of the state of California, which cannot be done.

An award is only allowed to one who is a resident of this state.

1 Starr & C. Stat. p. 223; *Veile v. Koch*, 27 Ill. 129.

Even an award made to a widow in this state may be contested.

Marshall v. Rose, 86 Ill. 374.

The funds arise from the real estate in the state of Illinois of which E. O. Smith died seized. Such real estate descended to the heirs *eo instanti* of the death of their father. Any change from real estate has been made since by them through the aid of the court, and as of their own property and not the property of the estate.

Chapin, Petitioner, 148 Mass. 591, 2 L. R. A. 768; *Simonds v. Simonds*, 112 Mass. 157; 3 Pom. Eq. Jur. § 1107; *Howard v. Peavey*, 128 Ill. 430; *Holland v. Cruft*, 3 Gray, 162; *Emerson v. Cutler*, 14 Pick. 118; 3 Washb. Real Prop. 6; *Smith v. McConnell*, 17 Ill. 135, 63 Am. Dec. 340; *Horne, Probate Law*, § 172, p. 200; *Story, Conf. L.* §§ 428, 430, 431, 435, 483, 551, 555; 1 Redf. Wills, 4th ed. p. 398.

Real estate is governed by the *lex rei sitæ*.

1 Story, Eq. § 586; *McGarvey v. Darnall*, 134 Ill. 370, 10 L. R. A. 861; *Judy v. Kelley*, 11 Ill. 211, 50 Am. Dec. 455; *Rosenthal v. Renick*, 44 Ill. 202; *Stacy v. Thrasher*, 6 How. 44, 12 L. ed. 337; *Hill v. Tucker*, 13 How. 466, 14 L. ed. 226; *McLean v. Meek*, 18 How. 16, 15 L. ed. 277; *Freeman, Judgm.* §§ 163, 572; *McDonald v. McDonald*, 96 Ky. 209.

The allowance made by the superior court of Santa Clara county, California, to appellant as widow of E. O. Smith is only effective as to property in that jurisdiction.

McGarvey v. Darnall, 134 Ill. 367, 10 L. R. A. 861; *Story, Conf. L.* § 522; *Freeman, Judgm.* §§ 163, 572; *Jones & Cunningham, Probate Practice*, § 5, p. 206; *Stacy v. Thrasher*, 6 How. 44, 12 L. ed. 337; *Judy v. Kelley*, 11 Ill. 211, 50 Am. Dec. 455; *Rosenthal v. Renick*, 44 Ill. 202; *McLean v. Meek*, 18 How. 16, 15 L. ed. 277.

It can have no binding effect upon our courts.

Judy v. Kelley, 11 Ill. 211, 50 Am. Dec. 455; *McGarvey v. Darnall*, 134 Ill. 367, 10 L. R. A. 861.

No proof of the claim was made, and the admission relied upon was only that the claim had been allowed in another state, which admission could have no greater effect than proof of such allowance in such foreign jurisdiction, hence could not be held to establish even a *prima facie* case for claimant.

Smith v. Goodrich, 167 Ill. 46. *Jones & Cunningham, Probate Practice*, § 5, p. 206.

The fact that appellees were parties to the

suit in the foreign jurisdiction does not estop them.

Aspdon v. Nixon, 4 How. 467, 11 L. ed. 1059; *De Brimont v. Penniman*, 10 Blatchf. 436.

Even if the claim of appellant be warranted under our law, it was necessary for her to first establish it against the administrator in a county court of this state before the heirs (appellees) could be called upon to pay it out of their real estate.

Winslow v. Leland, 128 Ill. 304; *Cowdrey v. Hitchcock*, 103 Ill. 262; *Harris v. Douglas*, 64 Ill. 466; *Blanchard v. Williamson*, 70 Ill. 647; *Freeland v. Dazey*, 25 Ill. 294; 2 Freeman, Judgm. 4th ed. § 564; *Williams v. Gibbs*, 17 How. 239, 15 L. ed. 135.

An allowance to the widow is only for the benefit of the widow of a resident.

Cowdrey v. Hitchcock, 103 Ill. 272.

This claim is not a debt of E. O. Smith, and was not in existence at the time of his death.

Fitzgerald v. Glancy, 49 Ill. 465; *Walker v. Diehl*, 79 Ill. 473; *Lynch v. Hickey*, 13 Ill. App. 139.

Magruder, J., delivered the opinion of the court:

The superior court of Santa Clara county, California, allowed appellant, under the law of that state, \$3,850 "as and for a family allowance out of the estate of her deceased husband, Edward O. Smith." The appellant seeks to have her said claim of \$3,850 paid out of the proceeds of a sale of land in Illinois, made in a partition proceeding between the heirs and widow of the deceased. It is conceded that the claim whose payment the appellant here seeks to enforce has not been allowed in the county court of Macon county, or in any other court in Illinois. The only question in this case is whether or not the circuit court erred in refusing to allow the appellant's claim of \$3,850 for a "family allowance" to be paid out of the funds realized from the sale and rental of the Illinois land. This question would appear to have been settled by two recent decisions of this court. One of said decisions is the case of *McGarvey v. Darnall*, 134 Ill. 367, 10 L. R. A. 861. In the latter case we held that a judgment against an administrator in one state is not competent testimony to show a right of action against either a domiciliary or ancillary administrator in another state, or to affect the assets in such other state. The second decision is the case of *Smith v. Goodrich*, 167 Ill. 46, which holds the same doctrine as that announced in *McGarvey v. Darnall*, *supra*. It is not necessary here to repeat the reasoning by which the conclusions announced in the cases thus referred to are supported.

It is, however, claimed by the appellant that the administration in California is the principal administration, and the administration in Illinois is merely ancillary; that personal property is governed in its distribution by the law of the domicile; and that, after domestic creditors are paid, the property should be remitted to the place of the principal administration. Here, the domicile of the deceased, Edward O. Smith, was in Santa Clara county, California.

His widow was appointed administratrix in the state of his domicile, and is the principal administratrix. It is therefore claimed that so much of the moneys or funds now in the hands of the master and receiver in the partition suit should be paid over to the appellant, representing the principal administration, as may be necessary to pay the claims allowed against the estate in California, including the appellant's claim for a "family allowance." In *Young v. Wittenmyre*, 123 Ill. 303, we held that the administration granted in the state of a decedent's domicile at the time of his death is the principal administration, and that granted in another state is but ancillary to the other; and that when the principal administration of an estate is had in this state, and the ancillary administration in another state, it is the duty of the administrator in such other state to collect all debts due the estate there, and convert all assets within that jurisdiction into money, pay all debts established against the estate there, and after all such debts are satisfied, to pay the balance to the principal administrator in this state, so that it may be disposed of and distributed under the authority of the county court of this state. But the doctrine thus announced has reference to personality or money, and to the proceeds of the sale of personality. In order to make this doctrine applicable to the facts of the present case, it is insisted by the appellant that when the sale of the land was made in the partition proceeding, the proceeds of such sale in the hands of the master were thereby converted into and became personality, and ceased to be real estate. Upon the theory that these funds are personality, it is claimed that they should be paid over to the administratrix appointed in California, to be applied upon the claims allowed there. We cannot agree with the contention that the proceeds of the sale of the land made in the partition proceeding were by such sale converted into personality, so that they can be ordered to be distributed among foreign creditors of the estate, whose claims have not been allowed in Illinois. The real estate sold is located in Illinois. Nothing is better settled than that the law of the place where real and immovable property is situated exclusively governs in respect to the rights of the parties, and the modes of transfer and distribution. When the property is real estate, the *lex rei sitæ* controls. *Story*, Conf. L. § 424; *Wunderle v. Wunderle*, 144 Ill. 40, 19 L. R. A. 84; *McCartney v. Osburn*, 118 Ill. 403; 2 Freeman, Judgm. §§ 564, 572. Under the laws of Illinois the administrator has no interest in the land. *Noe v. Moutray*, 170 Ill. 169. The claims against the estate must be proved up in the county or probate court, and, if there is a deficiency of personal assets, then the administrator may apply for a sale of the realty to pay such claims. The allowance of a claim in the probate or county court is, as against the heirs, prima facie evidence of its validity.

Counsel refer to some cases in other states than Illinois where, upon a sale by an administrator to pay debts allowed in the

state where ancillary administration is taken out, a surplus remaining from the proceeds of such sale after the payment of all of such debts will be remitted to the administrator in the state of the principal administration to be applied upon unpaid claims there. Such a case is that of *Re Gable*, 79 Iowa, 178, 9 L. R. A. 218. Whether or not the surplus arising under such a state of facts would so far be regarded as personalty as that the ancillary administrator should be authorized to pay it to the principal administrator is a question which we are not called upon to decide in this case. Here the fund on hand is not the proceeds of a sale made by the administrator to pay debts, but it is the proceeds of a sale made by the master in chancery of the court for the purpose of distribution among the heirs, and not among the creditors. It follows that the proceeds of sale now under consideration are affected with the character of real estate.

The doctrine of equitable conversion is applicable, as a general thing, when land is directed by a will or other instrument to be converted into money for a particular purpose, such as the payment of debts. Where land is sold by the order of court for any purpose, the character of the property is changed only so far as may be necessary to accomplish the particular purpose. The conversion of real into personal property, or personal into real property, under a power in a will, takes place only for the purposes for which it is authorized. Where these purposes fail, or do not take effect in fact or in law, the property is considered as remaining in its former condition. Where an executor sells real estate of his testator to pay his debts under a power contained in a will, the conversion of the realty into personalty is completed to all intents and purposes only to the extent to which the purchase money is required for the particular objects for which the sale takes place; and the excess, though in the form of money, remains impressed with the character of real estate for the purpose of determining who is entitled to receive it. 3 Pom. Eq. Jur. § 1167; *Cronise v. Hardt*, 47 Md. 433; 6 Am. & Eng. Enc. Law, p. 671. Section 31 of the Illinois partition act provides that "the proceeds of the sale shall be divided according to the interests of the parties, as directed by the court." Section 5 of the act provides that the petition shall describe the premises sought to be divided, and shall set forth the interests of all the parties interested therein, and shall pray for the division and partition of the premises according to the respective rights of the parties interested therein. Section 5 further provides that, if a division cannot be made, etc., a sale shall be made, and the proceeds divided according to the respective rights of the parties. Hence, under our statute, in case of a sale in a partition proceeding, the proceeds are to be divided among the parties interested in the land according to their respective interests. When the partition is among the heirs of a deceased ancestor, the purpose of the sale is the distribution of the proceeds among the owners of the undivided interests in the land. Such

proceeds, therefore, remain impressed with the character of real estate for the purpose of distribution. It may be that in a case where the creditor of one of such heirs is seeking to reach the money derived from such sale it would be regarded as personalty, but, so far as the ancestor is concerned from whom the heirs inherited the land, the proceeds of such sale cannot be regarded as the personal estate of such ancestor, and therefore cannot be paid to his administrator. Indeed, the purpose of the sale is the distribution of the proceeds among the heirs, and not the payment thereof to the administrator for distribution among the creditors. Hence we do not think that under the facts of this case the proceeds of the sale in this proceeding can be regarded as having been converted by the sale from land into money, so as to require the payment of the same to the administratrix in California. If the appellant had presented her claim to the county court of Macon county, Illinois, and had it allowed there, and then applied for a sale of the land of these appellees for the purpose of having it paid, a different question would be presented. But such question does not here arise.

It is said, however, that the heirs of the deceased, Edward O. Smith, who are the appellees here, appeared in the court in California, and opposed appellant's claim there made for a "family allowance." From this fact it is argued that the matter is *res judicata* as to them, and that they are estopped from contesting the claim here. It is true that the appellees did appear in the California court, and there oppose the claim for a "family allowance." But they are not on that account estopped from contesting the claim here. No judgment was entered against them in the California court. The judgment there was only against the estate of the deceased within the jurisdiction of the California court rendering the judgment. By allowing the claim, the California court settled the question that under the laws of that state appellant was entitled to the "family allowance." But here the question is whether such allowance shall be paid out of property in Illinois. The matter to be determined here is a new matter, not heretofore passed upon. The question before the circuit court of Macon county was whether the appellant, under the laws of Illinois, is entitled to such allowance. The statutes of Illinois do not provide for such a "family allowance" as is permitted by the statutes of California. Such a claim against the estate of a decedent is unknown in the courts of Illinois. Moreover, the claim for this allowance was not an existing claim at the death of the intestate. It was made to his widow, under the laws of California, after his decease. A state has the right to provide for the allowance of such a claim for the benefit of one of its own citizens, and can enforce it out of the property within its own jurisdiction; but it is not one which can be enforced in another state as to the property there. Such a provision is local in its nature and operation. It has no extraterritorial significance, but must be executed up-

on persons and property within the jurisdiction of the state where the law permitting it is in force. *Aspden v. Nixon*, 4 How. 467, 11 L. ed. 1059; *De Brimont v. Penniman*, 10 Blatchf. 436. What we said in *McGarvey v. Darnall*, 134 Ill. 367, 10 L. R. A. 861, upon this subject, is precisely applicable here. In that case the proceeding was for the partition of land in this state, and one of the defendants by cross bill set up the allowance of a claim in his favor against the estate of the deceased ancestor in the state of Iowa, the residence of the decedent at his death, and asked to have such judgment paid out of the proceeds of the sale of the land in case of a sale, but made no proof of the justice of the claim, other than the production of the judgment of allowance in Iowa. We there held that the cross bill was properly dismissed for want of proof of the claim, and that the judgment of the Iowa court was not evidence against the heirs of the estate, saying, in the course of the decision (134 Ill. 372, 10 L. R. A. 861: "Moreover, that in regard to which the Iowa courts had jurisdiction to adjudicate was the property in that state, and that only; and when they assumed to adjudicate that the demand of appellant was a just charge upon the estate of the deceased, such adjudication had reference solely to the property in that state, and was efficacious in respect to that property only."

It is also to be noted that the appellant did not pursue the remedy which she had at law. Even if her claim were warranted under our statute, it was necessary for her to first establish it against the administrator in a county court of this state, before the heirs could be called upon to pay it out of their real estate. She cannot come into a court of chancery in the first instance, as her claim has not been reduced to judgment. The law is well settled in this state that a court of equity will not ordinarily assume jurisdiction of claims against an estate until the claimant shall have exhibited his claim and had it allowed in the county court, and then, if any special reasons that may be deemed sufficient can be assigned why that court cannot afford the requisite relief, equity will assist him, but not otherwise. *Harris v. Douglas*, 64 Ill. 466. As was said

in *Smith v. Goodrich*, 167 Ill. 46: "This proceeding seeks to reach the proceeds of real estate. It is, in fact, a proceeding against the land itself, without a judgment at law, and is a resort to chancery on a simple contract indebtedness. This cannot be done where the law provides a remedy." It is, however, claimed by the appellant that the appellees have admitted the correctness of her claim by the terms of the agreed statement of facts in this record, and that they are estopped by such admission from questioning the claim. The admission, as contained in the agreed statement of facts, is "that under and by virtue of the laws of California said superior court of Santa Clara county allowed the said Katheryne S. Smith out of the estate of the said deceased, as and for a family allowance, the following sum," etc. This is not an admission that the claim is right or just, or that under the laws of Illinois such an allowance can properly be made. The admission is only that under the law of California, in a case in that state where the appellees appeared and defended, it was adjudicated that appellant was entitled to the allowance. The admission is of no greater force than would be given to the presentation of a properly authenticated copy of the proceedings of the California court allowing the claim. It can have no greater effect. But the presentation of such an authenticated copy under the decisions of this court would not have made even a prima facie case for the appellant. *McGarvey v. Darnall*, 134 Ill. 367, 10 L. R. A. 861.

Appellees are entitled to insist that under the laws of the state there is no authority for the collection of this "family allowance" out of the real estate of the decedent in Illinois, which descended to them as heirs. To hold otherwise would be to allow the law of California, however different from our own, to govern the distribution of real estate here. This is contrary to the well-settled rules of law upon this subject.

The judgment of the Appellate Court, and the order of the Circuit Court disallowing appellant's claim, are affirmed.

Boggs, J., took no part in the decision of this case.

INDIANA SUPREME COURT.

STATE of Indiana, *ex rel.* Joseph R. HARRISON, *Appt.*,

v.

Benjamin F. MENAUGH *et al.*

(.....Ind.....)

1. A statute changing the time for an election of township trustees, whereby it is to come more than four years after the previous election, does not violate Const. art. 15, § 2, which inhibits the creation of an of-

fice the tenure of which shall be longer than four years, where the statute does not in any manner profess or attempt to extend the tenure of the trustees then in office; but, if their term is extended, it will be by operation of Const. art. 15, § 3, which provides that officers may hold over until their successors have been elected and qualified.

On rehearing.

2. Bitter and intense feeling against township trustees, in the communities where they reside, cannot be considered by the

NOTE.—As to the effect of the constitutional provision for the holding over of officers, see also *People, Richardson, v. Henderson* (Wyo.) 43 L. R. A.

22 L. R. A. 751; *Lafferty v. Huffman* (Ky.) 32 L. R. A. 203; and *Baker City v. Murphy* (Or.) 35 L. R. A. 88.

courts in determining the validity of an act extending the time for the election of their successors.

3. A suitor has no standing in court to compel the holding of an election under an earlier law because the later one is unconstitutional where the earlier one is subject to the same objection although his pleadings do not show that fact.

(Hackney, Ch. J., and Howard, J., dissent from proposition 1.)

(July 1, 1898.)

APPEAL by relator from a judgment of the Circuit Court for Whitley County in favor of defendants in a mandamus proceeding to compel the taking of the necessary steps to hold an election on the first Tuesday after the first Monday in November, 1898. *Affirmed.*

The facts are stated in the opinion.

Messrs. Thomas R. Marshall, William F. McNagy, and Philemon H. Clugston, for appellant:

The office of township trustee was one which, by the Constitution of 1852, the legislature had a right to create.

Under § 2, art. 15, of the Constitution the legislature has no power to extend the term of an officer beyond the period of four years, as it would have no power to abridge the term of an officer specifically declared by the Constitution.

State, Gibson, v. Friedley, 135 Ind. 119, 21 L. R. A. 634.

Although the office of township trustee is not a constitutional office but is created by the legislature, the term is limited by that constitutional restriction which forbids the creation by the legislature of any office the tenure of which shall be more than four years.

The people have never confided in the legislature the power either directly or indirectly to choose, appoint, or elect township trustees, nor is that right reserved to the legislature in the Constitution.

State, Wilson, v. Wells, 144 Ind. 231.

If by this act the legislature attempted to appoint township trustees, such attempt by the legislature, directly or indirectly, to exercise the power of appointment to a purely municipal office is an interference with the right of local self-government.

15 Am. & Eng. Enc. Law, p. 994; *Evansville v. State, Blend*, 118 Ind. 426, 4 L. R. A. 93; *State, Jameson, v. Denny*, 118 Ind. 382, 4 L. R. A. 79; *Hovey v. State, Carson*, 119 Ind. 395.

An act of the legislature which changes the time of holding election from 1898 to 1900 and makes no provision for the short term is an appointment by the legislature.

People, Fowler, v. Bull, 46 N. Y. 57, 7 Am. Rep. 302.

This act is in direct violation of express prohibitions of the Constitution, and is therefore unconstitutional and void.

Cooley, Const. Lim. 5th ed. p. 208; *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272; *Evansville v. State, Blend*, 118 Ind. 426, 4 L. R. A. 93.

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The right to choose officers is primarily and inherently in the people. Primarily it is neither an executive nor a legislative function.

Silence on the subject takes no part of the power from the people and vests none in their representatives.

State, Jameson, v. Denny, 118 Ind. 382, 4 L. R. A. 79; *Evansville v. State, Blend*, 118 Ind. 426, 4 L. R. A. 93; *State, Holt, v. Denny*, 118 Ind. 449, 4 L. R. A. 65.

In view of the interests involved the court will disregard the suggestion of this being a struggle for party supremacy and look to the real merits of the controversy.

Fesler v. Brayton, 145 Ind. 71, 32 L. R. A. 578.

The board of election commissioners are purely ministerial officers, and if they refuse to perform ministerial duties upon application to the proper court writ of mandamus will issue to compel them.

State, Plaquemines Parish Supers. of Election, v. Livaudais, 48 La. Ann. 827; *McPherson v. Blacker*, 92 Mich. 377, 16 L. R. A. 475, *Affirmed* in 146 U. S. 3, 36 L. ed. 870; *State, Morris, v. Wrightson*, 56 N. J. L. 128, 22 L. R. A. 548; *People, Hodges, v. McGaffey*, 23 Colo. 156.

On rehearing.

In view of the bitter and intense feeling in many communities of Indiana at the continuance in office of a number of township trustees who are looked upon with suspicion by the people, and the formation of that latest and most consummate flower of the trust system, the township trustees' organization which meets in the state house to devise ways and means by which to hold office, we have felt it a solemn duty, to file a petition for rehearing in this cause, and briefly, in everyday language, to argue it. We do this in the hope that maturer consideration has changed the opinion of the majority of this court, and in the belief that a few suggestions will lead the minority to modify its final conclusion.

The liberties of the Anglo-Saxon race are not suddenly wrenched from it. It is only by subtle and small but persistent encroachments upon them that they are lost. A judge of the Supreme Court of the United States changes his mind over night, and deprives the people of a part of the power of taxation.

The majority of this court, in this case, declares in substance that the general assembly of this state has had the sovereign power delegated to it by the people of abolishing and postponing elections for township trustees. It is but a little matter, yet the fathers never dreamed of it, and it is an encroachment upon the inalienable and guaranteed rights of the people.

So apparent is the unconstitutionality of the act of 1897, postponing the election of township trustees to 1900, that if it is to be upheld it can only be done by a naked statement that it is one of the solemn acts of the legislature, and must therefore stand.

Appellant has an interest and attacks the law of 1897 only. The minority of this court

says that the contention is well founded. The appellant does not attack the act of 1893, nor do the township trustees, unless inferentially in argument.

Had the township trustees attacked the act of 1893, they would have come clearly within the exception in that permitting them to attack that act would give them an unconscionable advantage by retaining benefits derived from that act.

State, Collett, v. Gorby, 122 Ind. 17; 6 Am. & Eng. Enc. Law, p. 1090; Cooley, Const. Lim. 6th ed. p. 196; *Buck v. Eureka*, 109 Cal. 504, 30 L. R. A. 409; *Com. v. Wright*, 79 Ky. 22, 42 Am. Rep. 203; *Smith v. McCarthy*, 56 Pa. 359; *Wagner v. Garrett*, 118 Ind. 114.

Messrs. A. A. Adams, Hogate & Clark, C. M. McCale, W. W. Spencer, E. P. Ferris, and B. E. Gates for appellees.

Jordan, J., delivered the opinion of the court:

This action was instituted by the relator to obtain a writ of mandate against appellees to compel them to take the necessary steps in order that an election might be held in Columbia township, Whitley county, Indiana, on the first Tuesday after the first Monday in November, 1898, for the purpose of electing a trustee for that township. Each of the appellees filed a separate demurrer to the complaint, which the court sustained; and, the relator refusing to amend, judgment was rendered against him for costs. Sustaining these several demurrers constitutes the errors assigned in this court.

The only questions raised and discussed by the parties to this appeal relate to the constitutional validity of an act of the legislature approved February 25, 1897 (Laws 1897, p. 64). The title of this statute, and the first section thereof, are as follows:

"An Act Providing for Changing the Time of Electing Certain Township Officers, Fixing the Time when They Shall Qualify and Assume the Duties of Their Respective Offices, Providing for Separate Ballots and Ballot Boxes, and Repealing All Laws and Parts of Laws in Conflict Therewith.

"Sec. 1. Be it enacted by the general assembly of the state of Indiana: That the time for holding the election of township trustees and assessors shall be changed from the general election on the first Tuesday after the first Monday in November, 1898, to the general election on the first Tuesday after the first Monday in November, 1900, and at the general election on the first Tuesday after the first Monday in November of every fourth year thereafter. Said township trustees and assessors shall qualify as now provided by law, and enter upon the discharge of the duties of their respective offices at the expiration of ten days after such election."

Section 2 provides that the time of holding the election of justices of the peace, constables, and other officers of the township shall remain as now fixed by law.

Section 3 declares that "the election of said township officers shall be conducted under

the provisions of the law governing said general elections."

The fourth section relates to the ballots and ballot boxes to be used at the election of township officers.

The fifth section repeals all laws in conflict with the act.

It is insisted by counsel for appellant that, as this act is invalid by reason of its being repugnant to the Constitution, therefore the law of 1893 (Laws 1893, p. 192; Burns's Rev. Stat. 1894, § 6290), whereby the time of holding the election for township officers was changed from April to the first Tuesday after the first Monday in November, 1894, and every fourth year thereafter, is still in force, and consequently the election of township trustees must be held at the November election in 1898. It will be observed that the act of 1897, *supra*, applies only to township trustees and assessors, and changes the time of the election of these officials from the general election in November, 1898, as provided for by the act of 1893, to the general election in November, 1900, and every fourth year thereafter, and further provides that these officers shall qualify and enter upon the discharge of the duties of their respective offices at the expiration of ten days after such election. The time of electing justices of the peace, constables, and such other township officers as may be provided for by law is left unchanged, and remains as fixed by the act of 1893, *supra*. If the act of 1897 is a valid exercise of legislative power, no election of township trustees and assessors can be held by reason thereof until the general election in November, 1900, unless the legislature at its next session provides for one to be held at an earlier time.

Appellant's learned counsel challenge the constitutional validity of the law in controversy upon the ground that it extends the term of trustees elected in 1894 beyond the period of four years,—the time allotted by the Constitution for the tenure of an office created by the legislature; or, in other words, they virtually contend that, as § 2 of article 15 of the Constitution inhibits the general assembly from creating any office the tenure of which shall be longer than four years, by this inhibition the legislature has no power to extend the term of a township trustee beyond the period of four years, which it is contended the act of 1897, as a necessary result, does, in respect to trustees elected at the November election in 1894, and therefore it is in violation of this provision of the Constitution. Counsel assert that, as, under the provisions of the act in question, the election of trustees being postponed until November 1900, the result will be that the present incumbents will hold for two years beyond the constitutional limit. They say: "Of course, this act does not expressly appoint the present incumbents, but it does produce that result; and we contend that, in the consideration of the act, we must look to the results, and, where the results would be absolutely repugnant to the Constitution, a law cannot be upheld." It is conceded that under article 2, § 14, of the Constitution, the right to

provide for or fix the time for holding township elections is reserved for the legislature; but the contention seems to be that this provision of the Constitution contemplates that elections for township officers must at least be held once in every period of four years, and therefore the legislature has no power to enact a law like the one in dispute, which operates in changing or postponing the time for electing trustees beyond the quadrennial period.

Before reviewing the cardinal question involved, we may say that, if the objections urged by appellant against the validity of the act of 1897 can be sustained, then the effect of such holding would certainly result in striking down the act of 1893, under which the relator seeks to compel appellees to hold an election in November, 1898. Unquestionably, it can be said of the latter act that it is impressed with the same infirmities which are alleged to exist against the statute of 1897. It expressly changed or postponed the time of electing trustees and other township officers from the first Monday in April, 1894, as provided by the amendatory act of 1889 (Laws 1889, p. 425), to the time of holding the general election in November, 1894, and every fourth year thereafter, and thereby, if the argument of counsel for appellant is sound, extended the holding of the trustees elected in April, 1890, three months in excess of four years. It will be seen that trustees elected at the April election, 1890, by reason of the provision of the act approved March 9, 1889 (Laws 1889, p. 344), entered upon the discharge of their duties on the first Monday in August of that year, and the time of electing their successors was fixed by the act of 1893 on the first Tuesday after the first Monday in November, in 1894. Thus, if the reasoning of appellant can be accepted as correct, it operated to extend their term three months, at least, over or beyond the constitutional limit of four years; and, in accordance with the insistence of counsel, for this reason the act of 1893 must be condemned for violating the Constitution in like manner as does the act of 1897, and, without further legislation, the law of 1889 would control, and the time for holding an election under the latter would not again occur until April, 1902. But this would not be the only result which would follow a decision of this court adverse to the validity of the act of 1897. The act of 1893 being unconstitutional and void under appellant's contention, consequently there was no legal authority for electing township trustees and assessors at the November election in 1894, and therefore the present incumbents would not be legally entitled to hold their offices, and could be ousted therefrom, and those whom they succeeded might be, if they desired, reinstated into the offices which they, as it might be said, without authority of law, surrendered; and no doubt numerous suits would be instituted on the part of trustees and assessors elected in 1890 against present incumbents, to obtain possession of the respective offices, together with the past emoluments thereof. Passing these features of the case, however, as of no pres-

ent consequence, in view of our ultimate conclusion, they being mentioned merely to show the deplorable results which would follow an adverse decision on the validity of the act in question in the event our views on the law constrained us to so decide, we proceed to consider and determine the real question in controversy between the parties.

It becomes necessary for us to refer to and examine certain provisions of the Constitution which the parties to this appeal insist have a material bearing upon the decision of the questions presented. It must be remembered that, under § 1 of article 4 of the state Constitution, all legislative authority is lodged in the general assembly; and, as regards this authority, that body is considered supreme and sovereign, subject to no restrictions except those which the state's Constitution expressly or impliedly imposes, and the restraints of the Federal Constitution and the laws and treaties passed and made pursuant thereto. Aside from these inhibitions or restrictions, the legislature may be said to be unfettered in the exercise of the power with which it has been invested. This doctrine has been repeatedly affirmed in many of the decisions of this court. See *Beauchamp v. State*, 6 Blackf. 299; *Beebe v. State*, 6 Ind. 501, 63 Am. Dec. 391; *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185; *Mount v. State*, *Richey*, 90 Ind. 29, 46 Am. Rep. 192; *Robinson v. Schenck*, 102 Ind. 307; *Hovey v. State*, *Carson*, 119 Ind. 395; *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576; *State, Smith, v. McClelland*, 138 Ind. 395; *Townsend v. State*, 147 Ind. 624, 37 L. R. A. 294.

The sole contention of appellant, as previously stated, is that the statute in question is antagonistic to the fundamental law of the state. As against this attack upon an act of the legislative department, this court must indulge all reasonable presumption in favor of its validity; and, guided by a well-settled rule, we cannot consistently declare the statute in controversy invalid unless it is clearly, palpably, and plainly shown to be violative of the Constitution, so as to remove all reasonable doubts that may exist in the mind of the court in respect to its alleged invalidity. *State, Smith, v. McClelland*, 138 Ind. 395; *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313; *Townsend v. State*, 147 Ind. 624, 37 L. R. A. 294. Being therefore required to give the benefit of all reasonable doubts in favor of the validity of the act of the lawmaking power, it is consequently incumbent upon him who assails its validity to affirmatively and clearly establish his charge to the exclusion of all such doubts. Especially must this rule prevail in view of the fact that the legislature is invested with plenary power for all purposes of civil government. Therefore an inhibition to exercise a particular power is an exception and the burden must rest upon the party who questions the validity of a statute to show that it is forbidden. *Jamieson v. Indiana Nat. Gas & Oil Co.* 128 Ind. 555, 12 L. R. A. 652, 3 Inters. Com. Rep. 613, and cases cited; *State, Smith, v. McClelland*, 138 Ind. 395; *Cooley, Const. Lim.* p. 105.

It was well said by Chief Justice Black, in *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759, on page 161 of the opinion, as follows: "The Constitution has given us a list of the things which the legislature may not do. If we extend that list, we alter the instrument, we become ourselves the aggressors, and violate both the letter and the spirit of the organic law as grossly as the legislature possibly could. If we can add to the reserved rights of the people, we can take them away; if we can mend, we can mar; if we can remove the landmarks which we find established, we can obliterate them; if we can change the Constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely." It may be true, perhaps, as counsel for appellant would seem to insist, that the great power conferred upon the legislature may be, and sometimes is, abused, but the remedy for this evil lies in an appeal to the people, who, in their sovereign capacity, can correct it, and not by appeal to the judiciary. There is no reason for assuming that the mere abuse by the legislature of its power was intended to be corrected by the courts. *Brown v. Buzan*, 24 Ind. 194; *State, Terre Haute, v. Kolsem*, 130 Ind. 434, 14 L. R. A. 566. If the latter should assume to protect the people against the abuse of power upon the part of their own servants or representatives, it would be the equivalent of attempting to protect the people against their own abuse. We have repeatedly affirmed that the question whether an act of the general assembly is politic, expedient, or necessary is one of legislative discretion, which is not subject to judicial review; and we have not the liberty to declare a statute void because it is not in harmony with our opinions in respect to policy, expediency, or justice. If the people are aggrieved by the action of their representatives in the general assembly, the way to redress the wrong is open to them at the next biennial election. The question in this case with which we have to deal is not whether the power to change or repeal a statute relative to the time of the holding of township elections has been conferred upon the legislature, but whether such power has been restricted or withheld by the organic law of the state. Section 14 of article 2 of the Constitution provides that "all general elections shall be held on the first Tuesday after the first Monday in November; but township elections may be held at such time as may be provided by law," etc. Section 3 of article 6 provides that "such other county and township officers as may be necessary shall be *elected or appointed* in such manner as may be prescribed by law." (Our italics.) Section 2 of article 15 reads as follows: "When the duration of any office is not provided for by this Constitution, it may be declared by law. . . . But the general assembly shall not create any office the tenure of which shall be longer than four years." The express restriction imposed by this last section is that the general assembly shall not create any office the prescribed term of which is longer than four years. Section 3 of the same article provides 43 L. R. A.

vides that "whenever it is provided in this Constitution, or in any law which may be hereafter passed, that any officer, other than a member of the general assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified." Tested by any or all of these provisions, and it is evident, we think, that no express or implied antagonism can be held to exist between any of them and the statute in dispute. We are of the opinion that the Constitution will be searched in vain to discover any restriction against the enactment of a statute of the character or purport of the one here involved. That the creation of the office of township trustee, under our Constitution, is a matter which is left wholly with the legislature, is undisputed. It may or may not, in the exercise of its discretion, create such an office; but, if it chooses to do so, the tenure prescribed cannot be in excess of four years. Within this limit, the legislature, in its discretion, may enlarge, abridge, or otherwise change the term of the office, or abolish it entirely, and repeal all laws pertaining thereto. *State, Fwing, v. Bell*, 116 Ind. 1; *State, Reese, v. Bogard*, 128 Ind. 480.

The electors of this state have no unalterable right to elect township trustees at the polls, for, as we have seen, the legislature, under the Constitution, has the power to provide that they may be chosen by election or appointment. The Constitution in no uncertain terms declares that "*township elections may be held at such time as may be prescribed by law*." (Our italics.) The power to fix the time at which the people may elect township officers is by this provision of the Constitution left entirely with the legislative department. This power is a continuing one, and surely it cannot be said to be exhausted by being once exercised. The legislature may from time to time direct when the election shall take place. That the general assembly may, unless restricted by the Constitution, amend, change, or repeal the acts of its predecessors, is a right which cannot be successfully questioned. Its power to make a reasonable change in the time of holding township elections from that fixed by a previous law is certainly a legitimate exercise of the power with which it is invested. *Wall v. State*, 23 Ind. 150; *State, Clark, v. Haworth*, 122 Ind. 462, 7 L. R. A. 240; *Bloomer v. Stolley*, 5 McLean, 158; *Jordan v. Bailey*, 37 Minn. 174. In *State, Clark, v. Haworth*, 122 Ind. 462, 7 L. R. A. 240, it is said: "To deny the power to change is to affirm that progress is impossible, and that we must move forever 'in the dim footsteps of antiquity.' But the legislative power moves in a constant stream, and is not exhausted by its exercise in any number of instances, however great." In fact, the power of the legislature to fix or change the time of electing township trustees has always been recognized, and not, to our knowledge, until now has it ever been called in question. Formerly such elections were held in April, then

changed to October, then back again to April, and subsequently, by the act of 1893, to November. The power of right of the legislature to change the time of electing trustees or other township officers from the time fixed by a former law being recognized, as it must be, as a continuing and existing right or power, the mere fact that the legislature, in the exercise thereof, may deprive the electors for a reasonable time of electing successors to present incumbents, will not alone operate to render the act providing for the change unconstitutional, and thereby invalid.

Counsel for appellant seem especially to base their contention on § 2 of article 15 of the Constitution, which, as we have seen, prohibits the legislature from creating any office the tenure of which shall be longer than four years, and their insistence is that this restriction will prevent the act in question from being upheld. It is manifest, we think, that this contention is wholly untenable. An examination of the act will readily disclose that it does not profess to create the office of township trustee, nor to extend the term thereof beyond the constitutional limit. It proceeds upon the theory that the office has been previously created, and it merely declares as the legislative will that the time of holding an election for township trustees, etc., shall be changed from the general election on the first Tuesday after the first Monday in November, 1898, to the general election on the first Tuesday after the first Monday in November, 1900, and on such day "of every fourth year thereafter." The trustees and assessors elected thereunder are thereby authorized to qualify as provided by existing laws, and enter upon the discharge of their official duties at the expiration of ten days after such election. These provisions of the law do not appear to us to be impressed with any constitutional infirmities. The change or postponing of the time of electing these officers from the general election in 1898 to the next general election cannot be said to be so unreasonable as to render the law open to judicial condemnation on that ground; especially in view of the fact that the members of the general assembly to be elected at the coming election in November can change the time of the election to an earlier date. The act does not in any manner profess nor attempt to extend the tenure of the trustees elected in 1894, nor of those to be elected thereunder in 1900, beyond the constitutional limit of four years. If it provided that the election should be held in 1900 and every fifth or sixth year thereafter, quite a different question would be presented. The statute in question makes no reference to present incumbents. It neither pretends nor attempts to abridge or enlarge their tenure. In no sense, under its terms or provisions, can it be said to be retrospective, but is wholly prospective, and in no manner does it take into consideration the question as to the holding of any of the present incumbents of the office; and the question as to whether they will hold over under the provisions of § 3 of article 15 of the Constitution, or some other provision of 43 L. R. A.

the law, until their successors are elected and qualified, remains, under this act, wholly intact. Consequently, if incumbent trustees are permitted to hold beyond four years, it cannot, in legal contemplation be attributed to the provisions of the act in controversy, but will be due to the force and effect of the provision of the Constitution last mentioned, which, as we have seen, provides that the prescribed tenure of any office under the Constitution, or any law, other than a member of the general assembly, "*shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified.*" (Our italics.) Certainly, what results from the force and operation of the Constitution itself cannot be said to be unconstitutional. There is some question, it is true, as to whether at common law an officer was entitled to hold beyond his prescribed term. But the general rule of the common law seems to be that, when the term of an office to which one is elected or appointed expires, the power of the incumbent to perform the duties thereof is terminated. Mechem, Pub. Off. § 396, and authorities were cited.

It is elementary that the law abhors vacancies in public offices, and great precaution is usually taken to guard against their occurrence; and courts of this country have not adhered to a strict rule, and in the absence of some express or implied legal restriction, the officer is held to be entitled to hold his office until he is superseded by the election and qualification of another person. *State, Carson, v. Harrison*, 113 Ind. 434, and authorities there cited; Mechem, Pub. Off. § 397; Throop, Pub. Off. § 308. It was no doubt the design of the molders of our fundamental law, by incorporating therein a provision that public officials should hold for their prescribed constitutional or statutory terms, as the case might be, and until their successors are elected and qualified, to guard against the possibility of the office becoming vacant, and the powers and duties of the incumbent being terminated, before some one had been duly selected and qualified, as provided by law, to succeed him. See *Fesler v. Brayton*, 145 Ind. 71, 77, 32 L. R. A. 578. In consideration of this constitutional provision, the electors of this state, when, by their ballots, they designate a person to fill a public office the tenure of which is prescribed either by the Constitution or some statute, must be presumed to understand and know that the contingent holding of the officer until his successor is elected and qualified is as much a part of the term for which he is elected as is that which is expressly prescribed and fixed. *Kimberlin v. State, Tow*, 130 Ind. 120, 14 L. R. A. 858; *State, Reese, v. Bogard*, 128 Ind. 480. Therefore the contention of appellant that the act in question operates to continue the present incumbents in office until 1900, in opposition to the will of the people, is of no merit and without force. Mitchell, Ch. J., speaking for the court, in *State, Carson, v. Harrison*, 113 Ind. 434, in respect to this provision of our Constitution (on page 442 of the opinion, 113 Ind.), said: "It is certain, therefore,

that all offices to which the above constitutional provision applies are held by the same title, or by as high and lawful tenure, after the prescribed term, until the title of the duly elected and qualified successor attaches, as before and during such term." Continuing (on page 447 of the opinion, 113 Ind.), he said: "After the expiration of the term fixed by the general assembly, the tenure of the officer is not under or by legislative approbation or authority, but by the continuing and superior authority and approbation of the Constitution." See also upon this point, *Com., Broom, v. Hanley*, 9 Pa. 513.

Reliance is placed on the case of *State, Wilson, v. Wells*, 144 Ind. 231, and it is cited by appellant to sustain the invalidity which he imputes to the statute in dispute. The decision in that case, however, in view of the question there involved, cannot be invoked as an authority in support of his insistence, but some of the reasoning in the opinion in that case may be said to "fight" on the side of the appellees in this appeal. It is there said: "Certainly, a change in the date of an election cannot affect the term of the office to be filled. If the office becomes vacant by the change of the date of filling it, the Constitution makes ample provision therefor by continuing the old incumbent in office until his successor is elected and qualified." Of course, the word "vacant," as employed by the writer of the opinion in that case, was used in the sense or meaning of the expiration of the prescribed term of the office. The question involved in the *Wells Case* was, to an extent at least, of like character to the one in controversy in *Griebel v. State, Niezer*, 111 Ind. 369. It was further said in the *Wells Case* that there could be no election of township trustees except at the time provided by the act of 1893. The decision in that case rests upon the validity of the act of 1893, and its effect was to affirm, impliedly at least, the validity of that statute. It is certain that a decision by this court adverse to the validity of the law of 1897 would result in uprooting the decision in the *Wells Case*, and would, as heretofore said, pave the way to ousting present incumbents, and to the reinstatement of the trustees and assessors elected at the April election in 1890.

Counsel for appellant have referred us to *People, Fowler, v. Bull*, 46 N. Y. 57, 7 Am. Rep. 302. The decision in that case is in no manner helpful to the appellant's side of the issue in the case at bar, for the question there raised was in respect to the power of the legislature, under the Constitution of the state of New York, at the expiration of the term of the incumbent of an elective office, to extend, by an express enactment, his term for three years beyond that for which he had been elected. It was therein held that it was not competent, under the Constitution of that state, for the legislature to put or continue a person in office in that manner, without an election by the people. In that case, Folger, J., speaking for the court, in the course of the opinion, on page 68, said: "The Constitution empowers the legislature, in the clause first above quoted, to direct the times and manner of the elec-

tion. . . . It is a continuing power. And the legislature may from time to time, as it sees occasion, direct when and how the election shall take place." While it is true that the case of *People, Fowler, v. Bull*, 46 N. Y. 57, 7 Am. Rep. 302, does in fact deny that the legislature, under the then-existing Constitution of New York, had the power, by express enactment, to lengthen the tenure of the incumbent of the office, still it also affirms the constitutional right of that body to fix and change, at its discretion, the time when the charter election shall be held; and, to this extent at least, the case is an authority in support of the right of the legislature, under our Constitution, to change the time of holding township elections.

A defect in the argument of appellant, to an extent at least, is that he assumes that the act of 1897 extends the term of the office of township trustees, and his assault on the validity of the law proceeds upon the ground of his assumption. The legislature of 1869 changed the time of the annual election of county and township officers, and provided for their biennial election, declaring in the act that the first election thereunder should be held on the second Tuesday in October, 1870, and on that day biennially thereafter. Laws 1869, p. 57. It is a fact well known that many of the county officers throughout the state, whose successors, in the absence of the change in the time of holding the election, would have been elected at the annual October election in 1869, held over, under the provision of the Constitution, until their successors were elected, in October, 1870, and qualified, thereby holding and discharging the duties of their respective offices for a year and over beyond the tenure prescribed by the Constitution. And yet, we have no recollection that the validity of that act of the legislature was ever called in question on the ground that it operated to extend the term of the incumbents holding over beyond the time fixed by the Constitution; and the statute stood unchallenged, we believe, until superseded by the law of 1881. Rev. Stat. 1881, § 4678 (Rev. Stat. 1894, § 6190). If the insistence of appellant in respect to the act of 1897 is correct, then it necessarily would follow that the legislature, in 1869, was powerless to change from an annual to a biennial election, and the people would have either been compelled to change the Constitution, or submit forever to the extra expense of holding annual elections. For a like reason, the legislature would have been fettered and devoid of power to change township elections from April to November, as it did in the act of 1893. The mere mention of a proposition denying the right or power of the legislative department in this respect ought to suffice to expose the weakness thereof.

If it were necessary to look beyond the decisions of this court for support of the ultimate conclusion reached in this appeal, the case of *State, Barton, v. McCracken*, 51 Ohio St. 123, is directly in point. The Constitution of Ohio provides for the election of a clerk of the court of common pleas, who, as therein declared, shall hold his office for the

term of three years, and until his successor is elected and qualified. The legislature of that state, in March, 1893, by an act, provided that the clerk of the court of common pleas should be elected triennially, and hold his office for three years, his term being fixed by the act to begin on the first Monday in August after his election. The contention in that case was that the act was invalid because it operated to extend the term of incumbents beyond the time fixed by the Constitution. This the court denied, and sustained the validity of the law, saying, in the course of its opinion, on page 127, 51 Ohio St.: "The assumption, we think, is not warranted. The act in question does not purport to extend the term of the incumbent, nor does it in effect do that. The result of this legislation upon the incumbent depends wholly on the Constitution. If, by virtue of § 16 of article 4, a vacancy is created, then the term of the incumbent is not extended; if under that section no vacancy ensues, it is the force and effect of the Constitution, and not of the statute, which extends the term." The decision of the supreme court of Missouri in *State, Atty. Gen., v. McGonee*, 92 Mo. 428, is also in point, to sustain the right of the legislature to make changes in the times of electing public officers.

Other minor objections are made against the validity of the act, among which is that the subject-matter thereof is not sufficiently expressed in the title. There is no merit in this contention, for it is evident that, under the many decisions of this court, the title of the act is sufficient. The law does not, as insisted, attempt to fix the time of electing justices of the peace, constables, and other officers of the township; but, as previously said, it leaves the time fixed for the election of such officers unchanged.

From what we have said, and by force of the authorities cited, the conclusion must necessarily follow that, if the incumbent trustees hold and discharge the duties of their offices beyond the term of four years by reason of their successors not being elected and qualified, they will be permitted to do so under the express warrant of the Constitution, and not by the act of 1897. It follows that the law in question is, and we so hold, a valid exercise of legislative power; and its validity is therefore sustained, and there can be no election of township trustees and assessors thereunder until the time therein fixed and provided.

The judgment is affirmed, at the cost of the relator.

Haekney, Ch. J., dissenting:

I cannot concur in the conclusion of the majority of the court. I am fully convinced that the general assembly, by the act of 1897, exercised a right expressly denied to it by the Constitution. The denial of authority is in these words: "The general assembly shall not create any office the term of which shall be longer than four years." Const. art. 15, § 2. This clause has frequently and properly been held to apply to the office, and

not to the officer. *Baker v. Kirk*, 33 Ind. 517; *Parmater v. State, Drake*, 102 Ind. 90; *State, Staff, v. Barlow*, 103 Ind. 563; *Jones v. State, Snodgrass*, 112 Ind. 193; *State, Carson, v. Harrison*, 113 Ind. 434; *Bell v. State, Summers*, 129 Ind. 1. In considering it, to avoid confusion, we must look to it as affecting the office, and not as giving or denying any right to the officer. To interpret this clause of the Constitution, we are required to ascertain the intent of the people in adopting it,—the thought which they expressed. *Indianapolis Brewing Co. v. Claypool*, 149 Ind. 193. "If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose, and so as to subserve it." *Prigg v. Pennsylvania*, 16 Pet. 612, 10 L. ed. 1088; *State, Perry, v. Arrington*, 18 Nev. 412; 16 Am. & Eng. Enc. Law, 2d ed. p. 921. "No court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends when another construction, equally accordant with the words and sense thereof, will enforce and protect them." *Prigg v. Pennsylvania*, 16 Pet. 612, 10 L. ed. 1088.

What, then, were the objects of the tenure clause? It is most certainly a limitation upon the power of the general assembly. It relates to office. It has reference to time, and is definite in the period prescribed: This clause, in similar form, has found its way into the Constitution of several of the states, notably California, Florida, Kansas, Nevada, Oregon, and Texas. Its purpose could not have been an idle one. The framers were engaged in a more serious undertaking than in mere empty phrase-making. They were certainly providing a bar against the loss of some right to the people from the encroachment of the legislative department of the government. That right, considered with reference to the period of time named, could only have meant the right to choose their public servants at least once in four years. There was wisdom in this purpose, for it would prevent the general assembly from building up a favored class of office holders without responsibility to the people, and whose tenure would depend alone upon the perpetuity of the party controlling the assembly. This purpose would cut off that train of evils which would follow from an official class using its offices in the interest of party, and for its own perpetuity. The clause, interpreted in the light of this purpose, is wise and effective, and no other provision supplies its place. Rejecting this purpose as one of the objects of the clause, and the general assembly is left free to visit upon the people all such evils. Tenure, then, as applied to the office, must mean the period bounded by the appointments or elections to the office. In this meaning it must be assumed, it was designed that the general assembly should not violate it directly or indirectly. That, after creating the office and providing for elections once in four years (the constitutional limit), the act of 1897, postponing an election for two years, violated the Constitution, seems too plain for serious

difference of opinion. Can it be doubted for a moment that an act fixing the period between elections to an office of legislative creation at six years would be unconstitutional. That it would was held in the recent case of *Indianapolis Brewing Co. v. Olappool*, 149 Ind. 193. If such an act would fail, why, after creating the office and providing the full tenure, may such tenure be enlarged by a second act? Nor is there sound reason in the conclusion that, in computing the time, that which has already been occupied by legislative sanction should not be added to the new time. What difference in the result can be said to exist where six years' time has been provided by one act, and where four years has been provided by one act, and another increase such time two years? Certainly, no difference, unless the first should be void as to the whole time, and the last only as to the two-years' added time. Looking to the objects to be attained by the tenure clause, can we say that its purpose is satisfied when the general assembly provides a tenure of four years, places an occupant in the office, and then takes away the means of electing a new occupant at the close of the period of that tenure? By postponing the exercise of that privilege for two years beyond the four-years' limit, the time bounded by the periods of electing is enlarged to six years as certainly as if the act had declared originally that elections to the office shall occur but once in six years. It is not creditable to the wisdom of the framers of the Constitution to say that they intended to limit the tenure period to four years, as a limit upon the legislative authority, and, at the same time, intended that the general assembly might, by intentional jugglery or innocent oversight or misconstruction, so evade the provision as to render it meaningless. Nor can it be said with reason that the framers intended by one provision to create a limitation, and by another to strike it down. If one or more of the objects of the clause are defeated by the legislation, our duty is plain, and we must declare the object paramount to the will of the general assembly. It is true that the act does not expressly provide that the tenure is enlarged; but it enlarges it indirectly as certainly as if it directly provided that the tenure should be enlarged. As to the office of trustee,—indeed, as to most offices,—the general assembly has not said “the tenure shall be” so long, or “the term shall be” so long; but it has usually been provided that at a given period an election to the office shall be held, and elections thereto shall be held thereafter once in two or four years. The idea thus adopted is that tenure and periods bounded by elections are one and the same. Keeping in mind the conclusions that the tenure clause relates to the office and to the periods within which the people reserved the right to elect to such offices as the general assembly might create, it seems, inevitably, that this act has done indirectly that which could not have been done directly. Nor do we regard the fact that the effect is not permanent as controlling. If the enlargement of the ten-

ure for two or more periods or for all periods is a violation of the Constitution, it follows that the enlargement of one period is likewise a violation.

Considering the question with reference to those provisions of the Constitution conferring upon the general assembly the power to create the office of trustee, and to provide the times of election (art. 6, § 3; art. 2, § 14), we find no support for the proposition that the tenure clause may be disregarded. These various constitutional provisions, construed as other laws or instruments, should be made to stand together, as constituting a consistent whole, if possible. So construing them, it must be held that, while the general assembly may create the office and prescribe and change the times of electing thereto, this must be done within the limits of the expressed inhibition of the Constitution. It must be done so as to not enlarge the tenure limit; so as not to deprive the people of the privilege of electing to an office of this character at least once in four years. Nor will it do to say that, in exercising the right to change the time of electing, it may become necessary or indispensable to extend the tenure. Since terms may be made of different duration, within the four-years' limit, and since laws may be enacted to take effect in the future, there is no objection to a provision for a short tenure to fill the interregnum between the expiration of the discarded term and the taking effect of the new.

Considering the questions before us with reference to the hold-over clause of the Constitution, I find no authority for the violation of the tenure clause. It is that “when, ever it is provided in this Constitution, or in any law which may be hereafter passed, that any officer, other than a member of the general assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified.” Const. art. 15, § 3. It is contended with much learning and ability that this provision of the Constitution saves the legislation under consideration from the inhibition of the tenure clause. This provision, unlike that of the tenure clause, has reference to the officer and his right to hold the office for the term prescribed by law, and until a successor is elected and qualified. It has no reference whatever to the periods between which the people may deny the right to elect their officers. One provision has reference to the office, and not to the officer; and the other has reference to the officer, and not to the tenure of the office. It is true, as held in some of the cases, that when one is elected to an office, except that of legislator, he is elected for the prescribed term, and until a successor is elected and qualified, although that may result in a holding of more than four years; but that is neither excuse nor authority for holding that the general assembly may enlarge the four-years' tenure,—may deny the people the right of choice for more than four years; the hold-over clause was designed to

save the public service from embarrassment by the failure of the people to elect, or the failure of their choice, from death or other causes, to qualify and assume the duties of the service. It was not designed as authority, and is not even a reasonable pretext, for an act directly or indirectly enlarging the tenure beyond the limit of four years. Upon this construction of the hold-over clause, we have no question before us involving that provision, since we have no question of a vacancy and no question of rival claimants to the office, and we decide nothing as to any right to hold over. The exact question here is as to whether the general assembly may by an act, directly or indirectly, enlarge the tenure of an office of its own creation beyond the period of four years. If it may do so for two years, it may do so for four years or ten years, and until some succeeding session of that body concludes to accord to the people the right guaranteed by the tenure clause to elect their officers. That there are dangers which may result from the denial to the people of the opportunity, within reasonable periods, to elect public officers, is plainly seen. That such possible dangers gave rise to the tenure clause of the Constitution I have no doubt. And that the construction of that clause which I maintain is a guaranty against such dangers supplies the strongest reasons in support of that construction.

The case of *State, Barton, v. McCracken*, 51 Ohio St. 123, relied upon by appellees, involved an act providing for the beginning of an official term after the expiration of the term of the incumbent, the right of the incumbent, under a constitutional hold-over provision, to continue in the office until the beginning of the newly-fixed term, and the claims of one elected to the office under the new law to take the office before the beginning of the term for which he was elected, namely, upon the expiration of the old term. As we have already shown, none of these questions are before us. The act there in question did not postpone or deny the right of the people to elect, and there was no question made as to the enlargement of the tenure of the office in question beyond constitutional limit. The questions there decided might be pertinent if we were called upon to decide as to the right of the incumbents of the office of trustee to hold over until a successor should be elected and qualified, but they are not pertinent to the questions before us. The case of *Christy v. Sacramento County Supers*, 39 Cal. 3, also cited and relied upon by the appellees, involved a law postponing for two years the election of certain commissioners, the prescribed tenure of whose office was two years. Notwithstanding repeal of the law for an election at the end of the two-years' term, votes were cast for successors to the incumbents. The court held that it was within the power of the general assembly to postpone the election, since the power was given to fix the times of election, but that such power must be exercised with reference to the four-years' tenure clause of the Constitution, which is like our own. It will be seen, therefore, that the

case did not involve the tenure clause further than the repeated expressions of the court that such postponement must not exceed the limit of such clause. By the act there in question the people were not denied the right to elect commissioners within the four years' limit, but, observing the limit, the tenure was extended to but four years. The reasoning of the court is in harmony with our conclusion. The case of *Jordan v. Bailey*, 37 Minn. 174, is another case cited by the appellees as supporting their contention. That case involved a law postponing the time of electing for two years, the term having been four years, and the constitutional tenure limit having been seven years. The act did not reach the constitutional limit by one year, and the people were not deprived of the right to elect within the period reserved by the Constitution. Anything said in these cases or others as to extending the terms of incumbents, as to vacancies, and as to holding over, we do not regard as bearing upon the question before us; and upon the question here for decision the cases are clearly distinguishable from this. I realize the full meaning of the rule that the judge should be satisfied beyond a reasonable doubt that the Constitution has been violated before he should hold that the general assembly has exceeded its authority. However, it is not questioned that I have correctly interpreted the tenure clause; and I see no reasonable ground for contention that this clause is not involved before us. The inquiry must be, then, Has the act violated it? To my mind there is but one answer. I am not to be deterred from giving this answer because the consequences may possibly be to continue in office the incumbents even beyond the time intended by the act. If the act is invalid, its authors must be held to account for the consequences. The Constitution is the paramount law, and by it the acts of every department of the government must be tested. If I permitted this legislation to stand against the inhibition of the Constitution, I should feel that I had violated that sacred law. I conclude, therefore, that the act of 1897 violates the tenure clause of the Constitution, and is void.

The invalidity of that act, however, does not fully support the appellant's theory that the election should be held in November, 1898, since that theory implies the validity of the act of 1893 (*Laws 1893*, p. 192), which postponed the elections for trustee from April, 1894, to November, 1894, in exactly the same manner that the act of 1897 postponed the election from November, 1898, to November, 1900. Counsel for the appellees insist that the objections urged by the appellant to the act of 1897 obtain as against the act of 1893, and with this insistence we all concur. The violations of the Constitution are of the same character, and differ only in degree; one being a postponement of two years, and the other of seven months, beyond the constitutional period for the tenure of said office. The theory of the petition affirmed the invalidity of the act of 1897 and the validity of the act of 1893 by seeking to

require an election under it. We are therefore unable to avoid the consequences of this theory. Counsel for the appellant contend that, the people having elected under the act of 1893, the appellees are estopped to deny its validity, and assert that this court so held with reference to the apportionment law in *Fesler v. Brayton*, 145 Ind. 71, 32 L. R. A. 578. In this position, I respectfully submit, counsel are in error. It is the general rule that the constitutionality of an act may be questioned at any time by anyone having an interest, excepting that, where, to do so, he would gain an unconscionable advantage from retaining benefits derived from such acts, and escape the liabilities therefor. An unconstitutional law is as no law; it is as waste paper. The case of *Fesler v. Brayton*, 145 Ind. 71, 32 L. R. A. 578, was not decided upon the ground of estoppel, but was decided upon an exception to the general rule, which was that a law could not be declared in violation of the Constitution when to do so would defeat the Constitution itself, in abrogating the form of government declared by the Constitution.

These conclusions should result in affirming the judgment of the circuit court. Whether the incumbents of the office shall hold until the regular election period in April, 1902, whether they, having been elected under an invalid law, hold *de facto*, as against appointees, or whether the general assembly may provide for the exigency which these invalid laws have created, it is not for us to suggest.

Howard, J., concurs in the foregoing.

A petition for rehearing having been filed, the following response was handed down on July 1, 1898:

Per Curiam:

Counsel for appellant, in their brief filed in support of the petition for a rehearing, in the main insist that it be granted upon the grounds urged at the former hearing of this cause. Counsel preface their argument by asserting that: "In view of the bitter and intense feeling in many communities of Indiana at the continuance in office of a number of township trustees who are looked upon with suspicion by the people," etc., they are impressed with the "solemn duty" to file the petition for rehearing, and "in every-day language to argue it, . . . in the hope that mature consideration has changed the opinion of the majority of this court, and in the belief that a few suggestions will lead the minority to modify their final conclusion." Counsel recognize the fact that the minority opinion of Judges Hackney and Howard expressly declares that the final conclusion therein reached must result in affirming the judgment of the lower court which denied the right of the relator to demand that an election for township trustees be held at the November election of the present year. This court, under the two opinions in question, may properly be said to have been unanimous in holding that the judgment below

must be affirmed for the reason that there was no existing law which authorized the election of township trustees at the November election of 1898. While it is true that the minority opinion in this cause does not agree with the premises from which the final conclusions of the majority of the court were deduced, nevertheless it is evident that it is nothing more nor less than a concurrence in the court's final conclusion that the judgment must be affirmed, and that there could be no election of trustees at the ensuing November election. The material difference or distinction between the two opinions consists in the reasoning by which the ultimate conclusion in each is reached. That of the majority, as will be seen, is arrived at by affirming the constitutional validity of the act of 1897; while that of the minority is reached by denying the constitutional validity of the act of 1897, and, for like reasons, that of the act of 1893.

As to the assertion of counsel that such a "bitter and intense feeling" exists in many communities against the present township trustees, and which, as counsel for appellant seem to intimate, has, in part at least, actuated them to discharge the "solemn duty" by applying for a rehearing in this appeal, we may say that, in regard to this feeling upon the part of these communities, this court has no concern, and in no wise is it responsible for its existence.

We are informed by counsel's brief of the fact, as they therein assert, that some members of the bar, not of counsel, however, in this case, "for some occult reason" are imbued with the desire to have this cause tried and determined in the "forum of public opinion," and that these particular attorneys declare with "charming frankness" that the majority opinion in this case "is not an opinion, but an argument." If the majority opinion can be said to be impressed with this infirmity, the responsibility therefor should be charged to the writer thereof, and not to the court, for the latter is only responsible for the final result reached in the case. We may also say, in passing, that this tribunal, in the determination of questions involved in causes pending therein, cannot be influenced by any "bitter and intense feeling" that may exist in some communities relative to the merits of such question. Neither is the judgment of this court in appeals thereto to be molded or controlled in any manner by means or methods which can be more properly, and with better effect, employed at a "town meeting" or a political caucus, than in a court constituted for the administration of law and justice. Concluding, we may say that we have again given the questions involved in this cause a careful consideration, and are fully satisfied that the conclusion reached at the former hearing is correct, and in full harmony with well-settled principles of law. Considering the principal question involved in this appeal from the final conclusion of either the majority or minority opinion of this court, and it must necessarily follow as, and is, the unanimous opinion of this court, that the petition for a rehearing

ought to be denied. It may also be said that appellant's learned counsel, in their criticisms upon the minority opinion, to the effect that the validity of the act of 1893 could not become involved under the complaint of the relator, and that the minority in so holding traveled outside of the record, are certainly mistaken. It is evident that the complaint of the relator is founded upon his theory that the act of 1893 is a valid exercise of legislative power. If the objections which his counsel urge against the validity of the act of 1897 can be maintained, they will certainly apply with equal force, and for like reasons, in striking down the act of 1893; and he could therefore have no standing in court to demand the relief which he does under his complaint. That this result would follow, his counsel, in their argument, from the position which they assume, certainly make evident.

The petition for a rehearing is overruled, at the costs of the relator.

Hackney, Ch. J., concurring:

The appellant's petition, as addressed to the minority opinion, rests, we respectfully submit, upon false premises, *i. e.*, that the validity of the law of 1893 was not in issue, that the appellees were estopped to assert its invalidity, and that the case of *State, Wilson, v. Wells*, 144 Ind. 231, holds the act of 1893 to be constitutional. As in *Denney v. State, Basler*, 144 Ind. 503, 31 L. R. A. 726, the petition sought the relief prayed upon the earlier act, and denied the validity of the later act. The respondents—properly,

we have no doubt—contended that the entire relief prayed could not be granted, because of the invalidity of the earlier act. It was there held that both acts were in question, the relief demanded affirming one act and denying the other. It would be remarkable if one seeking relief under a law could preclude his adversary from denying the constitutional validity of that law. It would be no less remarkable to hold that the question must be specially pleaded, and could not arise upon demurrer. In considering the question of estoppel again argued, it must be borne in mind that the person to be estopped, according to the appellant, is not in court. He is the trustee in office, who, in this case, is not a party denying or affirming the right of the appellant to require an election this fall. The issue in this case, as we affirmed originally, is not as to the right of a trustee; it is as to the right of the people to elect a trustee. It was the loss of this distinction by the majority of the court, as the minority conceived, that made the hold-over clause appear to have application to the case. In the case of *State, Wilson, v. Wells*, 144 Ind. 231, the constitutional validity of the act of 1893 was neither mooted nor decided, and, as well said by appellant's counsel, constitutional questions are never passed upon unless necessary to a decision of the case. The constitutionality of laws is assumed where not denied. The minority adhere to their original opinion.

Howard, J., concurs in this opinion.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

John B. GROMMES *et al.*, *Appts.*,
v.

William K. SULLIVAN, Receiver of the American Building, Loan, & Investment Company.

(53 U. S. App. 359, 81 Fed. Rep. 45, 26 C. C. A. 320.)

1. The right of a building, loan, and investment society to execute nego-

tiable paper is implied in the power to incur debts for various purposes, and to sell and mortgage property.

2. The acceptance of a negotiable order by a building, loan, and investment society which has power to execute negotiable paper under some circumstances is binding on the corporation in favor of a bona fide holder, although nothing was due to the drawer of the order when it was accepted.

(June 17, 1897.)

NOTE—*Power of building association to issue negotiable paper.*

In some states where the statute authorizing the incorporation of building associations gives them powers of corporations in general, they have the same power as other corporations to issue negotiable paper. Under the English statutes, authorizing societies to make rules, where a rule provides for borrowing money and issuing notes for the same, negotiable paper issued under it and within the limit prescribed thereby is valid. A building association, like any other corporation, may indorse checks received by it in its business. But where the issue of negotiable paper exceeds the limit provided for in the rules under the English statutes, or where the rules give no power, or where, in this country, over drafts, notes, bonds, and mortgages, are issued by a building association in the absence of a statute, such paper is not binding upon the 45 L. R. A.

association for want of power. This note is not intended to include cases on the question of the right of an association to receive deposits and issue certificates therefor, or the general power to borrow money.

The case of *GROMMES v. SULLIVAN*, which was the case of the acceptance of a negotiable order, holds that a building association authorized by express provision by statute to purchase land in which it has any interest, and to sell, convey, or mortgage the same at pleasure, has the power to borrow money implied in the power to mortgage, and has the power to negotiate notes taken for real estate sold, and has the power to incur debt and to execute the customary evidences of indebtedness.

This case reverses the decree in *Towle v. American Bldg. Loan & Invest. Co.* 78 Fed. Rep. 688.

A building association formed "for the accumu-

A PPEAL by interveners from a decree of the Circuit Court of the United States for the Northern District of Illinois dismissing their petition filed in an action by Marcus M. Towle against the American Building, Loan, & Investment Society for the purpose of obtaining payment of claims which plaintiffs had against said society. *Reversed.*

Before Woods, Jenkins, and Showalter, Circuit Judges.

Statement by Woods, Circuit Judge:

This appeal is from a decree dismissing the intervening petition of the appellants, John B. Grommes and Michael Ullrich, in the case of *Marcus M. Towle v. The American Building, Loan, & Investment Society*, wherein William K. Sullivan had been appointed receiver of the assets of the society. The case was submitted and heard upon the petition, answer, and a stipulation of the parties. The substance of the petition is that George F. Montgomery, being indebted

to the appellants in the sum of \$1,608.47, on October 5, 1893, executed to them the following accepted draft:

\$1,608.47-100 Chicago, Oct. 4, 1893.

Sixty days after date pay to the order of Grommes & Ullrich one thousand six hundred eight and 47-100 dollars, value received, and charge to account of

George F. Montgomery.

To the American Building & Loan Society, Owings Building.

The acceptance written upon the face of the draft being as follows:

10-5-'95. Accepted. Am. B., L. & I. Soc'y, F. B. Modica, V. P.

It is alleged that prior to the delivery of the acceptance the appellants had from time to time taken from Montgomery "various and sundry other accepted drafts," drawn upon, and which at their maturity had been

issue such paper. It was contended that it was subject to the conditions of the association, but it was held otherwise. The power to indorse a check, which the secretary of the loan association, who is its general official agent, has authority to collect, is implied in the power given him to collect securities and pay the money for them to the treasurer. *Gate City Bldg. & L. Asso. v. National Bank of Commerce*, 126 Mo. 82, 27 L. R. A. 401.

In this case under the by-laws the secretary was made the general official agent of the association, the custodian of its securities, and to him was intrusted the duty of collecting all moneys due the association, and he had full power to receive the check and collect the same.

And a building association has the power to borrow money and issue notes therefor, under *Sanborn & B. (Wis.) Stat. 1204, §§ 2009-2014*, providing for the formation of mutual savings fund, loan, or building corporation, in the manner prescribed in chapter 86, and that thereupon such corporation shall have all the powers and privileges, and be subject to all the liabilities, conferred and prescribed by this chapter, and such other powers conferred on corporations by these statutes as are necessary or proper to accomplish the purposes prescribed by its articles of association. *North Hudson Mut. Bldg. & L. Asso. v. First Nat. Bank*, 79 Wis. 31, 11 L. R. A. 845.

In this case the court said that if the board had the power to borrow the money for a legitimate purpose, the corporation cannot defeat a recovery by the bank for the money borrowed, on the ground that the board applied the money borrowed to an unauthorized purpose, unless it shows that the bank knew the purpose for which the money was borrowed was unauthorized, and that there is no pretense that the bank had any such knowledge.

It will not be assumed on demurrer that a note made by a building society was improperly issued, where the society was incorporated under U. C. Consol. Stat. chap. 53, § 6, providing that the powers of the directors shall be regulated by rules of the society, and § 38, providing that every such society by its rules authorized to borrow money shall not borrow other than in stock and shares of such society any sum greater than three fourths of the amount of capital actually paid in on unadvanced shares and invested in real securities by such

lation of a fund by the savings of the members thereof, sufficient to enable them to purchase for themselves respectively, real or leasehold property, and generally for the purpose of a building association, and subject in all particulars to the limitations relating to corporations, which are contained in the general laws of the state," organized under Md. act 1868, chap. 471, § 48, providing that a corporation formed thereunder may do every act or thing not inconsistent with law, which may be necessary or proper to promote the objects, designs, and purposes for which they may be formed, is authorized to issue a negotiable note, and if transferred to a bona fide holder before maturity it is binding on the association. *Davis v. West Saratoga Bldg. Union*, No. 3, 32 Md. 285.

In this case a note was secured by a mortgage, and when it became due the association issued two notes to have them discounted to raise money to pay the first note, and one of them on which suit was brought was discounted through the agency of a broker.

And a building association organized under Md. act 1868, chap. 471, is authorized to issue promissory notes under Articles of Association 9 and 11, providing that the board may issue promissory notes on mortgages only, and that such note shall always be drawn to the order of the mortgagor, who shall in all cases indorse the same. *Jackson v. Myers*, 43 Md. 452.

The fact that this note had on its face a printed representation of a seal did not restrain its negotiability.

In *Muth v. Dolfield*, 43 Md. 466, the power to issue notes is sustained, the court saying that the notes are negotiable in form, and that they and others of a similar form and character have been used and regarded by the commercial community as negotiable notes.

In *Canton Nat. Bldg. Asso. v. Weber*, 34 Md. 663, an action was brought upon a single bill issued by a building association. The question as to the power to issue such bill was not discussed.

In *Clark v. Lake Ave. Permanent Sav. & L. Asso.* 48 N. Y. S. R. 189, an order given by the president and secretary for money, and assigned for value, was held to be negotiable, either as an accepted bill or promissory note.

In this case the bill was issued to a party for a loan which was due him, and no question was made as to the power of the association to 43 L. R. A.

severally paid by, the American Building, Loan, & Investment Society; that at the time when the first of the drafts had been taken from Montgomery in satisfaction of the amount which he owed the appellants, they had been advised by F. B. Modica, as the agent of the society, that Montgomery was a creditor of the society, and that his drafts upon it were good, and would be met at maturity; that each of the earlier drafts was accepted by the association "by F. B. Modica, its vice president, in manner and form precisely similar to the acceptance on the face of the draft of October 4, 1893, aforesaid"; that "Modica was, at the time, in full charge and control" of the society, "and in all business matters, so far as your petitioners were concerned, he was the chief managing officer of the said society." It is further alleged that, the draft not having been paid at maturity, the petitioners in December, 1893, began in the superior court of Cook county an action at law, and procured a writ of at-

tachment to be issued and levied upon real property of the society in the county of La Salle, Ill., that the attachment was a first and valid lien upon that property, which was worth more than the amount of the demand. The petition concludes with an offer to dismiss the proceedings in the superior court of Cook county, and to release the attachment, if leave to file the petition be granted, and the receiver ruled to answer the same within a short day.

The receiver answered, admitting the averments of fact in the petition, but alleging that when the draft was accepted Montgomery was not, and had not since been, a creditor or member or stockholder of the society; that by the by-laws of the society, of which the articles defining the powers of the president and vice president are set out, Modica had no authority to sign, and that the society had no right or power to execute, the acceptance. The by-laws referred to read as follows: "It shall be the duty of the president

society, and that the paid-in and subscribed capital shall be liable for the amount so borrowed. *Suarr v. Toronto Permanent Bldg. & Sav. Soc.* 29 U. C. Q. B. 317.

Where a note was given for money advanced and title deeds delivered as a security by a society founded in 1870, and incorporated under 6 & 7 Wm. IV. chap. 32, and not incorporated under the building societies act of 1874, the court sustained a rule providing that the trustees or directors may from time to time as occasion may require, borrow and take up at interest any sum or sums of money, and any borrowed money shall be a first charge on the funds and property of the society, and in case the trustees or directors shall at any time give their joint and several promissory note or other security for money borrowed for or on behalf of the society, in such case the person giving the security shall be indemnified by the society, and the funds and property of the society shall be subject to the repayment of the borrowed money; the borrowed money being always a charge on the society's funds and property. It was further held that the lenders were entitled in the winding up to the payment out of the assets after satisfaction of the outside creditors and in priority to the claims of all shareholders or members, the lenders giving up their securities to the official liquidators. The act of 1875, amending § 8 of the act of 1874, was held not to affect the existing societies unless they registered under the new act, which this society had not done. *Agnew v. Murray*, L. R. 9 App. Cas. 519.

In this case the *dictum* in *Laing v. Reid*, *infra*, as to an unlimited power of borrowing, was overruled. These cases were in substance, though not in form, appeals from a decision *Re Guardian Permanent Ben. Bldg. Soc.* L. R. 23 Ch. Div. 440, and reverse the decision of the court of appeals in that case.

Where a building society organized under act 6 & 7 Wm. IV., chap. 32, had from time to time borrowed money and given notes to secure the payment of the same under rule 1, providing that the object of the society is to raise by weekly contributions a fund to enable each of them to erect or purchase a dwelling house, or other real or leasehold property, and rule 18, providing that the trustees may, as occasion shall require, borrow and take up at interest any sum of money from any banker with whom the funds of this society shall be deposited, or from any other person, to procure which the trustees

may give their own personal security, and be indemnified out of the first funds of this society which shall be received, and that the total sum to be borrowed shall not exceed two thirds of the amount secured by the mortgages to the society, a shareholder brought a suit for an injunction against the payment of the notes given by the trustees for borrowed money, alleging a want of power, although admitting that the money had been applied to the purposes of the society; but it was held that the rule was not in itself in excess of the power of the society. *Laing v. Reid*, L. R. 5 Ch. 4, 18 Week. Rep. 76.

It was said in this case that if the rule had not limited the amount it would have been *ultra vires*, but this *dictum* was overruled in *Agnew v. Murray*, L. R. 9 App. Cas. 519.

But where nothing has been secured by a society on mortgages from its members, it is not liable on an overdraft by the society on its bankers, secured by a deposit of title deeds to be paid with interest, that is a loan under building societies act 1874, § 15, providing that a society may receive deposits or loans at interest from its members or other persons, within the limits provided by the section, and in a terminating society the total amount received on deposit or loan and not repaid may either be a sum not exceeding two thirds of the amount for the time being secured to the society by mortgages from its members, or a sum not exceeding twelve months' subscription on the shares for the time being in force. In such a case the directors are personally liable under building societies act, § 43, providing that if any society receives loans or deposits in excess of the limits prescribed by the act, the directors receiving such loans shall be personally responsible, where the society adopts the first alternative under § 15, *supra*, and they cannot maintain that the other alternative of the act applies. *Looker v. Wrigley*, L. R. 9 Q. B. Div. 397.

Under the certified rules of an unincorporated building society providing that the directors might borrow money not exceeding a prescribed amount, where loans were made in accordance with advertisements, through the secretary, who gave a receipt in writing agreeing "to procure the promissory note of the directors for the loan," after which a note was given of the date of the receipt, and when the limit had been exceeded other money was loaned but no note of the directors was given,

to preside at all meetings of the shareholders and of the board of directors, to sign all certificates of stock, and to sign all releases of mortgages, and he shall do all other duties usually pertaining to this office." "The vice president shall perform all the duties of the president in his absence. In case of any vacancy in that office he shall be *ex officio* president until the vacancy is filled."

The stipulation of the parties is to the effect that the copy of the by-laws set out in the answer is correct; that the petitioners, when the accepted draft was delivered to them, had no knowledge that such were the by-laws, other than the general knowledge imputed to them from the nature of the society; and that it is true, as alleged in the answer, that the society was not and had not been indebted to Montgomery, of which fact, and that he was not a member or stockholder of the society, the petitioners were ignorant

until the date of the stipulation. The American Building, Loan, & Investment Society was incorporated on November 22, 1888, under the act of the general assembly of Illinois entitled "An Act to Enable Associations of Persons to Become a Body Corporate to Raise Funds to be Loaned only among the Members of Such Association," which went into force July 1, 1879. 1 Starr & C. Anno. Stat. 2d ed. p. 1045, chap. 32, §§ 108-134.

Messrs. Ralph M. Shaw, Frederick S. Winston, James F. Meagher, Silas H. Strawn, and Frederick R. Babcock, for appellants:

The acceptor of a bill of exchange, even though he has no funds in his hands belonging to the drawer at the date of the acceptance, and even though he was not then, or did not thereafter become, indebted to the drawer in any manner, is nevertheless liable

whereupon the secretary absconded, the society was held not to be liable on his agreements. *Chapleo v. Brunswick Permanent Bldg. Soc. L. R. 6 Q. B. Div. 696, 50 L. J. C. P. N. S. 372, 44 L. T. N. S. 440, 29 Week. Rep. 529.*

And a bond and mortgage given by a building association for the purchase of land is *ultra vires*, in the absence of any statute authorizing such purchase. But under Pa. act June 17, 1878 (Pub. Laws, 214), confirming purchases made by building and loan associations prior to the act, the title to the land is validated, at least so far as to enable the association to hold the land if it so elect, the purchase money due is a lien on the land, and the recourse of the vendors is limited to the land. *Faulkner's Appeal, 11 W. N. C. 48.*

Under a building association rule stating that the object of the society is to raise a fund for the purpose of enabling its members to purchase land, to erect houses thereon, to provide means for the profitable investment of small savings, and an amended rule providing that the directors shall have power to borrow for the purpose of the society such sums and at such rates of interest as they may think proper, the society has not the power to borrow money to loan to another society where the trustees give their notes and deposit society mortgages as security. But the holder of the securities will not be compelled to give them up until he has been paid his debt. *Re Durham County Permanent Invest. Land & Bldg. Soc. L. R. 12 Eq. 516, 41 L. J. Ch. N. S. 124, 25 L. T. N. S. 83.*

In this case it was not disclosed that the lender knew the purpose for which the money was to be used.

Bankers allowing an overdraft under a contract *ultra vires*, made by a building society, were entitled to hold securities for so much of the money advanced as has been applied in payment of the debts and liabilities of the society properly payable and unpaid to the banker. *Blackburn Bldg. Soc. v. Cunliffe, L. R. 22 Ch. Div. 61, 52 L. J. Ch. N. S. 541, 48 L. T. N. S. 33, 31 Week. Rep. 98.*

Where bankers advanced money on a note given by a committee for a building society, and one of the obligors brought suit against the bankers and shareholders asking for an accounting, and for a contribution in respect of the notes by the persons who signed the same, and by the persons present at the meeting, at which it was resolved to borrow money and to appoint a committee to join in the security, it was held under the society rules, cl. 13, providing for accommodating a member desiring an advance by the 43 L. R. A.

society obtaining a loan for that purpose, that no loan could be made by the managing body so as to bind the society, unless to make an advance to a member who had agreed to the terms specified; but that as between the persons who signed and those who authorized them to sign they were all liable to make good the amount and indemnify the plaintiff who has paid. *Moye v. Sparrow, 18 Week. Rep. 400, 22 L. T. N. S. 154.*

And where money was advanced in 1857 to a society on the security of promissory notes signed by the trustees, when the rules of the society as certified did not contain any power to borrow money, but a rule which was never certified was subsequently added empowering the managers to borrow such sums as they might consider necessary to advance to members, it was held that the claim on winding up against the company on the notes should be disallowed. *Re Coetnor Ben. Bldg. Soc. 51 L. T. 253.*

In *State, Colburn, v. Oberlin Bldg. & L. Asso. 35 Ohio St. 258*, which was an information in quo warranto to oust a building association from acting as a corporation, it was held that under Ohio acts May 5, 1868, May 9, 1868 (65 Ohio Laws, 133-173, Swan & S. 194, 195), providing for an association becoming a corporation to raise money to be loaned among its members, such an association had no power to discount notes given by its officers for the purpose of raising money to loan the same; that the only way in which money to be loaned could be accumulated was by dues, fees, premiums, and interest.

In *GROMMES v. SULLIVAN* the case of *State, Colburn, v. Oberlin Bldg. & L. Asso. 35 Ohio St. 263*, was distinguished, on the ground that there the procedure was by quo warranto against the society for an abuse of its power, and involved no question of the validity of a corporate obligation in the hands of an innocent purchaser.

Under statutes like *Tex. Rev. Stat. art. 589*, limiting the business of such associations to the legitimate objects of their creation, some questions might arise as to the distinction between the purposes for which their negotiable paper might be issued, and the consequent effect upon the validity of such paper. But these questions do not seem to have been yet before the courts, although it was held in *Anderson v. Cleburne Bldg. & L. Asso. 4 Tex. App. Civ. Cas. (Willson) § 174*, that such a statute made the discounting of notes by such an association *ultra vires* as an exercise of banking business.

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in an action brought by the payee against him to recover on the acceptance.

Diversy v. Loeb, 22 Ill. 394; *Diversy v. Moor*, 22 Ill. 331, 74 Am. Dec. 157; *United States v. Bank of the Metropolis*, 15 Pet. 377, 393, 10 L. ed. 774, 780; *Goetz v. Bank of Kansas City*, 119 U. S. 551, 560, 30 L. ed. 515, 518.

This is the law, even if there was no consideration as between the drawer and the acceptor. And lack of consideration would not be a defense in an action brought by the payee against the acceptor, even if the payee knew there was no consideration as between the acceptor and the drawer.

Diversy v. Loeb, 22 Ill. 394; *Diversy v. Moor*, 22 Ill. 331, 74 Am. Dec. 157; *Nowak v. Excelsior Stone Co.* 78 Ill. 307; *Hardy v. Ross*, 4 Ill. App. 501; *Townesley v. Sumrall*, 2 Pet. 170, 7 L. ed. 386; *United States v. Bank of the Metropolis*, 15 Pet. 377, 393, 10 L. ed. 774, 780.

The negotiable paper of a corporation in the hands of a holder who takes it in good faith for value can be enforced against the corporation, even though it be an accommodation note.

San Antonio v. Mehaffy, 96 U. S. 312, 314, 24 L. ed. 816, 817; *Mechanics' Bkg. Asso. v. New York & S. White Lead Co.* 35 N. Y. 505; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322.

Whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. This law applies to corporations as well as to individuals.

Lickbarrow v. Mason, 2 T. R. 63; *Hern v. Nichols*, 1 Salk. 289; *Story, Partn.* ¶ 108; *Merchants' Bank v. State Bank*, 10 Wall. 604, 646, 19 L. ed. 1008, 1017; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 479, 14 L. ed. 502, 506; *Heenrich v. Pullman Palace Car Co.* 20 Fed. Rep. 100; *Lee v. Sandy Hill*, 40 N. Y. 443; *Locke v. Stearns*, 1 Met. 560, 35 Am. Dec. 382.

If agents conduct themselves fraudulently so that if they had been acting for private employers the persons for whom they were acting would have been affected and bound by their fraud, the same rule must prevail when the principal under whom an agent acts is a corporation.

Merchants' Bank v. State Bank, 10 Wall. 604, 646, 19 L. ed. 1008, 1018; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 50; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 210, 16 L. ed. 73, 75; *First Nat. Bank v. Graham*, 100 U. S. 699, 702, 25 L. ed. 750, 751; *Frankfort Bank v. Johnson*, 24 Me. 490; *Henderson v. San Antonio & M. G. R. Co.* 17 Tex. 560, 67 Am. Dec. 675; *Soosfield Rolling Mill Co. v. State*, 54 Ga. 635.

Strangers to a corporation cannot be bound by the rules adopted for the government of the company.

Smith v. Smith, 62 Ill. 493; *Metropole Bldg. & Turkish Bath Co. v. Garden City Fan Co.* 50 Ill. App. 681; *Wait v. Smith*, 92 Ill. 385; *Union Mut. L. Ins. Co. v. White*, 106 Ill. 67; *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353; *Driscoll v. West Bradley & C. Mfg.* 43 L. R. A.

Co. 59 N. Y. 96; State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671.

The by-laws of the association in question did not in any degree increase or lessen the authority of the officers of the association.

Smith v. Smith, 62 Ill. 493; *Glover v. Lee*, 140 Ill. 102; *Mitchell v. Deeds*, 49 Ill. 416, 95 Am. Dec. 621.

Where the officers of a corporation openly exercise powers affecting the interests of third parties, which presupposes a delegated authority for that purpose, and other corporate acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful and the delegated authority will be presumed.

Marshall County Supers. v. Schenok, 5 Wall. 772, 18 L. ed. 556; *Farmers' & M. Bank v. Butchers' & D. Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *Union Mut. L. Ins. Co. v. White*, 106 Ill. 67; *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353; *Metropole Bldg. & Turkish Bath Co. v. Garden City Fan Co.* 50 Ill. App. 681; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Page v. Fall River, W. & P. R. Co.* 31 Fed. Rep. 257; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 58.

The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong.

Kadish v. Garden City Equitable Loan & Bldg. Asso. 151 Ill. 531; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Darst v. Gale*, 83 Ill. 136; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 267, 24 L. ed. 693, 695; *San Antonio v. Mehaffy*, 96 U. S. 312, 315, 24 L. ed. 816, 817.

If the extrinsic fact upon which depends the lawful character of the act is one peculiarly within the knowledge of the general agent of the corporation by whom the act is done, the act itself is an implied representation that the necessary fact exists, the truth of which the corporation is estopped to deny as against any person who in dealing with the corporation has parted with value, or what the law considers value, on the faith of it.

Farmers' Nat. Bank v. Sutton Mfg. Co. 6 U. S. App. 312, 52 Fed. Rep. 191, 3 C. C. A. 1, 17 L. R. A. 595; *Bissell v. Michigan S. & N. I. R. Cos.* 22 N. Y. 258; *Union Mut. L. Ins. Co. v. White*, 106 Ill. 67; *Farmers' & M. Bank v. Butchers' & D. Bank*, 16 N. Y. 125, 69 Am. Dec. 678.

If it is possible, under any hypothetical condition of facts, for the act in question to be within the express or implied power of a corporation, the corporation will be estopped in a particular instance to say that the act in question is not within such express or implied power, when such a defense would be to the injury of an innocent third party; and this, even if the act itself was unauthorized and illegal.

Citizens' State Bank v. Hawkins, 34 U. S. App. 423, 71 Fed. Rep. 369, 18 C. C. A. 78; *Farmers' Nat. Bank v. Sutton Mfg. Co.* 6 U. S. App. 312, 52 Fed. Rep. 195, 3 C. C. A. 1, 17 L. R. A. 595; *Marshall County Supers. v.*

Schenck, 5 Wall. 772, 784, 18 L. ed. 556, 559; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 267, 24 L. ed. 693, 695; *Bissell v. Michigan S. & N. I. R. Cos.* 22 N. Y. 258; *Macon County v. Shores*, 97 U. S. 272, 279, 24 L. ed. 389, 390; *Gelpcke v. Dubuque*, 1 Wall. 175, 203, 17 L. ed. 520, 524; *Farmers' & M. Bank v. Butchers' & D. Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *Stoney v. American L. Ins. Co.* 11 Paige, 635; *Madison & I. R. Co. v. Norwich Sav. Soc.* 24 Ind. 457; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *State Bd. of Agri. v. Citizens' Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

Where a party dealing with a corporation has acted in good faith, and the contract has been completely executed, so that nothing remains to be done except the payment by the corporation to the party, the corporation is always estopped to set up its want of authority as a defense, unless the act is *malum in se* or expressly prohibited.

Wood v. Corry Waterworks Co. 44 Fed. Rep. 146, 12 L. R. A. 168; *Knox County Comrs. v. Aspinwall*, 21 How. 539, 545, 16 L. ed. 208, 210; *Dimpfel v. Ohio & M. R. Co.* 9 Biss. 127; *National Bank v. Matthews*, 98 U. S. 621, 629, 25 L. ed. 188, 190; *Planters' Bank v. Union Bank*, 16 Wall. 483, 499, 500, 21 L. ed. 473, 479, 480; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 468, 29 L. ed. 963, 975; *Bradley v. Ballard*, 55 Ill. 413, 7 Am. Rep. 656; *Kadish v. Garden City Equitable Loan & Bldg. Assn.* 151 Ill. 531; *Darst v. Gale*, 83 Ill. 136; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187; *Holmes & G. Mfg. Co. v. Holmes & W. Metal Co.* 127 N. Y. 252; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Parish v. Wheeler*, 22 N. Y. 494; *Woodruff v. Erie R. Co.* 93 N. Y. 609; *Hays v. Galion Gaslight & Coal Co.* 29 Ohio St. 330; *Thompson v. Lambert*, 44 Iowa, 239; *State Bd. of Agri. v. Citizens' Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702.

Under such circumstances, when the contract has been fully executed the question of *ultra vires* can only be raised by a direct proceeding in quo warranto.

National Bank v. Matthews, 98 U. S. 621, 629, 25 L. ed. 188, 190; *Citizens' State Bank v. Hawkins*, 34 U. S. App. 423, 71 Fed. Rep. 369, 18 C. C. A. 78; *Knox County Comrs. v. Aspinwall*, 21 How. 539, 16 L. ed. 208; *Alexander v. Tollestone Club*, 110 Ill. 65; *Union Water Co. v. Murphy's Flat Plumbing Co.* 22 Cal. 621; *California State Teleg. Co. v. Alta Teleg. Co.* 22 Cal. 398; *Chester Glass Co. v. Devey*, 16 Mass. 94.

Messrs. Lorin C. Collins, Jr., and William Meade Fletcher, for appellee:

Appellee is not estopped from asserting that it is not liable upon the instrument in question, its execution being beyond the scope of any express or implied powers on the part of the party purporting to act for the corporation, and it being undisputed that the corporation in question never received any consideration of any kind from any person for such attempted liability.

Humboldt Min. Co. v. Variety Iron Works Co. 22 U. S. App. 334, 62 Fed. Rep. 357, 10 C. C. A. 415; *St. Louis, V. & T. H. R. Co. v.* 43 L. R. A.

Terre Haute & I. R. Co. 145 U. S. 393, 36 L. ed. 738; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55; *Morawetz, Priv. Corp.* § 351; *Merchants' Nat. Bank v. Detroit Knitting & Corset Works*, 68 Mich. 620; *Davis v. Rockingham Invest. Co.* 80 Va. 290; *New York Iron Mine v. First Nat. Bank*, 39 Mich. 644; *Adriance v. Roome*, 52 Barb. 411; *Lowell Five Cents Sav. Bank v. Winchester*, 8 Allen, 121; *First Nat. Bank v. Council Bluffs City Waterworks Co.* 56 Hun, 412; *Webber v. Williams College*, 23 Pick. 302; *Oity Electric Street R. Co. v. First Nat. Exch. Bank*, 62 Ark. 33, 31 L. R. A. 535; *Catiron v. First Universalist Soc.* 46 Iowa, 106; *Bigelow, Estoppel*, 5th ed. § 466; *Oregonian R. Co. v. Oregon R. & Nav. Co.* 10 Sawy. 464.

The contention of the appellants, that whenever one of two innocent parties must suffer by the acts of others, he who has enabled such third person to occasion loss must sustain it, and this law applies to corporations as well as individuals, is not well founded, and does not apply in the present instance.

Lowell Five Cents Sav. Bank v. Winchester, 8 Allen, 115; *Oregonian R. Co. v. Oregon R. & Nav. Co.* 10 Sawy. 464.

The same distinction exists between trading and nontrading corporations as between trading and nontrading copartnerships. Even bona fide purchasers of negotiable instruments executed by a nontrading partnership must prove the power of the agent or partner to execute such instrument on behalf of the firm, and the same rule applies to the agent or officer of a nontrading corporation. Such power is not implied or presumed.

Bates, Partn. §§ 342, 345, 443; *Smith v. Sloan*, 37 Wis. 285, 19 Am. Rep. 757; *Hibbler v. De Forest*, 6 Ala. 92; *Ulery v. Ginrich*, 57 Ill. 533; *Story, Partn.* §§ 102-126; 3 Collyer, *Partn.* p. 269, chap. 1, § 2; *Morse v. Richmond*, 6 Ill. App. 169; 17 Am. & Eng. Enc. Law, p. 1026; *Pooley v. Whitmore*, 10 Heisk. 629, 27 Am. Rep. 733; *Pease v. Cole*, 53 Conn. 53, 55 Am. Rep. 53; *Dickinson v. Valpy*, 10 Barn. & C. 138; *Hedley v. Bainbridge*, 3 Q. B. 316; *Judge v. Braswell*, 13 Bush, 67, 26 Am. Rep. 185; *Levy v. Pyne, Car. & M.* 453; *Hunt v. Chapin*, 6 Lans. 139; 4 *Thomp. Corp.* § 4641; *Morawetz, Priv. Corp.* 2d ed. §§ 351, 353, 606; *First Nat. Bank v. Council Bluffs City Waterworks Co.* 56 Hun, 412; *Merchants' Nat. Bank v. Citizens' Gaslight Co.* 159 Mass. 505; *Webber v. Williams College*, 23 Pick. 302; *Packard v. First Universalist Soc.* 10 Met. 427; *Torrey v. Dustin Monument Assn.* 5 Allen, 327; *Lowell Five Cents Sav. Bank v. Winchester*, 8 Allen, 109; *Tappan v. Warren Five Cents Sav. Bank*, 127 Mass. 107; *Craft v. South Boston R. Co.* 150 Mass. 207, 5 L. R. A. 641; *Silliman v. Fredericksburg, O. & C. R. Co.* 27 Gratt. 131; *The Floyd Acceptances*, 7 Wall. 680, 19 L. ed. 175; *Clark v. Des Moines*, 19 Iowa, 209; *Bateman v. Mid-Wales R. Co. L. R.* 1 C. P. 499; *Narragansett Bank v. Atlantic Silk Co.* 3 Met. 282; *Bates v. Keith Iron Co.* 7 Met. 224.

The American Building, Loan, & Investment Society is not a trading or manufac-

turing corporation. Building and loan associations are essentially corporate copartnerships; they have no function except to gather together from small stated contributions sums large enough to justify loans to their members, and the same rule exists relative to the issuance of negotiable paper by them through their officers as in the case of an instrument executed in the name of a nontrading copartnership by one of the general partners.

Toole v. American Bldg. Loan, & Invest. Soc. 61 Fed. Rep. 446; *Re National Sav. Loan & Bldg. Asso.* 9 W. N. C. 79; *Endlich, Bldg. Asso.* §§ 111, 283, 511, 515, 547; *Burbridge v. Cotton*, 8 Eng. L. & Eq. 57; *Silver v. Barnes*, 6 Bing. N. C. 180; *Christian's Appeal*, 102 Pa. 184; *Thompson, Bldg. Asso.* p. 132, § 1; *Starr & C. Rev. Stat.* 1896, chap. 22, §§ 115, 118; *Rhodes v. Missouri Sav. & L. Co.* 173 Ill. 621, 42 L. R. A. 93; 2 Am. & Eng. Enc. Law, p. 604; 1 Am. & Eng. Enc. Law, p. 89; *Bouvier, Law Dictionary*; *Warren v. Shook*, 91 U. S. 704, 23 L. ed. 421; Ill. Const. art. 11, § 5; *Re National Permanent Ben. Bldg. Soc.* 22 L. T. N. S. 285; *Re Victoria Permanent Ben. Bldg. Invest. & Freehold Land Soc.* 22 L. T. N. S. 779; *State, Colburn, v. Oberlin Bldg. & L. Asso.* 35 Ohio St. 263; *Morawetz, Priv. Corp.* § 351; *Bissell v. Michigan S. & N. I. R. Co.* 22 N. Y. 258; *Pooley v. Whitmore*, 10 Heisk. 629, 27 Am. Rep. 733; *Bates, Partn.* § 342; *Merchants' Nat. Bank v. Citizens' Gaslight Co.* 159 Mass. 505; 2 *Morawetz, Priv. Corp.* 2d ed. § 608; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1018; *City Electric Street R. Co. v. First Nat. Exch. Bank*, 62 Ark. 33, 31 L. R. A. 535; *Mechem, Agency*, § 289; *The Floyd Acceptances*, 7 Wall. 666, 19 L. ed. 169; *Farmers' & M. Bank v. Butchers' & D. Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *Madison & I. R. Co. v. Norwich Sav. Soc.* 24 Ind. 457; *Stoney v. American L. Ins. Co.* 11 Paige, 635; *Marshall County Supers. v. Schenck*, 5 Wall. 782, 18 L. ed. 559; *Farmers' Nat. Bank v. Sutton Mfg. Co.* 6 U. S. App. 312, 52 Fed. Rep. 195, 3 C. C. A. 1, 17 L. R. A. 595.

Officers of a corporation are special and not general agents, consequently they have no power to bind the corporation, except within the limits prescribed by the charter and by-laws. Persons dealing with officers of a corporation do so at their peril.

Merchants' Nat. Bank v. Detroit Knitting & Corset Works, 68 Mich. 620; *Davis v. Rockingham Invest. Co.* 89 Va. 290; *New York Iron Mine v. First Nat. Bank*, 39 Mich. 644; *Adrian v. Roome*, 52 Barb. 411; *Lowell Five Cents Sav. Bank v. Winchester*, 8 Allen, 121; *First Nat. Bank v. Council Bluffs City Waterworks Co.* 56 Hun, 412; *Claffin v. Farmers' & C. Bank*, 25 N. Y. 293; *Re Cunningham*, L. R. 36 Ch. Div. 536; *Webber v. Williams College*, 23 Pick. 302; *City Electric Street R. Co. v. First Nat. Exch. Bank*, 62 Ark. 33, 31 L. R. A. 535; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 644, 19 L. ed. 1018; 2 *Morawetz, Priv. Corp.* § 608; *Mechem, Agency*, § 289; *The Floyd Acceptances*, 7 Wall. 668, 19 L. ed. 169; *Cattron v. First Universalist Soc.* 46 43 L. R. A.

Iowa, 106; *Lyndon Mill Co. v. Lyndon Literary & Biblical Inst.* 63 Vt. 585; *Life & Fire Ins. Co. v. Mechanics' F. Ins. Co.* 7 Wend. 34; *Koch v. National Union Bldg. Asso.* 35 Ill. App. 465; *Morawetz, Corp.* § 537; *Morris v. Griffith & W. Co.* 69 Fed. Rep. 131; *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. ed. 470; *Chicago & N. W. R. Co. v. James*, 22 Wis. 198; *Titus v. Cairo & F. R. Co.* 37 N. J. L. 98.

Appellants are not bona fide holders of the bill of exchange. There were sufficient circumstances of suspicion to put reasonably cautious men upon inquiry as to the transaction in question.

Knapp v. Bailey, 79 Me. 195; *Pringle v. Phillips*, 5 Sandf. 157; 16 Am. & Eng. Enc. Law, p. 790; *Lawrence v. Gebhard*, 41 Barb. 577; *First Nat. Bank v. Council Bluffs City Waterworks Co.* 56 Hun, 412; *Lowell Five Cents Sav. Bank v. Winchester*, 8 Allen, 115; *Taylor v. Atchison*, 54 Ill. 196, 5 Am. Rep. 118; *Auton v. Gruner*, 90 Ill. 300; *Wade, Notice*, §§ 3, 4; *Toole v. American Bldg. Loan, & Invest. Soc.* 61 Fed. Rep. 446.

From the facts appearing in the record it appears that the bill was obtained by fraud or circumvention, and under the statutes of the state of Illinois such fact renders a negotiable instrument void, even though it be in the hands of a bona fide holder.

Ill. *Starr & C. Rev. Stat.* 1896, chap. 98, § 14; *Mitchell v. Kintzer*, 5 Pa. 216, 47 Am. Dec. 408; 2 Pom. Eq. Jur. § 873; *Kerr, Fraud & Mistake*, p. 42; *Story, Eq. Jur.* 3d ed. § 186.

Woods, Circuit Judge, delivered the opinion of the court:

We are of opinion that, under the law of its creation, the American Building, Loan, & Investment Society had power to execute negotiable paper. The rule is well established that corporations authorized to do a particular business, unless especially denied the power, have implied authority to contract debts in the legitimate transactions of the business authorized; and the right to contract debts, it is the equally well settled American rule, carries with it the power to give negotiable notes or bills in payment or security for the debts, unless that power is expressly denied. *Reese, Ultra Vires*, § 100; *Green's Brice, Ultra Vires*, 2d ed. p. 253; *Dan. Neg. Inst.* 4th ed. §§ 381, 382; *Morawetz, Priv. Corp.* 2d ed. §§ 350, 351. The decisions upon the subject are numerous, and are cited in the footnotes to the texts referred to. With respect to municipal corporations the Supreme Court of the United States has established a different doctrine (*Police Jury v. Britton*, 15 Wall. 566, 21 L. ed. 251; *Merrill v. Monticello*, 138 U. S. 673, 34 L. ed. 1069); but for further exception to the rule as stated there seems to be no authority in this country.

In the usual course of its business the American Building, Loan, & Investment Society was empowered, expressly or by implication, to incur debt in various ways,—as for example, to its secretary for his services, to withdrawing members, to the representatives or beneficiaries of deceased members,

and to others, strangers to the association, for stationery, office supplies, office rent, for real estate to be used as a place of business; and by express provision it was authorized "to purchase at any sheriff's or other judicial sale, or at any other sale, public or private, any real estate" in which it had an interest, "and the real estate so purchased, to sell, convey, lease, or mortgage, at pleasure, to any person or persons whatsoever." 1 Starr & Curtiss (Ill.) Anno. Stat. 2d ed. pp. 1045, 1050, chap. 32, ¶ 120. This power to mortgage its real estate imported, necessarily, the power to borrow or in some way to become indebted. It had power, also, to receive from its vendees negotiable notes for the price of real estate sold, and from its members like notes for loans made to them, and the notes so acquired it had the right to sell, to pledge, and to indorse. In short, its right to incur debt and to execute the customary evidences of indebtedness was not exceptional or extraordinary, but pertained to the ordinary line and scope of the business which it was organized to do. It was competent, and doubtless would have been wiser, for the legislature to have provided that such societies should not have power to bind themselves by negotiable promises or contracts, into the consideration of which, when in the hands of a good-faith purchaser, there can be no inquiry; but it is not for the courts to put upon the powers granted a restriction which would be inconsistent with an established rule of construction, from which, presumably, the legislature intended no departure.

The power of the society to execute notes or bills for the various purposes suggested being conceded, and there being no ground for questioning the authority of Modica as vice president to sign the name of the society to such obligations executed in the regular course of business, the case comes within the rule that, when a corporation has power—"under any circumstances," as some of the cases say, and certainly when it has power under ordinary circumstances, or in the usual course of its business—to execute negotiable obligations, the bona fide purchaser of a particular obligation has a right to presume that it was executed under circumstances which gave the requisite authority. *Gelpoke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258-267, 24 L. ed. 693-695; *Macon County v. Shores*, 97 U. S. 272-279, 24 L. ed. 889, 890; *Bissell v. Michigan S. & N. I. R. Cos.* 22 N. Y. 258; *Mon-*

ument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322; *Webster v. Howe Mack. Co.* 54 Conn. 394; *National Bank v. Young*, 41 N. J. Eq. 531. It is admitted in the answer that the appellants received the acceptance in question of Montgomery "for a bona fide indebtedness," and, whether that be regarded as meaning in discharge of or only as collateral security for the debt, it made the appellants purchasers for value (*Swift v. Tyson*, 16 Pet. 1-18, 10 L. ed. 865-871; *Brooklyn City & N. R. Co. v. National Bank of the Republic*, 102 U. S. 14, 26 L. ed. 61); and, in the absence of proof that they purchased with knowledge or notice that the acceptance was without consideration, or was otherwise wrongfully obtained, gave them the rights of good-faith purchasers. *King v. Doane*, 139 U. S. 166, 173, 35 L. ed. 84, 87; *Atlas Nat. Bank v. Holm*, 34 U. S. App. 472, 71 Fed. Rep. 489, 19 C. C. A. 94.

The chief contention of the appellee is that the American Building, Loan, & Investment Society is not a trading or manufacturing corporation, that building and loan associations are essentially corporate partnerships, and that the officers thereof have no more authority to bind them by negotiable paper than has a member of a nontrading partnership to make such paper in the firm name. Numerous authorities are cited in support of these propositions. Of the English cases referred to it is enough to observe that they proceed upon the theory that a corporation, without special authority, express or implied, cannot make, accept, draw, or indorse bills or notes. That is not the American rule. The only American cases cited, which need be mentioned, are *State, Colburn, v. Oberlin Bldg. & L. Asso.* 35 Ohio St. 263, and *Christian's Appeal*, 102 Pa. 184. These cases are not in point. In the first, the procedure was by quo warranto against the society for an abuse of its powers, and involved no question of the validity of a corporate obligation in the hands of an innocent purchaser. The Pennsylvania case had reference to the rights of the members in the distribution of the assets of an insolvent company, and contains nothing which can be regarded as bearing upon the question now under consideration. See *Davis v. West Serritoga Bldg. Union*, No. 3, 32 Md. 285.

It follows that the decree below must be reversed, and, accordingly, it is ordered that the decree entered be set aside, and a decree given for the interveners for the amount of the acceptance, with interest.

MINNESOTA SUPREME COURT.

Caroline H. SVANBURG, *Resp't.*,
v.

Osmond FOSSEEN, *Exr.*, etc., of James
Fosseen, Deceased, *Appt.*

(.....Minn.....)

- *1. Where, in a parol agreement for the purchase of real estate, the consideration consists of services to be rendered which are of such a peculiar character that it is impossible to estimate the value to the vendor by a pecuniary standard, and neither party intended so to measure them, the performance of the services will entitle the vendee to a specific performance, notwithstanding the contract was by parol; and this rule is especially applicable where, in addition to such services, the vendee, at the request of the vendor, subsequently sold real estate at a sacrifice, and paid the proceeds over to the vendor, as further consideration, and where, after the full performance of the services, it is out of the power of the court to restore the vendee to the situation in which he was before the contract was made, or to compensate him in damages.
2. The probate court has no jurisdiction over actions for the specific performance of parol contracts for the conveyance of real estate.
3. A contract on the part of husband and wife to convey by deed or will all their property, both real and personal, and a subsequent agreement on their part and that of each of them to make such conveyance, to take effect on their demise, would include all the property which they owned jointly or separately.
4. Where the demurrer is one as to want of jurisdiction and insufficiency of facts in the complaint to constitute a cause of action, it does not reach an objection that there is a defect of parties either of nonjoinder or misjoinder.

(January 25, 1899.)

APPEAL by defendant from an order of the District Court for Hennepin County overruling a demurrer to a complaint filed to enforce specific performance of a contract to convey property. *Affirmed.*

The facts are stated in the opinion.

Messrs. O. Moenness and M. L. Fosseen, for appellant:

The plaintiff has had her day in court and she is barred by a former adjudication.

That decision upon the validity of the will becomes *res judicata*, and binding on all persons and all courts.

State v. McGlynn, 20 Cal. 234, 81 Am. Dec. 118; *Deslonde v. Darrington*, 29 Ala. 95; *Bogardus v. Clark*, 4 Paige, 625; *Woodruff v. Taylor*, 20 Vt. 65; *Ballow v. Hudson*, 13 Gratt. 682; *Tompkins v. Tompkins*, 1 Story, 557; *Broderick's Will*, 21 Wall. 503, 22 L. ed. 599; 3 Redf. Wills, p. 56.

*Headnotes by BUCK, J.

The alleged agreements relied on in the complaint, being oral, are within the statute of frauds.

Townsend v. Fenton, 30 Minn. 528, 32 Minn. 482.

Performance of the consideration by living with a person during his life will not take an oral agreement therefor out of the statute of frauds.

Austin v. Davis, 128 Ind. 472, 12 L. R. A. 120; *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222; *Bender v. Bender*, 37 Pa. 419; *Gorham v. Dodge*, 122 Ill. 528; *Parker v. Heaton*, 55 Ind. 1; *Pond v. Sheean*, 132 Ill. 312, 8 L. R. A. 414; *Moore v. Small*, 19 Pa. 461; *Crabill v. Marsh*, 38 Ohio St. 331; *Mauck v. Melton*, 64 Ind. 414; *Ham v. Goodrich*, 37 N. H. 185; *Smith v. Smith*, 28 N. J. L. 208; *Shahan v. Swan*, 48 Ohio St. 25.

A parol agreement to convey real estate by will, made in settlement of a lawsuit, is not enforceable under the statute of frauds, where there has been no act of part performance on the part of the defendant, although valuable rights may have been relinquished by the intended devisee in consideration of the contract.

Swash v. Sharpstein, 14 Wash. 426, 32 L. R. A. 796; *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222; *Temple v. Johnson*, 71 Ill. 13; *Ackerman v. Fisher*, 57 Pa. 457; *Purcell v. Miner*, 4 Wall. 513, 18 L. ed. 435; *Williams v. Morris*, 95 U. S. 444, 24 L. ed. 360; *De Moss v. Robinson*, 46 Mich. 62, 41 Am. Rep. 144; *Crabill v. Marsh*, 38 Ohio St. 331; *Bresnahan v. Bresnahan* (Minn.) 73 N. W. 515; *Maddison v. Alderson*, L. R. 8 App. Cas. 467; *Campbell v. McKerricher*, 6 Ont. Rep. 85.

The probate court has exclusive jurisdiction of all *ex contractu* obligations of the testator.

Bill v. Nichols, 47 Minn. 382; *Horn v. Ludington*, 32 Wis. 73.

Mr. John M. Rees, for respondent:

The testator could not lawfully devise the property to third parties in open disregard of his contract to devise it to plaintiff and her sisters.

He had no right, within the meaning of the law, to dispose of property which he had already disposed of to the children, except subject to such obligation, and to his just debts.

Statutes 1894, § 4423.

Probate courts have jurisdiction of the estates of deceased persons, that is, of the estate or interest of deceased in the particular property.

Mousseau v. Mousseau, 40 Minn. 236.

The kind and character of the services rendered by the children cannot be adequately paid for in money; it was never intended between the parties in the contract that such services should be paid for in money.

NOTE.—As to the validity of agreements to give property at the promisor's death, see note to *Krell v. Codman* (Mass.) 14 L. R. A. 880; also *Wright v. Wright* (Mich.) 23 L. R. A. 196; 43 L. R. A.

Kofka v. Rosicky (Neb.) 25 L. R. A. 207; *Nowack v. Berger* (Mo.) 31 L. R. A. 810; *Swash v. Sharpstein* (Wash.) 32 L. R. A. 796; and *Owens v. McNally* (Cal.) 33 L. R. A. 369.

There was such part performance as to take the case out of the statute.

Slingerland v. Slingerland, 39 Minn. 197; *Brown v. Hoag*, 35 Minn. 373; *Newton v. Newton*, 46 Minn. 33; *Pollock, Contr.* *310; *Pom. Contr.* p. 161; *Fry, Spec. Perf.* 254; *Maadon v. Rowe*, 23 Ga. 431, 68 Am. Dec. 535; *Gill v. Newell*, 13 Minn. 462.

An oral contract to convey land may be enforced in equity when, relying thereon, a party has made a manifest change in his property.

Place v. Johnson, 20 Minn. 219; *Williams v. Stewart*, 25 Minn. 516.

A parol contract to make a will in a certain person's favor is valid where there has been a part performance in services.

Owens v. McNally, 113 Cal. 444, 33 L. R. A. 369; *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383; *Patterson v. Patterson*, 13 Johns. 379; *Carmichael v. Carmichael*, 72 Mich. 76, 1 L. R. A. 596; *Linneman v. Moross*, 98 Mich. 178.

Specific performance is a matter of discretion with courts of equity.

Kofka v. Rosicky, 41 Neb. 328, 25 L. R. A. 207.

The principles of equity will be applied to new cases as they are presented, and relief will not be withheld merely on the ground that no precedent can be found.

Vandeyne v. Vreeland, 12 N. J. Eq. 142; *Kofka v. Rosicky*, 41 Neb. 328, 25 L. R. A. 207; *Nowack v. Berger*, 133 Mo. 24, 31 L. R. A. 810.

A contract to leave property to an adopted child as an heir is taken out of the statute of frauds by its complete performance.

Wright v. Wright, 99 Mich. 170, 23 L. R. A. 196; *Neal v. Gilmore*, 79 Pa. 421; *Frank's Appeal*, 59 Pa. 190; *Seddon v. Rosenbaum*, 85 Va. 928, 3 L. R. A. 338; *Swain v. Seamens*, 9 Wall. 254, 19 L. ed. 554; *Walker v. Wilmington, C. & A. R. Co.* 26 S. C. 80; *McClure v. Otrich*, 118 Ill. 320; *Frame v. Frame*, 32 W. Va. 463, 5 L. R. A. 323, note.

A court of equity will specifically enforce a promise to leave to another the whole of a definite portion of one's estate as reward for peculiar personal services rendered or other acts done by the promisee which are not susceptible of a money valuation and were not intended to be paid for in money, provided the consideration has been substantially received at the promisor's death.

Jaffee v. Jacobson, 4 U. S. App. 4, 48 Fed. Rep. 24, 1 C. C. A. 24, 14 L. R. A. 352; *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383; 8 Am. & Eng. Enc. Law, p. 740; *Warren v. Warren*, 105 Ill. 568.

Buck, J., delivered the opinion of the court:

Appeal by defendant from an order overruling a demurrer to plaintiff's complaint. The grounds of the demurrer are: First, that the court has not jurisdiction of the subject-matter of the causes of action therein stated; second, that the complaint does not state facts sufficient to constitute a cause of action. The facts stated in the complaint and admitted by the demurrer are as follows:

The plaintiff, whose maiden name was Caroline H. Hanson, when three and a half years old, with two sisters under six years of age came with their father, from Europe to America, to live with their uncle and aunt, James and Anna Mary Fosseen. James Fosseen died about the 3d day of December, 1894, and his wife died April 5, 1891. Plaintiff and her said sisters lived for several months with their said uncle and aunt after their arrival in this country, and thereafter they lived part of the time with the Fosseens, and part of the time with their father, until about the 23d day of January, 1876, when plaintiff's father died. At that time plaintiff was about eight years old, and her sisters were then of the respective ages of ten and thirteen years. Immediately after the death of their said father, the plaintiff and her said sisters, as aforesaid, and the said James and Anna Mary Fosseen, contracted orally by and between each other, in fact and in substance, as follows: That if the plaintiff and her said sisters would come to the house of the said James and Anna Mary Fosseen, as aforesaid and live with them, and give them their services, as they should be directed, until they had grown up, in consideration thereof, at their death said James Fosseen and his said wife would give and leave to the plaintiff and her said sisters, as aforesaid, all the property, both real and personal, which they then owned, and which they might own at the time of their death. That relying upon said promises and agreements, and in pursuance to said contract, as aforesaid, the plaintiff lived at the house of said James Fosseen and his said wife, and gave them her services, as requested, daily and continuously, until she was twenty-one years of age, when she was married to Charles H. Svanburg, her present husband. That the services so rendered by the plaintiff, as aforesaid, cannot be enumerated specifically, but they consisted of housework of every kind and character, all work in and about the house of every nature, required in housekeeping, and in running and maintaining a home, of sewing, washing, ironing, of care and nursing for said James Fosseen and his said wife and much other and different kind of work done and performed outside of the dwelling house, in many and different ways, as requested by the said James Fosseen and his said wife. That during said time, as aforesaid, a strong affection existed between said James Fosseen and his wife and the plaintiff and her said sisters, aforesaid, and that the labor and services, as aforesaid, and the relationship herein described, were daily and continuous until the plaintiff was married, as herein alleged. That the plaintiff never received any compensation or wages whatever for her said work and services, nor for any part thereof. These sisters inherited real estate of value of \$2,000; and about the 1st day of December, 1885, they made an additional contract with the said Fosseens, as follows: That if said plaintiff and her sisters would sell and convey their said real estate, hereinbefore described, to one Swen Anderson, or to some other person whom said

James and Anna Mary Fosseen would name, and give the money and proceeds thereof to said James Fosseen and his said wife, that said James and Anna Mary Fosseen, and each of them, in consideration thereof, would, by deed or by will, convey or bequeath to said plaintiff and to her said sisters, as aforesaid, all the property which they then had or which they might thereafter acquire, both real and personal, in equal parts, such conveyance to take effect at the demise of the said James and Anna Mary Fosseen, and that said James and Anna Mary Fosseen, in consideration of the premises, would give and leave to the plaintiff and her said sisters, at their death, all the personal property which they should own at their demise. That said deed or will, as aforesaid, was to be left at the death of said James and Anna Mary Fosseen, or that the title to all of said property at their decease, was to be left in this plaintiff and her said sisters, as aforesaid. That said plaintiff and her said sisters, relying upon said promises and agreements, as aforesaid, were thereby induced to, and did thereupon, sell, deed, and convey their said real property, as aforesaid, to one Swen Anderson, at the request and solicitation of said James and Anna Mary Fosseen, at the price and for the sum of \$1,300. That nearly all of said sum of \$1,300, was, upon said 1st day of December, A. D. 1885, or immediately thereafter, paid to said James and Anna Mary Fosseen, by and with the consent of the plaintiff and her said sisters. That thereafter the balance of said \$1,300 was paid to and turned over by said Swen Anderson to said James and Anna Mary Fosseen, by and with the consent of the plaintiff and her said sisters, and that the whole of said \$1,300, as aforesaid, was, by and with the consent of the plaintiff and her said sisters, paid to said James Fosseen and Anna Mary Fosseen, and was by them used and appropriated to their own use. That neither of the Fosseens, by deed, conveyance, will or otherwise, in any manner, during their lifetime, made or executed any papers nor did they, by gift or otherwise, give or leave the title to any of the property which they owned at the time the contract was made, or which they died seised of, as hereinafter alleged and set forth, to this plaintiff or to her said sisters, or to either of them.

James Fosseen died seised of a large amount of real estate a portion of which is specifically described in the complaint, situate within the jurisdiction of the court; and it is also alleged in the complaint that the defendant executor has disposed of a large portion of the estate, and now has the proceeds thereof in his hands. After the decease of James Fosseen, the defendant, Osman Fosseen, qualified as the executor of said will, and is engaged in settling the estate in accordance with the terms thereof but has not distributed any portion thereof to the beneficiaries therein named. He gave a bond for only \$5,000, whereas the said estate is of the value of about \$25,000. The relief asked in the complaint is that plaintiff be adjudged the owner of an undivided one third of the real and personal property

of which James Fosseen died seised; that said executor be enjoined from disposing of the same, as he is not financially responsible; that he be enjoined from paying to the beneficiaries in said will named any of said property, or conveying any thereof to said beneficiaries, but that one third should be conveyed and turned over and paid to plaintiff. The demurrer was overruled, and defendant appeals.

It is proper to state that the other two nieces have each brought similar actions in equity in the district court, praying for the same relief, and a stipulation has been entered into between the parties whereby such actions shall abide the event of the decision in this case.

The two questions more distinctly brought before us for consideration are: First. Are the contracts, or either of them, set forth in the complaint, within the statute of frauds? Second. Was the probating of the will a final determination of all the interests of the plaintiff and her sisters in the property of the deceased?

The law is too well settled to need argument or citation of authorities that a person may make a valid obligation which is not within the statute of frauds, binding himself to make his will in a certain way, and thereby give certain property to a particular person or persons, and that such contract may be specifically enforced if such contract is not in itself unlawful. Under our statute of frauds (Gen. Stat. 1894, § 4215), "every contract for the leasing for a longer period than one year or for the sale of any lands or any interest in lands shall be void unless the contract or some note or memorandum thereof expressing the consideration is in writing and subscribed by the party by whom the lease or sale is to be made or by his lawful agent thereunto authorized in writing." But by § 4216, same statute, it is provided that "nothing in this chapter contained shall be construed to abridge the power of courts of equity to compel the specific performance of agreements in cases of part performance of such agreements." The original statute of frauds was passed in the reign of Charles II., and a majority of the American states have enacted laws substantially, in legal effect, the same as the English statute. Section 4215 of our statute above quoted is an illustration. "The controlling motive of the statute is one of expediency and convenience, and this motive has always been kept in view by the ablest courts in their work of interpretation. As its primary object is to prevent mistakes, frauds, and perjuries by substituting written for oral evidence in the most important classes of contracts, the courts of equity have established the principle, which they apply under various circumstances, that it shall not be used as an instrument for the accomplishment of fraudulent purposes. Designed to prevent fraud, it shall not be permitted to work fraud. This principle lies at the basis of the doctrine concerning part performance, but is also enforced wherever it is necessary to secure equitable results." Pom. Contr. § 71. In the very nature of human

legislative enactments, it is sometimes impossible to guard against every case of fraud, but equity, with its remedial powers, frequently steps in where law has failed or is powerless to accomplish the desired effect. And the legislature, recognizing the great wrongs that may sometimes be perpetrated in the name and under color of law, has enacted § 4216, above quoted, whereby equity may be invoked to stay the iniquities of those who rely upon the rigid rules of law; and it has thus made part performance a ground for the more perfect administration of justice. There are certain special features in the contract herein involved, appearing in the relation of the parties, in the terms of the subject-matter, and in the full performance on the part of the plaintiff, where damages would be inadequate if not impracticable. These special features and incidents of the contract and the relations of the parties are, in our opinion, sufficient to bring the case within the rules justifying an action for specific performance in behalf of plaintiff, whereby her interests can only be satisfied by an actual fulfilment of the stipulations which have been made for her benefit, and are justified by the authorities.

In the case of *Slingerland v. Slingerland*, 30 Minn. 197, in an action to compel specific performance for conveyance of land, the plaintiff was never in the possession of the land, and never made any improvements thereon. The defendant was the father of the plaintiff, and owned a large farm; and the son had brought several different actions or proceedings against the father, each being practically a party in interest, and the father had one suit as plaintiff against the son, and all of them being on the court calendar for trial when the father proposed orally to the son that if he would dismiss the action brought by him, and consent that the money involved in the other action should be paid to the father, and the proceedings discontinued, he (the father) would convey to the son a certain farm, and the personal judgment belonging to it, on the day when the son should be married to a young lady named. The son accepted the proposition, dismissed four actions, and the money involved in the other action was paid to the father, and the proceedings discontinued. The son married the young lady, but the father refused to make the conveyance agreed upon. An action by the son for specific performance was sustained, the court holding that the son could not be restored in respect to the action and proceedings to the position he was in at the time of making the oral agreement, nor could any action for damages he might bring put him in as good position, and that the agreement was not within the statute of frauds. In that case it was further stated that in case of payment in services, if their character be such that it is impossible to estimate their value by any such standard, the performance of them is a part performance; citing, among other authorities, *Rhodes v. Rhodes*, 3 Sandf. Ch. 279. In that case it was held: "In general, the payment of the consideration is not such a part performance of a parol agreement for

the purchase of lands as will relieve it from the operation of the statute of frauds. But where the consideration consists of services to be rendered, which are of such a peculiar character that it is impossible to estimate their value to the vendor by a pecuniary standard and the vendor did not intend to measure them by such a standard,—the performance of the services will entitle the vendor to a specific performance, notwithstanding the contract was by parol. This was held of an agreement made between two brothers, who had always lived together and owned their property in common, by which the one having a family agreed to provide for and take care of the other,—who had no family, and who was subject to epileptic fits,—during his life, in consideration that the former should have all the real and personal estate of the latter. Held, also, that the contract was so far certain and reasonable in its terms that it ought to be enforced in equity." The doctrine of that case is cited with approval by Pomeroy in his work on Contracts (p. 161), where he says that the principle of this case is sound. He further says: "But if the services are of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, then the plaintiff, after the performance of these services, could not be restored to the situation in which he was before, or be compensated by any recovery of legal damages. Under these circumstances, the rendition of the services, or the procuring them to be rendered, is a part performance of the verbal agreement, and the case is quite analogous to those in which outlays are made for improvements by a vendee or lessee under a parol contract. This principle is, at bottom, the same as that upon which the courts have proceeded; especially in a series of recent English decisions, in specifically enforcing certain agreements for continuous acts of labor and services, and construction of works where the legal remedy of damages for their breach is impracticable. It has also been applied under analogous circumstances, where the plaintiff has not, indeed, made any payment, but has done other acts in pursuance of the verbal agreement, but not directly affecting its subject-matter, which would leave him without adequate remedy unless the contract is enforced. . . . Payment of the price, although not of itself sufficient to admit the equitable remedy, is always regarded as a strong circumstance in connection with other acts, such as possession or the making of improvements."

In *Davison v. Davison*, 13 N. J. Eq. 246, the services of Olson were held to be a good part performance of his father's verbal agreement to leave him a farm after the father's death.

Van Dyne v. Vredland, first reported in 11 N. J. Eq. 370, and on a second hearing in 12 N. J. Eq. 142, was a case in which "the father of an infant child made an agreement with an uncle of the infant, at the uncle's request, to this effect: that the uncle should take the infant and adopt him as his own child, and that he would treat him as his

own son, and that the property he should have should be given to the child, so that it should belong to him at the death of the uncle and his wife. The uncle took the child, and had him baptized, and the child assumed his surname, and lived with him twenty-five years. Held, that the child might maintain his bill upon the agreement after such performance."

In *Wright v. Wright*, 58 N. W. 54, a Michigan case, the court held: "Defendant, in his second year, was indentured to deceased until his majority. When he was eight, deceased and his wife, being childless, adopted him, under the law then in force, and his name was changed. He gave them his entire services, without pay, till he was over twenty-two, when deceased died. The widow testified that they intended that he should be their heir, that her husband believed that this was effected by the adoption, that defendant thought he was their child till after her husband's death, and that they never talked about paying him for his services. The adoption law was held unconstitutional. Held that defendant's performance entitled him to the inheritance, by way of specific performance of the oral contract." 99 Mich. 170, 23 L. R. A. 196.

In Missouri, in the case of *Sutton v. Hayden*, 62 Mo. 101, a case in which one Mrs. Green made an agreement by which she took, in its infancy, the child of her brother, upon the understanding that at her death all the property owned by her should go to the child, the child was to come and live with her, be as a daughter to her, and take care of her for the remainder of her life. The child entered upon the performance of her part of the agreement, and throughout the course of Mrs. Green's life rendered the services, and, so far as lay in her power, performed her part of the agreement. Mrs. Green died without having in any way secured the property to the child. Says the court: "There are things which money cannot buy,—a thousand nameless and delicate services and attentions, incapable of being the subject of explicit contract, which money, with all its peculiar potency, is powerless to purchase. The law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direction, by decreeing the specific execution of the contract."

See also *Sharkey v. McDermott*, 60 Am. Rep. 270, where it was held: "An agreement by a man and his wife to adopt a child, provide and care well for her, and leave her their property, at their death, performed on the part of the child, is enforceable as to the property upon their death." 91 Mo. 655.

In *Brinton v. Van Cott*, 33 Pac. 218, it was held as follows: "A verbal contract, whereby plaintiff agrees to live with and take care of an old woman until her death, in consideration of her promise to leave all her property to plaintiff, is taken out of the statute of frauds by the rendition of the services during the lifetime of the woman; and, after her death, equity will spe-

cifically enforce the contract, on the theory of part performance, since the services rendered are of a peculiar character, not intended by the parties to be measured by a pecuniary standard." "A contract by which an old woman, in apparent good health, and having the expectancy of many years of life, agrees to leave all her property, worth about \$5,000, to a sixteen-year-old girl, in consideration of the latter's promise to live with and take care of her as long as she lives, is not void for want of mutuality and fairness; and after her death the contract will be specifically enforced in favor of the girl, who performed her part of the agreement, though the woman died within three or four months after the execution of the contract." 8 Utah, 460. Also: "In this territory [Utah] the statute of frauds is in full force. 2 Comp. Laws, § 2831. It is therefore incumbent upon the appellant to show by her complaint that she has partly or wholly performed her contract, so as to take it out of the statute of frauds. 'When the consideration of the agreement consists in work, labor, and services personally done and rendered by the plaintiff, if the value of the same can be ascertained with reasonable accuracy in an action at law, and adequately compensated by the recovery of damages, then neither the services themselves nor the payment for them will avail as a part performance of the verbal agreement. But if the services are of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, then the plaintiff, after the performance of these services, could not be restored to the situation in which he was before, or be compensated by any recovery of legal damages.' Under these circumstances, the rendition of the services is a part performance of a verbal agreement. The act of part performance of a verbal agreement for services must be such that it would be a fraud on the party performing for the other party to refuse to perform his part as agreed between them. Pom. Contr. § 114." See also *Korminsky v. Korminsky*, 2 Misc. 138; *Godine v. Kidd*, 64 Hun. 585; *Jaffee v. Jacobson*, 4 U. S. App. 4, 48 Fed. Rep. 21, 14 L. R. A. 352, 1 C. C. A. 24; *McKinnon v. McKinnon*, 12 U. S. App. 433, 56 Fed. Rep. 409, 5 C. C. A. 530; *Haines v. Haines*, 6 Md. 435.

In the recent case of *Kofka v. Rosicky*, 41 Neb. 328, 25 L. R. A. 207, a girl about seventeen months old was given by her parents to her uncle and aunt, under an agreement that they would adopt her, and rear, nurture, and educate her, and that she was to be as their own child, and at their death to receive all the property which they might own. She lived with them until they died, some ten years, took their name, did not recognize or know her own father and mother in their true relation, but knew them as, and called them, uncle and aunt, and knew and recognized her uncle and aunt as father and mother. The uncle died intestate, possessed of real estate. It was held there was such a

part performance of the contract by the parties thereto as entitled the child to a decree giving her the title to the property, by way of specific performance of the contract.

Now, the first contract brings this case within the doctrine above stated. The Fosseens were childless. They took these children as members of their own household. A strong affection grew up between the sisters and their foster parents. For many years they rendered faithful services to their uncle and aunt, doing household work of every kind, as well as outdoor work. They nursed and cared for these old people, and in no respect were they disobedient, negligent, or unfaithful in their duties or attentions to their uncle and aunt. It is a fair inference that these childless old people regarded these nieces with a love and affection almost akin to that of parents for their own children, and in return, the services and society of these children to them were of great benefit and pleasure. The value of such society and services to their uncle and aunt is incapable of measurement in money. *Emery v. Darling*, 50 Ohio St. 160-167; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279.

The services were continuous for many years, until plaintiff was married, when she was twenty-one years old. The first contract would alone entitle the plaintiff to a specific performance. But the Fosseens encouraged and induced the plaintiff and her sisters to enter into the second contract, not that the Fosseens were, in substance, to do any more for the sisters than they had agreed to do under the first contract, but to procure from the sisters a further and valuable consideration to themselves. When their father died, in 1876, he left them real estate of the value of \$2,000, which the Fosseens induced them to sell; and to please and satisfy these foster parents, they sold the real estate for \$1,300, or \$700 less than its actual value, and paid the consideration to the Fosseens, upon their further promise to do just what they had, years before, substantially promised to do,—leave their property at their death to the sisters; and this payment of such money was a strong circumstance, creating an additional equity for the enforcement of this action. Now, courts of equity will not allow the statute of frauds to be used as an instrument of fraud. *Bork v. Martin*, 132 N. Y. 280. And where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or active encouragement induced the other party to change his position, so that he will be peculiarly prejudiced by the assertion of such adversary claim. *Swain v. Seamens*, 9 Wall. 254, 19 L. ed. 554. One of the underlying principles upon which an action for specific performance may be enforced is that the plaintiff cannot be restored to the situation in which he was before the contract was made, and cannot be compensated by the recovery of legal dam-

ages. *Slingerland v. Slingerland*, 39 Minn. 197; Pom. Contr. p. 162. The land sold by the sisters at a loss of \$700 could not be restored to them, especially as the consideration received by them had passed into the hands of the Fosseens, and beyond the control of the sisters, and hence they could not be placed *in statu quo*.

While the complaint is not complete in its description of all the property of which James Fosseens died seised, nor of that sold, and the proceeds of which are held by the defendant as executor, nor of the amount and kind of personal property so held by the defendant, yet, as against the demurrer, there is enough real property the subject of the action, specifically described, to entitle the plaintiff to maintain this action. It is also to be noted that the contracts provided that the sisters should have the Fosseens' personal property on their decease; hence the contract was an entirety, and must be enforced as such. *Mann v. Higgins*, 83 Cal. 66.

Great stress is placed by the appellant upon the fact, as he alleges, that the plaintiff has had her day in court; that the will has been proved, and her claim has not been presented or allowed in the probate court; and that such court has fixed the status of the estate. It is a sufficient answer to this contention to say that this is not an action for the construction of a will, or for the distribution of any property thereunder. The probate court has no jurisdiction over actions for the specific performance of parol contracts for the conveyance of real estate. Title 10, chap. 45a, Gen. Stat. 1894, and the sections thereunder, providing that the probate court may decree the conveyance of land, give that court jurisdiction only where the contract for conveyance is in writing; and it cannot decide controverted questions arising upon the merits even in such cases, but must leave the applicant or petitioner to his remedy by action. *Mousseau v. Mousseau*, 40 Minn. 236. Hence, if the probate court had no jurisdiction to hear this case, the plaintiff is not barred of her rights to enforce her contract in a court of general jurisdiction.

There is no merit in the contention of the defendant that the complaint does not show that the Fosseens had either jointly or separately any property whatever while they lived. Their promise was by the first contract to give and leave to plaintiff and her sisters all the property, both real and personal, which they owned and might own at the time of their death. Subsequently, by the terms of the second contract, said James Fosseens and Anna Mary Fosseens, and each of them, agreed to convey by deed, or bequeath, to said plaintiff and her sisters, said property, such conveyance to take effect upon their demise. This would include all the property which they owned jointly and separately.

The last point raised goes to the nonjoinder of parties plaintiff and defendant. But the demurrer is one as to want of jurisdic-

tion, and insufficiency of facts stated to constitute a cause of action, and does not reach the objection that there is a defect of parties, either by nonjoinder or misjoinder.

Order affirmed.

Start, Ch. J., concurring:

I concur in the result, and in all that is said in the opinion, except as to conveyance of plaintiff's real estate. I am inclined to the opinion that she could be compensated in damages for the real estate.

Mitchell, J., concurring:

While in the main I concur in the foregoing opinion, I do not attach much, if any, importance to the fact that the plaintiff sold her own property for less than its value, and gave the proceeds to the deceased. I think the case is taken out of the statute of frauds by the fact that the consideration which plaintiff has furnished consisted, not merely of services in the ordinary sense of the word, but also of the assumption of a peculiar personal and domestic relation to the deceased as a member of their family; and therefore the value of the consideration as a whole is incapable of being estimated by any mere pecuniary standard.

Collins, J., concurring:

I am of the opinion that plaintiff could be compensated in damages to the amount of her loss when selling her real estate, and therefore, that the fact of such sale is of no consequence here.

Canty, J., concurring:

I concur in a part of the result arrived at, but not in the foregoing opinion. I do not think that the statute of frauds should be brushed aside merely because the consideration for the land purchased on a verbal contract is personal services, whether it is difficult to estimate the value of such services or not. But I am of the opinion that the fact that the plaintiff was an infant, under the care and control of the vendor, and having no natural or legal guardian at the time, is a sufficient ground for taking the case out of the statute of frauds. Everyone who assumes to act as guardian for, or manage the affairs of, an infant, is, at the election of the infant, estopped to deny that he has assumed the relation of guardian to the infant. 9 Am. & Eng. Enc. Law, p. 121, and cases cited. Even where the adult has not the care or control of the infant, their dealings are scrutinized, and every presumption is against the adult, the same as if he bore to the infant the relation of guardian to ward. *Johnson v. Northwestern Mut. L. Ins. Co.* 56 Minn. 365, 28 L. R. A. 187; *Alt v. Graff*, 65 Minn. 191. But, when the adult has the sole care and control of the infant, equity should hold that such a fiduciary relation exists between them as to take the case out of the statute of frauds as to the real estate, but specific performance should not be awarded as to the personal property.

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St. PAUL & DULUTH RAILROAD COMPANY, Appt.,

v.

City of DULUTH et al., Respts.

(.....Minn.....)

*1. The right granted to the Lake Superior & Mississippi Railroad Company (now St. Paul & Duluth Railroad Company) by Special Laws 1861, chap. 1, to construct its railroad across any public road or highway, does not extend to branch roads which are neither a part of, nor appurtenant to, its main line to the west end of Lake Superior.

2. The mere construction, maintenance, and occasional use by a railroad company (which has no conveyance of the land) of an ordinary railroad track across a platted street while it still remains unimproved and unfit for public use, and before public convenience or necessity requires it to be opened and improved for use as a street, does not constitute adverse possession as against the public. Such occupancy must be presumed to be subject to the paramount right of the public.

(July 12, 1898.)

APPEAL by plaintiff from an order of the District Court for St. Louis County overruling a motion for new trial after dismissal of an action brought to enjoin defendants from tearing up a track which had been laid across a public street. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hadley & Armstrong for appellant.

Messrs. Thomas S. Wood, Ayres, Morris, & Greene and *J. B. Richards*, for respondents:

A grant of franchise to a corporation is to be strictly construed; nothing passes thereby but what is expressly granted, or is necessary to be implied to allow of the exercise of a power expressly granted.

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. 545, 9 L. ed. 823.

The right to cross highways is to be exercised in connection with, and so far as necessary to, the construction of the main line and the main line only, and with no branches.

By the simple act of placing ties in Arthur avenue and laying rails on those ties, and leaving the ties and rails there for fifteen years, appellant could not obtain either an easement or a fee in the land.

Texas Western R. Co. v. Wilson, 83 Tex. 155; *Emery v. Raleigh & G. R. Co.* 102 N. C. 209; *Indianapolis, P. & C. R. Co. v. Ross*, 47 Ind. 30; *Wayzata v. Great Northern R. Co.* 50 Minn. 438.

*Headnotes by BUCK, J.

NOTE.—For rights acquired as against the public by adverse possession of highway or street, see note to *Meyer v. Graham* (Neb.) 18 L. R. A. 146; also *Webb v. Demopolis* (Ala.) 21 L. R. A. 62.

The proof to support title by adverse possession must be of the clearest possible character.

1 Am. & Eng. Enc. Law, 2d ed. p. 887; *Sydnor v. Palmer*, 29 Wis. 226.

The possession was not hostile.

Reilly v. Racine, 51 Wis. 526; *Lane v. Kennedy*, 13 Ohio St. 42; *Com. v. Boston*, 16 Pick. 442; *Henshaw v. Hunting*, 1 Gray, 205; *Texas Western R. Co. v. Wilson*, 83 Tex. 155; *Smyles v. Hastings*, 22 N. Y. 217; *Bridges v. Wyckoff*, 67 N. Y. 130; *Olean v. Steyner*, 135 N. Y. 341, 17 L. R. A. 640; *New York v. Law*, 6 N. Y. Supp. 632; *Bedell v. Shaw*, 59 N. Y. 46; *Re Commissioners of Public Parks*, 25 N. Y. S. R. 231; *Hurley v. Mississippi & R. River Boom Co.* 34 Minn. 143; *Borer v. Lange*, 44 Minn. 285.

What will be hostile possession will vary according to the character of the street or of the possession.

Hostile possession "is possession taken with an intention to claim the title as owner, and in derogation of the rights of the true owner."

1 Am. & Eng. Enc. Law, 2d ed. p. 790; *Sherin v. Brackett*, 36 Minn. 152.

Buck, J., delivered the opinion of the court:

The St. Paul & Duluth Railroad Company, plaintiff herein, is the successor of the Lake Superior & Mississippi Railroad Company, and for many years has maintained a railroad track on Rice's Point, in the city of Duluth, crossing two streets or highways known as "Garfield Avenue" (formerly "Third Street") and "Arthur Avenue" (formerly "Fifth Street"). In the early part of June, 1897, the defendants tore up this railroad track where it was laid across Arthur avenue; and the plaintiff immediately replaced the track, and obtained an injunction from the court restraining the defendants from tearing up, removing, or interfering with the track during the pendency of the action. The differences as to Garfield avenue were subsequently adjusted. The application for a permanent injunction as to Arthur avenue came on for hearing on its merits in September, 1897, at a general term of the district court of St. Louis county, and upon defendants' motion the action was dismissed. A motion for a new trial was made and denied, and plaintiff appeals.

A considerable portion of the plaintiff's evidence was introduced in support of its claim that it had acquired an easement in the nature of a right of way across Arthur avenue, the *locus in quo*, by adverse possession. Rice's Point was platted in 1858. Arthur avenue, which appears upon this plat, was from 1881 up to 1896 a sandy or marshy waste; and during this time it had not been opened, used, or worked as a public highway. It was not needed during such time for highway purposes, and had no actual, visible marks of existence for avenue or street purposes; and fifteen years had not elapsed between the time when it was first required for public use as a highway and the 43 L. R. A.

commencement of this action. Gen. Stat. 1894, § 5155, provides "that all the provisions of this title ["The Time of Commencing Actions"] as to the time of the commencement of civil actions shall apply to municipal and all other corporations with like power and effect as the same applies to natural persons." This law would undoubtedly apply to this case if Arthur avenue had, during a period of fifteen years, been opened, worked, and used as a public highway by the city of Duluth prior to the commencement of this action. But the difficult question arises upon the fact that during part of said time it was not so opened, worked, and used and recognized as a public street, nor needed for such purpose, by said city. When a party makes a plat of his land, with streets and avenues marked thereon, and duly files the plat for record, the municipal corporation within whose boundaries the land is situate may adjudge when its necessities require the use of such streets and avenues for public purposes; and until it has so determined, and taken possession, and opened and used it, the statute of limitations will not commence to run against it. The mere execution and filing of a plat by the owner of land cannot entail upon a municipal corporation the absolute duty to protect the streets thereon marked, as against occupants thereof. Its right in regard to the plat may remain dormant for a reasonable time, at least, but until such rights spring into life no legal obligations arise against it. In this western country, and especially during the so-called "boom times," thousands of acres of land were platted, and frequently included land designated for street purposes, which, by reason of hills, rocks, marshes, or deep water at various places therein, was utterly unfit for public ways until improved, and often at great expense. Such designated streets a municipal corporation is not bound to protect against occupants until the time arrives when such a street, or part of it, is required for actual public use, and is actually opened. Of course, this rule would apply to any street marked on a plat, where the dedication thereof is not accepted, and it is not opened for public use. Hence persons in possession of such platted streets, or part of them, will, until the time arrives when such streets are required for actual public use, be presumed to hold subject to the paramount right of the public. *Reilly v. Racine*, 51 Wis. 526; *Derby v. Alling*, 40 Conn. 410; *Henshaw v. Hunting*, 1 Gray, 210.

It is unnecessary to discuss at length the question of adverse possession of the *locus in quo* prior to 1881, as the evidence is too meager and insufficient to establish such possession. Evidence of adverse possession is to be construed strictly, and is not to be made out by inference or presumption, but by clear and positive proof. The burden of proving the essential facts which create title by prescription rests upon him who asserts it. No such facts were proved in this case as to possession prior to the year 1881.

The next point raised by appellant is that the special acts of the legislature which incorporated the Lake Superior & Mississippi Railroad Company authorized the St. Paul & Duluth Railroad Company to construct its tracks across Arthur avenue, without need of further authorization. We have examined the material provisions of the various legislative acts bearing upon this case, and we find none of them authorizing the building of the track in question across Arthur avenue. If these acts can be construed as applicable to the main line, or even to a side track, where it crosses public streets and

highways, they are inapplicable to a track of this character. It is not part of the main line, and cannot be properly considered a spur or side track. It is constructed nearly at right angles from the main line, extending a long distance through private property, and over the public streets not occupied by the main line. It is in fact a distinct branch of the main line, and we find no express or implied authority for its crossing Arthur avenue, the *locus in quo* in question. It would serve no good purpose to go into any further details, or extend this opinion.

Order affirmed.

OREGON SUPREME COURT.

ESBERG-GUNST CIGARCOMPANY, *Appt.*,

v.

City of PORTLAND, *Respt.*

(.....Or.....)

1. That the waterworks of a city were built under authority imposed upon it by the legislature and under the direction and supervision of a committee appointed by the legislature will not exempt the city from the general rule which imposes upon municipal corporations owning and operating such works liability for injuries to private individuals through their negligent construction or operation.
2. The vote of a city accepting an act permitting the construction of waterworks and appointing a committee to supervise the work will make the committee its agent for whose negligent acts it will be responsible under the doctrine of *respondet superior*.
3. Sufficient evidence of negligence in the construction of a water main to carry the question to the jury exists when it is shown to have burst three times under ordinary pressure, and that pipe of its size will not, when properly constructed and laid, burst under such pressure.
4. The mere happening of an accident causing injury is evidence of negligence whenever the thing causing the injury is under control of defendant and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care.

(January 16, 1899.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County in favor of defendant in an action brought

NORR.—As to liability for damage by water from falling tank or standpipe, see *Defiance Water Co. v. Olinger* (Ohio) 32 L. R. A. 736.

As to presumption of negligence in several classes of cases from the occurrence of accidents, see *note* to *Barnowski v. Helson* (Mich.) 15 L. R. A. 33.

For some cases as to such presumptions from accidents injuring property, see also *Shafer v. Lacock* (Pa.) 29 L. R. A. 254; *Judson v. Giant Powder Co.* (Cal.) 29 L. R. A. 718; and *Ryder v. Kinsey* (Minn.) 34 L. R. A. 557.
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to hold it responsible for injury to plaintiff's goods through the bursting of a water main.
Reversed.

Statement by **Bean, J.:**

This is an action to recover damages for an injury to plaintiff's goods, caused by the bursting of an alleged negligently defective water main belonging to the defendant city, and the consequent flooding of the cellar in which such goods were stored. In 1885 the charter of the city of Portland was amended by adding thereto an additional chapter (Laws 1885, p. 97), by which the city was authorized and empowered to construct or purchase, keep, conduct, and maintain waterworks therein of a character and capacity sufficient to furnish the city and its inhabitants with water for all uses and purposes necessary for the comfort, convenience, and well-being of the same, and to issue and dispose of its bonds for that purpose. §§ 142, 153. The powers thus given to the city were to be exercised by fifteen resident taxpayers thereof, named in the act, styled collectively "the water committee," nine of whom should constitute a quorum, and who were authorized to fill by appointment all vacancies which may occur in their number. §§ 143, 145. This committee was required to organize within a certain time by the election of a chairman and clerk, whose duties were prescribed by the act (§§ 144, 146-148); to appoint a treasurer, who shall have the care and custody of all moneys received by the committee from the sale of bonds or otherwise for the construction or purchase of waterworks, and shall pay out the same on the order of the chairman, countersigned by the clerk of the committee, and not otherwise (§ 149); to employ and discharge, from time to time, such other agents, workmen, laborers, and servants at such compensation or wages as it may deem necessary and convenient to the accomplishment of the purposes of the act (§ 151). It is further provided that whenever and as soon as the works provided for in the act are, in the judgment of the committee, ready for use, it shall select from its members, if a sufficient number will consent to serve, and, if not,

from the resident taxpayers of the city, five persons for the several terms of two, four, six, eight, and ten years, who shall be styled individually "water commissioners," and collectively "the water commission," to which it is required to turn over the waterworks, and all property appurtenant thereto, together with all books, papers, and accounts relating to the construction or purchase thereof; and thereafter the power and authority given by the act to the city to keep, conduct, and maintain waterworks shall be exercised by such commission. §§ 154, 155, 157. After the water commission has been selected by the committee, as provided in the act, the members of such commission shall thereafter be appointed by the governor of the state from among the resident taxpayers of the city, as vacancies may occur from time to time. The commission is given power (1) to employ, hire, and discharge all such agents, workmen, laborers, and servants as it may deem necessary or convenient in the conduct and management of the waterworks; (2) to make all needful rules and regulations in reference thereto; (3) to establish rates for the use and consumption of water by the city and inhabitants thereof, including the people living along the line or in the vicinity of the works without the city; (4) to provide for the payment of water rates monthly in advance, and to shut off the water from any house, tenement, or place for which the water rate is not duly paid, or when any rule or regulation is disregarded or disobeyed; (5) to do any other act or make any other regulations necessary and convenient for the conduct of its business and the due execution of the power and authority given it by the act, and not contrary to law. § 159. All money collected or received by the commission for the use and consumption of water or otherwise is required to be deposited with the treasurer of the city, who shall keep the same separate and apart from other funds, and pay it out on the order of the chairman of the commission, countersigned by the clerk and to the holder of any overdue interest coupons of the bonds issued under the provisions of the act, on the presentation and surrender thereof. § 158. It is made the duty of the commission annually, before the 1st day of January, to make a written estimate of the probable expense of maintaining and conducting the waterworks during the ensuing year, and also the cost of any contemplated alteration, improvement, or extension, and thereupon ascertain and prescribe, as nearly as it conveniently can, a water rate for such year that will insure a sufficient income from the sale of water to pay such expense and costs, together with one year's interest on the bonds then issued and outstanding. § 160. And, after the expiration of five years, in fixing the water rates it is authorized to include in its estimate therefor a sum equal to 1 per centum on the par value of the bonds then issued and outstanding, which sum shall be collected and invested under the direction of the commission as a sinking fund for the payment or redemption of such bonds. § 161. Immediately after the act of 1885 became a law, the persons named therein as the water

committee proceeded to organize as directed, and to issue and dispose of city bonds, from the proceeds of which they purchased, in December, 1886, the plant of the Portland Water Company, a private corporation then engaged in supplying the city and its inhabitants with water for hire, and subsequently commenced to enlarge the works so purchased by the construction of a gravity system, by which water should be taken from Bull Run creek at a point some miles distant from the city. The act of 1885 was, in substance, incorporated in the later act (Laws 1891, p. 796), providing for the consolidation of the cities of Portland, East Portland, and Albina, which went into effect in July, 1891, after having been accepted by a majority of the legal voters of the several cities interested, at an election held for the purpose in June, 1891, and is also contained in the subsequent charter of 1893 (Laws 1893, p. 810). During the process of enlarging the works, the water committee, during the year 1892, laid a 24-inch main on Fourth street, and connected it with the other mains comprising the water system. On January 13, 1896, this main burst, and the waters escaping therefrom flooded the streets, and the cellars of the adjoining buildings, including the premises occupied by the plaintiff, and used as a tobacco and cigar store, to its damage in the alleged sum of \$2,607.87. Its claim therefor having been rejected by the city, this action was brought, resulting in a judgment of nonsuit, from which the appeal is taken.

Messrs. Cox, Cotton, Teal, & Minor,
for appellant:

Charters are never imposed upon municipal corporations except at their request. They are privileges of great value, and when such privileges are granted concurrent duties are imposed. There is no difference in this respect between a municipal corporation and a private corporation or private individual.

Henly v. Lyme, 5 Bing. 91; *Weet v. Brockport*, 16 N. Y. 161, note 165; *Meares v. Wilmington Comrs.* 31 N. C. (9 Ired. L.) 73, 49 Am. Dec. 412; *Pittsburgh v. Grier*, 22 Pa. 63, 60 Am. Dec. 65; *Bigelow v. Randolph*, 14 Gray, 541; *Jones v. New Haven*, 34 Conn. 1; *Weightman v. Washington*, 1 Black, 39, 17 L. ed. 52; *Detroit v. Blackeby*, 21 Mich. 117, 4 Am. Rep. 450; 1 Dill. Mun. Corp. § 27.

The authority to provide the city with water, if not inherent in the city as a municipal corporation, was vouchsafed by the several charters, and was to be exercised by the council.

Oregon Sess. Laws 1870, pp. 120, 123, 124; Oregon Sess. Laws 1882, pp. 141, 142; Oregon Sess. Laws, Special Sess. 1885, pp. 97-102; Sess. Laws 1891, pp. 832-837; Sess. Laws 1893, pp. 853-857; 1 Dill. Mun. Corp. §§ 27, 147, 443, and note; *Hale v. Houghton*, 8 Mich. 458; *Rome v. Cabot*, 28 Ga. 50; *McKnight v. New Orleans*, 24 La. Ann. 412; *Grant v. Davenport*, 36 Iowa, 396.

In constructing and maintaining a system of waterworks the city of Portland acts. not in a public capacity, but as a private corporation.

Sess. Laws 1885, Special Sess. pp. 97 et

seq.; Sess. Laws 1891, pp. 832 *et seq.*; Sess. Laws 1893, pp. 153 *et seq.*; *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Petersburg v. Applegarth*, 28 Gratt. 321, 26 Am. Rep. 357; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434; *Hannon v. St. Louis County*, 62 Mo. 313; *Crossett v. Janesville*, 28 Wis. 420; *Helena v. Thompson*, 29 Ark. 569; *Safety Insulated Wire & Cable Co. v. Baltimore*, 25 U. S. App. 166, 66 Fed. Rep. 140, 13 C. C. A. 375; *Illinois Trust & Sav. Bank v. Arkansas City*, 40 U. S. App. 257, 76 Fed. Rep. 271, 34 L. R. A. 518, 22 C. C. A. 171; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. Rep. 731; *Donahoe v. Kansas City*, 136 Mo. 664.

The water committee is an agency of the city, and the city must answer for it. *Respondent superior*.

Oregon Laws 1870, pp. 120, 123, 124; Oregon Laws, Special Sess. 1885, pp. 97 *et seq.*; Oregon Laws 1891, pp. 832 *et seq.*; Oregon Laws 1893, pp. 853 *et seq.*; Oregon Laws 1892, pp. 141, 142; *Henly v. Lyme*, 5 Bing. 91, 3 Barn. & Ad. 77; *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669, 2 Denio, 433; *Sage v. Brooklyn*, 89 N. Y. 189; *Fleming v. Suspension Bridge*, 92 N. Y. 368; *Genet v. Brooklyn*, 99 N. Y. 296; *Re New York*, 90 N. Y. 569; *Tormey v. New York*, 12 Hun, 542; *Ham v. New York*, 70 N. Y. 459; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Hand v. Brookline*, 126 Mass. 324; *Brooks v. Somerville*, 100 Mass. 271; *Perkins v. Lawrence*, 138 Mass. 305; *Stoddard v. Winchester*, 157 Mass. 567; *Watson v. Needham*, 161 Mass. 404, 24 L. R. A. 287; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434; *Detroit v. Blackeby*, 21 Mich. 117, 4 Am. Rep. 450; *Barnes v. District of Columbia*, 91 U. S. 541, 23 L. ed. 440; *Anne Arundel County Comrs. v. Duckett*, 20 Md. 468, 83 Am. Dec. 557; *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *Philadelphia v. Field*, 58 Pa. 320; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Meares v. Wilmington Comrs.* 31 N. C. (9 Ired. L.) 73, 49 Am. Dec. 412; *Jones v. New Haven*, 34 Conn. 1; *Springfield v. Le Claire*, 49 Ill. 476; *Clayburgh v. Chicago*, 25 Ill. 535, 79 Am. Dec. 346; *Browning v. Springfield*, 17 Ill. 143, 33 Am. Dec. 345; *David v. Portland Water Committee*, 14 Or. 98.

As there is some evidence of negligence, it was error to take the case from the jury.

1 Greenl. Evidence, § 49, note; *Southwell v. Beezley*, 5 Or. 458; *Salmon v. Olds*, 9 Or. 488; *Grant v. Baker*, 12 Or. 329; *Tippin v. Ward*, 5 Or. 450; *Ferrera v. Parke*, 19 Or. 141; *Anderson v. North Pacific Lumber Co.* 21 Or. 281.

The city in putting in and maintaining waterworks acted at its own peril, *sic utere tuo ut alienum non laedas*.

1 Thomp. Neg. pp. 2, 25, 28, 30, 31, 38-41; *Fletcher v. Rylands*, L. R. 1 Exch. 265; *Rylands v. Fletcher*, L. R. 3 H. L. 330; *Fletcher v. Smith*, L. R. 7 Exch. 305; *Fletcher v. Smith*, L. R. 2 App. Cas. 781; *Hay v. Cohoes Co.* 2 N. Y. 159; *Tremain v. Cohoes Co.* 2 N. 43 L. R. A.

Y. 163, 51 Am. Dec. 284; *Humphries v. Cousins*, L. R. 2 C. P. Div. 239; *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184.

The bursting of the main on Fourth street, especially where this had occurred several times and the city had taken no precaution to prevent a recurrence, in itself constitutes evidence of negligence sufficient at least to make a prima facie case for the jury—*res ipsa loquitur*.

2 Thomp. Neg. p. 1220; *Kearney v. London, B. & S. C. R. Co.* L. R. 5 Q. B. 411, L. R. 6 Q. B. 759; *Byrne v. Boadle*, 2 Hurlst. & C. 722; *Scott v. London & St. K. Docks Co.* 3 Hurlst. & C. 596; *Briggs v. Oliver*, 4 Hurlst. & C. 403; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Hogan v. Manhattan R. Co.* 149 N. Y. 23; *Sheridan v. Foley*, 58 N. J. L. 230; *Houser v. Cumberland & P. R. Co.* 80 Md. 146, 27 L. R. A. 154; *Vinoett v. Cook*, 4 Hun, 318; *Lyons v. Rosenthal*, 11 Hun, 46; *Morris v. Strobel & W. Co.* 81 Hun, 1; *Warren v. Kauffman*, 2 Phila. 259; *Hays v. Gallagher*, 72 Pa. 136; *Thomas v. Western U. Teleg. Co.* 100 Mass. 156; *Wharton, Neg.* 2d ed. §§ 857, 858; *Illinois C. R. Co. v. Phillips*, 49 Ill. 234, 55 Ill. 194; *Illinois C. R. Co. v. Houck*, 72 Ill. 285; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Toledo, W. & W. R. Co. v. Moore*, 77 Ill. 217; *John Morris Co. v. Burgess*, 44 Ill. App. 27; *Koonts v. Oregon R. & Nav. Co.* 20 Or. 2; *Carhart v. Auburn Gaslight Co.* 22 Barb. 297; *Holbrook v. Utica & S. R. Co.* 12 N. Y. 236, 64 Am. Dec. 502; *Ware v. Gay*, 11 Pick. 106; *Feital v. Middlesex R. Co.* 109 Mass. 308, 12 Am. Rep. 720; *Congreve v. Smith*, 18 N. Y. 79; *Curtis v. Rochester & S. R. Co.* 18 N. Y. 534, 75 Am. Dec. 258; *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 115.

The jury had a right to inspect the material and to say from such inspection whether it was weak or insufficient.

1 Wharton, Ev. §§ 345 *et seq.*; *Ingram v. Plasket*, 3 Blackf. 450; *State v. Arnold*, 35 N. C. (13 Ired. L.) 184; *Mulhadov. Brooklyn City R. Co.* 30 N. Y. 370; *Garvin v. State*, 52 Miss. 207; *Howell v. Hartford F. Ins. Co.* 6 Biss. 163.

Messrs. W. M. Cake and F. L. Keenan, for respondent:

Defendant has no power of appointment of the members of the water committee; no power of selecting or choosing agents or servants to carry out the provisions of the act creating said committee; no power to fix or collect water rates; receives no income or benefit from the levying of rates; receives no consideration for the duties performed by said committee; did not and could not, by any act or sanction, cause the committee to organize or proceed to the execution of the provisions of the act; nor is the water committee charged with a duty to file with or make any report to the defendant city of their actions or doings, or made amenable to the city in any way.

Portland Charter, chap. 12; Laws 1893, pp. 853-857.

The city was not required to adopt or sanction any plan for the proposed work before

the same was proceeded with; did not and could not let any contracts for the work or employ any agents or servants to perform the work, and could not discharge any that were employed.

Charter, §§ 150, 151, 153; Laws 1893, p. 854.

The water committee is not an agency of the city. Where there is no right of selecting or choosing the relation of principal and agent cannot exist, and the maxim of *respondere superior* has no application where that relation does not exist.

Pratt v. Weymouth, 147 Mass. 254; *Hafford v. New Bedford*, 16 Gray, 302; *White v. Phillipston*, 10 Met. 111; *Walcott v. Swampscott*, 1 Allen, 101; *McCarthy v. Boston*, 135 Mass. 200; *Morrison v. Lawrence*, 98 Mass. 221; *Fisher v. Boston*, 104 Mass. 93, 6 Am. Rep. 196; *McCann v. Waltham*, 163 Mass. 344; *Dooley v. Sullivan*, 112 Ind. 455; *Eastman v. Meredith*, 36 N. H. 288, 72 Am. Dec. 302; *Maxmilian v. New York*, 62 N. Y. 163, 20 Am. Rep. 468; *Ham v. New York*, 70 N. Y. 463; *Torney v. New York*, 12 Hun, 548; *Darlington v. New York*, 31 N. Y. 197, 88 Am. Dec. 248; *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 51, 30 L. R. A. 660; *Bryant v. St. Paul*, 33 Minn. 293, 53 Am. Rep. 31; *Detroit v. Blackeby*, 21 Mich. 112, 4 Am. Rep. 450; *Burrill v. Augusta*, 78 Me. 120, 58 Am. Rep. 788; *Dodge v. Granger*, 17 R. I. 607, 15 L. R. A. 781; *Gillespie v. Lincoln*, 35 Neb. 41, 16 L. R. A. 349; *Edgerly v. Concord*, 62 N. H. 22; *Gross v. Portsmouth* (N. H.) 33 Atl. 256; *Shearm. & Redf. Neg.* 4th ed. § 253, p. 436, § 256, pp. 440, 441; 2 Dill. Mun. Corp. 4th ed. §§ 974, 981; *Condict v. Jersey City*, 46 N. J. L. 160; *Haight v. The Mayor*, 24 Fed. Rep. 93.

The constructing and maintaining of the main on Fourth street was an act lawful in itself, and the defendant is not answerable unless it has been guilty of negligence or other fault in the manner of doing the act. The maxim *sic utere tuo ut alienum non lædas* has no application to the facts of this case.

Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; *Garland v. Towne*, 55 N. H. 57, 20 Am. Rep. 164; *Marshall v. Welwood*, 38 N. J. L. 339, 20 Am. Rep. 394; 1 Thomp. Neg. p. 112, § 12; *Cosulich v. Standard Oil Co.* 122 N. Y. 123; *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372; 1 Sedgw. Damages, pp. 35-38.

Evidence of the bursting of the main on Fourth street prior to January 13th, 1896, the time alleged in the complaint, was not admissible to show negligence.

North Chicago Street R. Co. v. Hudson, 44 Ill. App. 60; *Sherman v. Kortright*, 52 Barb. 269; *Wise v. Ackerman*, 76 Md. 390; *Collins v. Dorchester*, 6 Cush. 396.

The presumption is, until the contrary is shown, that every man has performed his duty, and it is incumbent upon one who alleges failure in this respect, as the foundation of a right of action, to prove facts from which an inference of negligence may properly be drawn, and proof of the mere fact that an accident has happened will not, in the absence of any contractual relations between the parties, authorize such an inference.

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Cosulich v. Standard Oil Co. 122 N. Y. 123; *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Armstrong v. Ackley*, 71 Iowa, 81; *Murphy v. Hays*, 68 Hun, 455; *Bradley v. Fort Wayne & E. R. Co.* 94 Mich. 35; *Walker v. Chicago, R. I. & P. R. Co.* 71 Iowa, 660; *Wiedmer v. New York Elev. R. Co.* 114 N. Y. 468; *Dobbins v. Brown*, 119 N. Y. 194; *Huff v. Austin*, 46 Ohio St. 387; *The Nitro-Glycerine Case*, 15 Wall. 538, 21 L. ed. 212; 2 Thomp. Neg. p. 1227.

Mcassrs. J. M. Long and Ralph R. Dunlaway, also for respondent:

The said water committee is the agent of the city of Portland only in the capacity that the said city has, as a governmental agent of the state of Oregon.

Both the water committee and the city of Portland, in bringing in Bull Run water, act as agents of the state of Oregon in its governmental capacity.

Such state agents are not subject to suit for acts of negligence in the absence of a statute giving a cause of action against these governmental agents for negligence.

David v. Portland Water Committee, 14 Or. 98.

The supreme court of Oregon has decided in *David v. Portland Water Committee*, 14 Or. 98, if the project was local and private, the act was unconstitutional and void, but that as the act was general and public, and as it involved the interests of the entire state, the act was valid.

Simon v. Northrup, 27 Or. 495, 30 L. R. A. 171; *Cole v. LaGrange*, 113 U. S. 1, 28 L. ed. 896; *People, Park Comrs., v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Davock v. Moore*, 105 Mich. 120, 28 L. R. A. 783; *People, McCagg, v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *People, Wilson, v. Salomon*, 51 Ill. 37; *People, Dunkirk, W. & P. R. Co., v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *Philadelphia v. Field*, 58 Pa. 320; *Cooley, Const. Lim.* 6th ed. pp. 263-268.

All the cases holding a city liable for negligence in the performance of a public work, in the absence of a statute creating such a liability hold expressly or impliedly that the city in doing that particular work does it in its private capacity for its own local benefit.

Springfield F. & M. Ins. Co. v. Keeseville, 148 N. Y. 46, 30 L. R. A. 660, Reversing 80 Hun, 162; *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665; *Gross v. Portsmouth* (N. H.) 33 Atl. 256; *Bulger v. Eden*, 82 Me. 352, 9 L. R. A. 205; *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 702; *Wilkins v. Rutland*, 61 Vt. 336; *Cushing v. Bedford*, 125 Mass. 526; *Diamond Match Co. v. New Haven*, 55 Conn. 510; *Chope v. Eureka*, 78 Cal. 588, 4 L. R. A. 325, and cases in the notes; *Edgerly v. Concord*, 62 N. H. 8; *Hafford v. New Bedford*, 16 Gray, 302; *Fisher v. Boston*, 104 Mass. 93, 6 Am. Rep. 196; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Howard v. Worcester*, 153 Mass. 426, 12 L. R. A. 160; *McCann v. Waltham*, 163 Mass. 344; *Dodge v. Granger*, 17 R. I. 607, 15 L. R. A. 781; *Gillespie v. Lincoln*, 35 Neb. 41, 16 L. R. A. 349; *Kuehn v. Milwaukee*, 92 Wis. 263; *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep.

760; *Schultz v. Milwaukee*, 49 Wis. 254, 35 Am. Rep. 779; *Condict v. Jersey City*, 46 N. J. L. 158; *Donahoe v. Kansas City*, 136 Mo. 657; *Wilcox v. Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Bamber v. Rochester*, 26 Hun. 587; *Goddard v. Harpswell*, 84 Me. 499, 30 Am. St. R. 373, note.

No case holds that the legislature can, by statute, compel a city to incur debts to make local improvements for the local benefit.

Cole v. La Grange, 113 U. S. 1, 28 L. ed. 896; *Cooley, Const. Lim.* 6th ed. pp. 227-231, 263-268, 283-285, 288.

The rule of *stare decisis* will cause the courts in this action to construe the act appointing the water committee the same way as said act was construed in the case of *David v. Portland Water Committee*, 14 Or. 98.

Poulson v. Portland, 16 Or. 103, 1 L. R. A. 673; *White v. Allen*, 3 Or. 103; *State v. Clark*, 9 Or. 466; *Cooley, Const. Lim.* 6th ed. pp. 29, 67; 23 Am. & Eng. Enc. Law, pp. 131, 132.

Appellant is in privity to the parties to the case of *David v. Portland Water Committee*, 14 Or. 98, and therefore appellant is bound by said decision under the rule of *res judicata*.

Freeman, Judgm. 4th ed. § 178; *Neil v. Tolman*, 12 Or. 280; *Barrett v. Failing*, 8 Or. 152; *Glenn v. Savage*, 14 Or. 574; *Morrill v. Morrill*, 20 Or. 104, 11 L. R. A. 155; *Farquar v. Farquar*, 20 Or. 69; *Harmon v. Auditor of Public Accounts*, 123 Ill. 123; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Gelpcke v. Dubuque*, 1 Wall. 212, 17 L. ed. 527; *Cooley, Const. Lim.* 6th ed. pp. 60-67.

The construction of the statute, made in *David v. Portland Water Committee*, became a part of the statute.

Douglass v. Pike County, 101 U. S. 677, 25 L. ed. 968; *Gelpcke v. Dubuque*, 1 Wall. 212, 17 L. ed. 527.

When the case of *David v. Portland Water Committee* was commenced, the courts had power to decide whether the water committee proceeded as agents of the city of Portland in its private capacity, in which event the act creating the water committee would be void, and the taxpayers would have enjoined the water committee from acting.

People, Park Comrs., v. Detroit, 28 Mich. 228, 15 Am. Rep. 202; *Davock v. Moore*, 105 Mich. 120, 28 L. R. A. 783; *People, McCagg, v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *People, Wilson, v. Salomon*, 51 Ill. 37; *People, Dunkirk W. & P. R. Co., v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *Cole v. La Grange*, 113 U. S. 1, 28 L. ed. 896; *Cooley, Const. Lim.* 6th ed. pp. 60-67, 263-268, 283-288.

Rights of taxpayers and bondholders have become vested under the construction of the statute made in *David v. Portland Water Committee*.

If the courts should now attempt to construe said act of the legislature so as to hold that the water committee was the agent of the city of Portland in its private capacity such a decision would deprive the city of Portland and the taxpayers thereof of their property without due process of law, 43 L. R. A.

trary to the 14th Amendment of the Constitution of the United States.

Warren v. Lyons City, 22 Iowa, 351; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Gelpcke v. Dubuque*, 1 Wall. 212, 17 L. ed. 527; *Cooley, Const. Lim.* 6th ed. p. 291.

There was no proof of negligence offered by appellant.

Wabash, St. L. & P. R. Co. v. Locke, 112 Ind. 404; *Huey v. Gahlenbeck*, 121 Pa. 238, 6 Am. St. Rep. 792, note; *Philadelphia, W. & B. R. Co. v. Anderson*, 72 Md. 519, 8 L. R. A. 673; *O'Brien v. Miller*, 60 Conn. 214; *Montgomery v. Muskegon Boom Co.* 88 Mich. 633, 26 Am. St. Rep. 308, note; *Hawkins v. Front Street Cable R. Co.* 3 Wash. 592, 16 L. R. A. 808, 28 Am. St. Rep. 72, note; *Kincaid v. Oregon Short Line & U. N. R. Co.* 22 Or. 35; 1 Thomp. Neg. pp. 91, 101, 108; *Bahr v. Lombard*, 53 N. J. L. 233; *Jenney v. Brooklyn*, 120 N. Y. 164; *Reiss v. New York Steam Co.* 128 N. Y. 107; *Hunt v. New York*, 109 N. Y. 134; *Livingston v. Adams*, 8 Cow. 175; *Lehman v. Brooklyn*, 29 Barb. 234; *Kendall v. Boston*, 118 Mass. 234, 19 Am. Rep. 446.

Beam, J., delivered the opinion of the court:

In support of the judgment it is contended: First, that the waterworks belong to the city in its public or governmental capacity, and it is therefore not liable to a common-law action for negligence in constructing or maintaining the same; second, the water committee, under whose direction and control they were constructed, and were being maintained at the time of the accident, is an independent body, appointed by the state for public governmental purposes, over which the city has no control, and for whose negligence it is not liable under the common-law doctrine of *respondet superior*; and, third, there was not sufficient evidence of negligence given on the trial to carry the case to the jury as a question of fact. There is a well-established distinction made by the authorities between the liability of a municipal corporation for the acts of its servants, agents, officers, or employees done in the exercise of powers and duties granted to or imposed upon it as a mere agency of the state, and performed exclusively for public governmental purposes, and acts done in the exercise of powers granted to or privileges conferred for its own profit, advantage, and emolument, although inuring incidentally to the public. This distinction, though a very shadowy one at times, and though much difficulty has been experienced by the courts in determining within which class a particular case should be placed, nevertheless is well settled, and has governed the decision in many cases. It is alluded to by Mr. Justice Strahan in *Caspary v. Portland*, 19 Or. 496, and is very clearly stated by Folger, J., in *Maximilian v. New York*, 62 N. Y. 160, 164, 20 Am. Rep. 468. "There are two kinds of duties which are imposed upon a municipal corporation," he says. "One is of that kind which arises from a grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from

the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public, and is used for public purposes. . . . The former is not held by the municipality as one of the political divisions of the state; the latter is. In the exercise of the former power and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is entrusted to it as one of the political divisions of the state, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser, nor for misuser by the public agents." Accordingly it has been held that municipal corporations are not responsible for the negligence or wrongful acts of health officers or boards of health (*Bryant v. St. Paul*, 33 Minn. 289, 53 Am. Rep. 31; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Brown v. Vinahaven*, 65 Me. 402, 20 Am. Rep. 709; *Barbour v. Ellsworth*, 67 Me. 294); or of employees of the commissioners of public charities and correction (*Maamilton v. New York*, 62 N. Y. 160, 20 Am. Rep. 468); or of officers or members of their fire or police departments (*Hafford v. New Bedford*, 16 Gray, 297; *New Orleans v. Abbagnato*, 23 U. S. App. 533, 62 Fed. Rep. 240, 10 C. C. A. 361, 26 L. R. A. 329; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Burrill v. Augusta*, 78 Me. 118, 58 Am. Rep. 788; *Wilcox v. Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Elliott v. Philadelphia*, 75 Pa. 347, 15 Am. Rep. 591; *Gillespie v. Lincoln*, 35 Neb. 34, 16 L. R. A. 349; *Calwell v. Boone*, 51 Iowa, 687, 33 Am. Rep. 154); nor for the negligent construction, maintenance, or use of appliances for the extinguishment of fires (*Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 46, 30 L. R. A. 660; *Egerly v. Concord*, 62 N. H. 8; *Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90); or for an injury caused by a negligent defect in a school building (*Ham v. New York*, 70 N. Y. 459; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332); or for an injury received by the giving way of the floor of a town house used for holding town meetings and other public purposes (*Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302). But when a special power or privilege is conferred upon or granted to a municipal corporation, to be exercised for its own advantage or emolument, and not as a mere governmental agency, it is liable to the same extent as an individual or a private corporation for negligence in managing or dealing with the property rights or franchises held by it under such grant. Thus if, in repairing a building belonging to the city, and used in part for municipal purposes, and in considerable part also as a source of revenue to the corporation, the agents and servants of the city dig a hole in the ground adjoining,

and negligently leave it open and unguarded, so that a person rightfully walking on a path leading by the building, although not a public highway, falls into such hole, and is injured, the city will be liable to an action at common law for the injury (*Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485). So, also, when the city owns a wharf, and receives and charges wharfage for its use, it is bound the same as a private individual to use ordinary care and diligence in keeping it safe and free from obstructions, and is liable in an action at common law for damages done to a vessel by reason of neglect of such duty (*Petersburg v. Applegarth*, 28 Gratt. 321, 26 Am. Rep. 357; *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *Mersey Docks & Harbour Board v. Gibbs*, 11 H. L. Cas. 686). In accordance with this distinction, it is quite universally held that when a municipal corporation voluntarily undertakes to construct and maintain water or gas works in pursuance of statutory authority, for the purpose of supplying the inhabitants thereof with water or gas at rates established by the city, it is liable for an injury in consequence of its acts in constructing and maintaining such works, the same as a private corporation or individual. "A municipal corporation, owning waterworks or gasworks which supply private consumers on the payment of tolls," says Mr. Dillon, "is liable for the negligence of its agents and servants the same as like private proprietors would be." 2 Dill. Mun. Corp. § 954. And the doctrine is well stated by Lewis, Ch. J., in *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 183, 72 Am. Dec. 730, in speaking of a municipal corporation as the owner of gasworks. "The supply of gas light," he says, "is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." To the same effect, see also *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669; *Hand v. Brookline*, 126 Mass. 324; *Perkins v. Lawrence*, 136 Mass. 305; *Stoddard v. Winchester*, 157 Mass. 567; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434; 19

Am. L. Reg. N. S. 743; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Scott v. Manchester*, 2 Hurlst. & N. 204; 2 Beach, Pub. Corp. § 1140; and 1 Dill. Mun. Corp. 3d ed. § 58. Unless, therefore, there is something in the facts of this case to take it out of the general rule, the liability of the defendant to persons injured by the negligent manner in which the waterworks in question were constructed or are maintained cannot be questioned. The argument of the defendant in this connection is that, although the works in fact belonged to the city, and were paid for from funds derived from the sale of its bonds, they were built in pursuance of a public duty, involuntarily imposed upon the municipality by express legislative mandate, and therefore are owned and controlled by the city as a public or governmental agency, and not in its private or proprietary capacity; and also that the committee under whose direction and supervision the works were constructed and are now operated and maintained is an independent body appointed by and acting as an agent of the state, over which the city has no control, and for whose negligence it is not responsible. In support of the position that the works belong to the city in its public, as distinguished from its private, capacity, reliance is had principally upon the decision of this court in *David v. Portland Water Committee*, 14 Or. 98. That was a suit brought by a resident and taxpayer to restrain the water committee named in the act of 1885 from issuing and disposing of the bonds of the municipality, and constructing waterworks in pursuance of such act, on the ground that it was unconstitutional and void, and would unlawfully impose a burden upon the taxpayers of the city. The only ruling in that case which has any bearing upon the question now before us was that, under the circumstances, the supplying of the city of Portland and its inhabitants with water which had to be brought by means of pipes from some place outside of the city was not so essentially a private purpose that the legislature could not constitutionally appoint the agents of the city for the construction of such works. But it does not follow from this view that the works when constructed would not belong to the city in its private or corporate capacity. Indeed, the entire reasoning of the opinion permits the clear inference, it seems to us, that the court never lost sight of the fact that they would be the property of the city, but, notwithstanding this, concluded that the object sought to be accomplished was so impressed with a public purpose that the determination of the legislature as to the necessity for such an enterprise, and its selection of the agents of the city by whom the work should be undertaken, was valid, and conclusive upon the courts. The act authorizing the construction of the works and appointing the committee to have control thereof became a part of the charter of the city. Under it the city alone was authorized and empowered to construct and maintain them. The money therefor was to be raised by the sale of its bonds, and the court expressly held in the *David Case* that the members of the water

committee were "no more than agents of the city required by the act to carry out its provisions," and should not be regarded as officers. So we conclude that there is nothing in the doctrine of that case to exempt the city of Portland from the general rule which applies to all municipal corporations owning and operating waterworks for the purpose of supplying its inhabitants with water for hire on the theory that the works are owned by it in its public or governmental, as distinguished from its private, capacity.

Nor do we concur in the position that the city is not liable for the negligent acts of the water committee and its servants and employees under the doctrine of *respondent superior*. It is true, this doctrine is grounded upon the right of an employer to select his servants, and discharge them if careless, unskilful, or incompetent, and to direct and control them while in his employ. But, whatever may have been the legal relation of the water committee to the city prior to the consolidation act of 1891, it is clear that thereafter it became as much the agent or representative of the municipality within the scope of the powers conferred upon it as any other officer or agent provided for in the charter. When the people of the cities of Portland, East Portland, and Albina by popular vote accepted the charter of 1891, containing, in substance, the same provisions as the act of 1885 creating and naming the water committee, and vesting in it and a commission thereafter to be appointed the power to construct, manage, and control the water system belonging to the city, they must be deemed to have thus accepted such committee and commission as their agents to carry out the work. By the terms of the charter, the water committee and commission are made agents or representatives of the municipality as much as the mayor, common council, or any other officer provided for therein. Each of these officers or agents is charged with the performance of certain municipal duties, and it takes all of them to constitute the corporation. The inhabitants within certain described territory were, by the act of 1891, created a municipal corporation, with certain defined rights, powers, privileges, and duties, to be exercised by agents and officers provided for in the act of incorporation. And it cannot be said that one of the officers thus provided for is any more the agent or representative of the municipality than the other. Nor is the manner of their appointment, if valid, of any consequence in determining their representative capacity. The legislature, in the exercise of its plenary powers over municipal corporations, thought best to provide that certain powers which it granted to the city of Portland should be exercised by officers and agents of its own selection. This legislation was held valid in *David v. Portland Water Committee*, but it does not make the agent so selected any the less the representative of the municipality. The power and authority given to the water committee by the charter is not, as counsel seem to think, exclusive of the city, but only exclusive of any other agent or officer of the city. The right

and power to construct and maintain water-works is expressly vested in the municipality. Its exercise is devolved by the charter upon the water committee. But this is a duty which they discharge, not for themselves, nor for the public generally, but for the city. As said by Earl, J., in *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622, in discussing the liability of a city for an injury received in consequence of a defective street which was under the exclusive control of a commission whose duties were prescribed and defined by the charter: "The city must act through officers and agents, and it is for the legislature to determine what powers and duties shall be devolved upon them. It matters not how ample or exclusive their powers may be, nor how independently they may act, nor how they are chosen. If they are provided by law, and authorized to discharge a corporate duty which rests upon the municipality, then, in the discharge of that duty, they represent the municipality, and it may be chargeable with their misfeasance and nonfeasance. . . . To determine whether there is municipal responsibility, the inquiry must be whether the department whose misfeasance or nonfeasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty, or charged with a duty primarily resting upon the municipality. For these views, the cases of *Bailey v. New York*, 3 Hill, 538, 38 Am. Dec. 669, 2 Denio, 433, and *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440, are ample authority, and the case of *Richards v. New York*, 16 Jones & S. 315, is a precise authority." The cases of *Bailey v. New York*, and *Barnes v. District of Columbia*, referred to by Mr. Justice Earl, are very much in point in the present discussion. In the former an action was brought against the city of New York by one who had been injured in his property by the careless construction of a dam across Croton river at a point about 40 miles distant from the city, for use as a part of the system for supplying the city and its inhabitants with water. The work was constructed under the control of water commissioners appointed by the governor, and in whose appointment the city had no voice; and it was contended there, as here, that the defendant was not chargeable for negligence or unskillfulness in the construction of the dam, because the commissioners were acting in a public capacity, and, like other public agents, not responsible for the misconduct of those necessarily appointed by them; and also on the ground that, inasmuch as the water commissioners were not appointed by the city, nor subject to its direction or control, it was not liable for their conduct. But Mr. Justice Nelson, in an opinion which, although it has been somewhat criticised, has stood the test of time, and is now generally regarded as sound, disposes of both of these objections in such a clear and lucid way as to leave but little to be said upon the subject. Examining the position that, "admitting the water commissioners to be the appointed agents of the defendants, still the latter are not liable.

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inasmuch as they were acting solely for the state in prosecuting the work in question, and therefore are not responsible for the conduct of those necessarily employed by them for that purpose," he says: "We admit, if the defendants are to be regarded as occupying this relation, and are not chargeable with any want of diligence in the selection of agents, the conclusion contended for would seem to follow. They would then be entitled to all the immunities of public officers charged with a duty which, from its nature, could not be executed without availing themselves of the services of others; and the doctrine of *respondent superior* does not apply to such cases. If a public officer authorize the doing of an act not within the scope of his authority, or if he be guilty of negligence in the discharge of duties to be performed by himself, he will be held responsible; but not for the misconduct or malfeasance of such persons as he is obliged to employ. . . . But this view cannot be maintained upon the facts before us. The powers conferred by the several acts of the legislature authorizing the execution of this great work are not, strictly and legally speaking, conferred for the benefit of the public. The grant is a special, private franchise, made as well for the private emolument and advantage of the city as for the public good. The state, in its sovereign character, has no interest in it. It owns no part of the work. The whole investment under the law, and the revenue and profits to be derived therefrom, are a part of the private property of the city; as much so as the lands and houses belonging to it situate within its corporate limits. The argument of the defendants' counsel confounds the powers in question with those belonging to the defendants in their character as a municipal or public body; such as are granted exclusively for public purposes to counties, cities, towns, and villages, where the corporations have, if I may so speak, no private estate or interest in the grant. As the powers in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in the mind, and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." And in answer to the objection that the commission-

ers were the agents of the state, and not the city, he says: "We have already given our views of the character of this work, and of the capacity in which the defendants hold the powers under which it has been executed. If we are not mistaken in that conclusion, and they are to be regarded as a private company, like any other body of men upon whom special franchises have been conferred for their own private advantage, such as banking and railroad corporations, then the appointment of the agents by the state did not make them less the agents of the defendants. The appointment in this way is but one of the conditions upon which the charter was granted, and stands on the footing of any other condition to be found in the grant, subject to which it has been accepted. By accepting the charter, the defendants thereby adopted the commissioners as their own agents to carry on the work." *Barnes v. District of Columbia* was an action brought to recover damages for a personal injury received by the plaintiff in consequence of the defective condition of one of the streets of the city of Washington. By the act creating the municipal corporation of the District of Columbia it was provided that there should be a board of public works, composed of the city governor and four other persons, to be appointed by the President, with the consent of the Senate, who shall have entire control of, and make all regulations which they shall deem necessary for keeping in repair, the streets, avenues, and alleys of the city; and the principal defense in the case was that, in view of these provisions, the municipality was not liable for the negligence of such board. But it was held that a municipal corporation, in the exercise of its duties, is a mere department of the state, having such powers as the state may, from time to time, at its pleasure, confer, and that it can act only by its agents and servants; but this does not mean or imply that the acts must be done by inferior or subordinate agents, but, on the contrary, the higher the authority of the agent, the greater is the responsibility of the principal. Mr. Justice Hunt, in speaking for the court, says: "A municipal corporation may act through its mayor, through its common council, or its legislative department, by whatever name called, its superintendent of streets, commissioner of highways, or board of public works, provided the act is within the province committed to its charge. Nor can it, in principle, be of the slightest consequence by what means these several officers are placed in their position,—whether they are elected by the people of the municipality, or appointed by the President or a governor. The people are the recognized source of all authority, state and municipal; and to this authority it must come at last, whether immediately or by a circuitous process. An elected mayor or an appointed mayor derives his authority to act from the same source, to wit, that of the legislature. The whole municipal authority emanates from the legislature. Its legislative charter indicates its extent, and regulates the distribution of its powers, as well as the manner of selecting and compensating

its agents. The judges of the supreme court of a state may be appointed by the governor with the consent of the senate, or they may be elected by the people. But the powers and duties of the judges are not affected by the manner of their selection. The mayor of a city may be elected by the people, or he may be appointed by the governor with the consent of the senate; but the slightest reflection will show that the powers of this officer, his position as the chief agent and representative of the city, are the same under either mode of appointment. Whether his act in a case in question is the act of and binding on the city depends upon his powers under the charter to act for the city, and whether he has acted in pursuance of them; not at all upon the manner of his election. It is equally unimportant from what source he receives compensation, or whether he serves without it." These authorities would indicate the true rule to be that the responsibility of the municipality for the acts of its officers or agents does not depend upon the manner of their appointment, but upon the duty devolved upon them. If such duty appertains to mere political or governmental affairs, the municipality is not liable; but, if it pertains to the private affairs of the corporation, it is liable for their negligence, the same as a private individual.

Our attention is especially called by the defendant's counsel to the cases of *Maximilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468, *Ham v. New York*, 70 N. Y. 459, and *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 46, 30 L. R. A. 660. But, as pointed out by Mr. Justice Earl in *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622, the *Maximilian* and *Ham Cases* were actions brought against the city for the negligence of employees of certain boards and commissions who were not engaged in the discharge of any duty which rests upon the city. And *Springfield F. & M. Ins. Co. v. Keeseville*, was an action to recover damages for a failure to keep the water system belonging to the city in condition to furnish protection from fires, and was defeated on the ground that the use of waterworks for the extinguishment of fire was a public, and not a private, purpose,—a distinction which is quite clearly pointed out in *Edgerly v. Concord*, 62 N. H. 8, which was an action brought to recover damages for an injury received through the negligent use of a fire hydrant by the officers and agents of the city.

We conclude, therefore, that the city of Portland is liable for the negligent act of the water committee charged in the complaint, notwithstanding the fact that its members were appointed by the legislature, and are independent of the control of any other department of the city government. And this brings us to the question as to whether there was sufficient evidence of negligence on the part of the servants or employees of the committee to carry the case to the jury. The evidence on behalf of the plaintiff was to the effect that the pipe in question was laid in 1892, by the water committee, and connected with the general water system of the city; that it burst twice, prior to the time of the

accident which caused the injury to plaintiff's goods, under an ordinary pressure; that at the time of the accident there was no unusual or extraordinary pressure upon the pipe, or reason why it should have burst at that time. The evidence further shows that a water pipe of its size and dimensions, when properly constructed and laid, will not ordinarily burst under such a pressure; and these circumstances, in our opinion, were sufficient to carry the case to the jury. As a general proposition, a party who alleges negligence as a cause of action must, of course, prove it; but under some circumstances the accident itself and the consequent injury may be of such a nature as to raise a presumption of negligence, and thus cast upon the defendant the duty of showing that he was free from fault. The rule seems to be that whenever a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from a want of care. *Scott v. London & St. K. Docks Co.* 3 Hurlst. & C. 596. And to the same effect, see 1 Shearm. & Redf. Neg. §§ 59, 60; *Thomp. Neg.* 1230; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Warren v. Kauffman*, 2 Phila. 259; *Huey v. Gahlenbeck*, 6 Am. St. Rep. 790, note (121 Pa. 238).

It follows from these views that the judgment of the court below must be reversed, and a new trial ordered.

S. A. HUDDLESTON, Admr., etc., of James Huddleston, Deceased, Appt.,
v.

City of EUGENE, Resp't.

(.....Or.....)

A change of a county road to a city street in consequence of the incorporation of the city does not impose an additional servitude upon the real property over which the highway is constructed so as to require any new condemnation.

(January 23, 1899.)

APPEAL by complainant from a decree of the Circuit Court for Lane County in favor of defendant in a suit brought to enjoin the sale of certain property for a street-improvement assessment. *Affirmed.*

Statement by Moore, J.:

This is a suit to enjoin the marshal of the city of Eugene from selling certain real property to satisfy an assessment for an alleged street improvement. The material facts are that plaintiff, as executrix of the

last will and testament of James Huddleston, deceased, is entitled to the possession of a tract of agricultural land, upon the north side of which the county court of Lane county located and constructed a county road; that subsequent to the establishment of said road the legislative assembly passed an act incorporating the city of Eugene, whereby said premises were included therein (Laws 1889, p. 273); that the common council of said city, deeming it expedient to lay out a street and establish the grade thereof upon the line of said road, attempted to do so in the manner prescribed in § 90 of said act, but failed to comply strictly with its provisions. An ordinance was passed and approved, in pursuance of which said street was graded and graveled, and a strip of said land, 128 rods in length and 160 feet in width, adjoining the same, was assessed for the improvement in the sum of \$315.02, and the amount thereof entered in the docket of city liens; but, the assessment becoming delinquent, a warrant for its collection was issued, and the marshal, obeying the command thereof, levied upon and threatened to sell the premises assessed, to prevent which this suit was instituted. The cause, being at issue, was referred to A. C. Woodcock, Esq., who took the evidence, from which he found, in substance, that notwithstanding the council had not complied with the provisions of § 90, *supra*, in establishing said street § 98 of the charter authorized it to change the road into a street, and provided that, when so changed, jurisdiction thereof should be thereupon transferred from the county to the city, and recommended that the temporary injunction theretofore issued be dissolved and the suit dismissed. The court approved the report, and gave a decree in accordance therewith, from which plaintiff appeals.

Messrs. L. Bilyeu and Joshua J. Walton, for appellant:

A highway or county road is not a street. To change a county road into a street will add new and increased expenses to the highway, and subject the land of the owner to other and greater servitude. This additional servitude is property.

Dyckman v. New York, 5 N. Y. 439; *Philadelphia v. Dickson*, 38 Pa. 249; *Heiple v. East Portland*, 13 Or. 97.

A municipal corporation has no inherent or implied power in the nature of eminent domain to condemn lands or any interest, right, or title therein, or to condemn any property rights for local improvements.

Philadelphia v. Dickson, 38 Pa. 249; *Watercorks Co. of Indianapolis v. Burkhart*, 41 Ind. 364; *State, Durant, v. Jersey City*, 25 N. J. L. 310; *Harbeck v. Toledo*, 11 Ohio St. 219; *People v. Brighton*, 20 Mich. 57; *Sheldon v. Kalamazoo*, 24 Mich. 383; *Heiple v. East Portland*, 13 Or. 97.

As a county road the property of the plaintiff was not liable to the assessment tax and

NOTE.—On the question, What constitutes an additional burden upon the fee of a street?—see note to *Western Railway of Ala. v. Alabama* 43 L. R. A.

Grand Trunk R. Co. (Ala.) 17 L. R. A. 474; also *Willamette Iron Works v. Oregon R. & Nav. Co. (Or.)* 29 L. R. A. 88.

burden now sought to be enforced, and to make it so liable it must become a street.

The city council has no authority to extend a street or alley without strictly conforming to the mode laid down in the statute; and in the case at bar the council undertook to extend Eighth street over and upon the county road, about a quarter of a mile, to the city limits.

Walsh v. Union, 13 Or. 589; *Ladd v. East Portland*, 18 Or. 87; *Grafton v. Sellwood*, 24 Or. 118.

Mr. E. R. Shipworth, for respondent:

The entire extension of Eighth street and the establishment of Blair street was upon, along, and within a county road within the corporate limits of the city of Eugene.

The respondent contends that nothing whatever was necessary to be done under the statute, and if anything on the part of the city was attempted to be done it was unnecessary and not binding.

There being no taking of property in this case, and no damages to appellant, she cannot be heard to complain.

Elliott, Roads & Streets, pp. 315, 316; *Springfield v. Connecticut River R. Co.* 4 Cush. 72; *West Boston Bridge v. Middlesex County Comrs.* 10 Pick. 272; *East Portland v. Multnomah County*, 6 Or. 62; *Multnomah County v. Sliker*, 10 Or. 65.

Where a new highway (street) is proposed to be established or laid out, notice etc., must be given, for the reason there is a taking of private property for public use, and therefore damages, hence § 90 of the city charter of 1889, and when there is no taking and no damage the converse is true, hence § 98.

1 Dill. Mun. Corp. § 71; 2 Dill. Mun. Corp. §§ 680, 681; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440.

Whenever the legislature incorporates a city, or extends the corporate limits of a city, public roads or public highways are included in said incorporation or extension, and, such being the case, eminent domain was at the time of laying out said roads or highways duly exercised and all the forms of law complied with.

Sutherland, Stat. Constr. § 240; *Foster v. Collner*, 107 Pa. 305; *State, Blinburg, v. Mann*, 21 Wis. 685; *Chapman v. Miller*, 128 Mass. 269; *Elliott, Roads & Streets*, pp. 313, 315, 316; *Springfield v. Connecticut River R. Co.* 4 Cush. 72; *West Boston Bridge v. Middlesex County Comrs.* 10 Pick. 272; *East Portland v. Multnomah County*, 6 Or. 62; *Multnomah County v. Sliker*, 10 Or. 65.

Agricultural lands within the corporate limits of a city can be made to respond for street assessments the same as other property within the city.

2 Dill. Mun. Corp. § 795; Charter of the City of Eugene, 1893, §§ 67, 74; 15 Am. & Eng. Enc. Law, p. 1013; *Linton v. Athens*, 53 Ga. 588; *Martin v. Dix*, 52 Miss. 53, 24 Am. Rep. 661; *Barker v. State*, 18 Ohio, 514; *Kelly v. Pittsburgh*, 85 Pa. 170, 27 Am. Rep. 633.

Moore, J., delivered the opinion of the court:

It is contended by plaintiff's counsel that 43 L. R. A.

the public has an easement only in a county road, while a qualified fee in the street is dedicated to, or condemned for, the public use; that a county road is laid out, built, and kept in repair by taxes collected from residents of the whole taxing district, and from property situated therein, while a street is usually established and improved by assessing the real property abutting thereon and hence changing a county road into a city street imposes upon the premises claimed to have been improved additional burdens, and that this supplemental servitude constitutes private property, the taking of which for a public use is prohibited by the organic law of the state, except upon the payment of a just compensation (Const. Or. art. 1, § 18); that the power of a municipal corporation to exercise the right of eminent domain will not be implied, and, while § 98 of the charter authorizes the council to establish a street upon said county road, this can only be done by strictly pursuing the mode prescribed in § 90 of the act of incorporation, which is the measure of its power, but, the council having failed to observe such requirements, jurisdiction to improve said road was never acquired, and hence the assessment is void, and the court erred in dismissing the suit.

It is maintained by defendant's counsel, however, that § 90 only applies in cases where a street is to be established over premises where no highway theretofore existed, and, it being admitted that no additional land was appropriated by changing the road into a street, plaintiff sustained no injury in consequence thereof, and hence compliance with the requirements of said section was unnecessary.

The provisions of the charter to which reference has been made are as follows:

"Sec. 90. Whenever the council shall deem it expedient to open, layout, establish, widen, straighten or extend a street or alley it shall cause the city surveyor to survey such proposed new street or extension or line to which the width is to be changed or straightened, and make a report thereof containing a plat of the survey of such street or alley, of the portion of each lot or part thereof required to be appropriated for such street or alley, which report, if satisfactory to the council, shall be adopted by an ordinance embodying the same; provided, that before the adoption thereof, the recorder shall give notice of the filing of such report by publication for two weeks in some newspaper published in the city of Eugene, or by written notices posted for two weeks at three public places in said city, and at the next meeting of the council, after the expiration of such notice, present to it the said report, and attached thereto a copy of such notice, with the proof of publication or posting indorsed thereon. Thereafter and within thirty days from the adoption of such report, the council shall appoint three disinterested freeholders of the city of Eugene, no kin to any owner or person interested in any property to be appropriated, and possessing the qualifications of jurors in courts of justice in this state, to view such proposed street or alley, and make

an assessment of the damages, if any, to the respective owners of the lots and parts of lots appropriated, and to report the same to the council. The said viewers shall meet at such time as may be designated by the council, and after having been duly sworn or affirmed to discharge their duties faithfully, shall proceed and view the whole distance of said proposed street or alley and ascertain and determine how much less valuable the premises of such owners, respectively, would be rendered by the opening of the same. If the council is satisfied that the amount of damages assessed by said viewers, or by the circuit court, upon appeal, as hereinafter provided, is just and equitable, and that the proposed street or alley will be of sufficient importance to the public to cause the damages so assessed and determined to be paid by the city, the council shall order the same to be paid to the said owners, respectively, out of the treasury as other claims against the city are paid; but if in the opinion of the council such street or alley is not of sufficient importance to the public to cause the damage to be paid by the city of Eugene, the council may refuse to open such street or alley or extend or widen the same, as the case may be, unless the damages, or such part thereof as the council may think proper, shall be paid by private parties."

"Sec. 98. The common council has authority and is hereby authorized, when it shall deem it expedient, to open, establish and locate streets upon the road-bed of, and upon or across any county road or public highway within the corporate limits of the city of Eugene; and when so located or established, said county roads or public highways shall be and become public streets of said city and subject to jurisdiction and control of the council the same as other streets."

It was virtually conceded at the hearing by counsel for the respective parties that if it was necessary to pursue the method prescribed in § 90, in order to establish a street upon the line of the county road, the means adopted were ineffectual to confer jurisdiction. An important question to be considered is whether a change, by authority of the legislative assembly, of a county road to a city street, imposes an additional servitude upon the real property over which the highway is constructed. In *Lankin v. Terwilliger*, 22 Or. 97, it is held that by the location of a county road the public only acquires an easement in the land, while the fee remains in the owner, and when the road is vacated by public authority the land immediately reverts to the owner, freed from the easement. The heirs of James Huddleston, deceased, therefore had a reversionary interest in the land over which the highway was located; and plaintiff, by reason of her trust, was entitled to the possession thereof when the road should be vacated by proper authority. *Phillips v. Dunkirk, W. & P. R. Co.* 78 Pa. 177. The statute regulating the recording of town plats and vacating streets provides, in general terms, that when a town is laid out the proprietor must record the

plat thereof in the recorder's office in the county in which the same is situated. Hill's Anno. Laws (Or.) § 4178. Every donation or grant to the public of a street marked as such on said plat shall be considered to all intents and purposes as a general warranty to the donee or grantee for the uses and purposes intended by the donor or grantor. Id. § 4180. When a street is vacated, the land theretofore used as a highway shall be attached to the lots or ground bordering on such street, and all right or title thereto shall vest in the person or persons owning the property on each side thereof in equal proportion, according to the length or breadth of such lots or ground as the same may border on such street. Id. § 4184. In *McQuaid v. Portland & V. R. Co.* 18 Or. 237, it is held that the fee of a street is either in the adjacent lotowner, or remains in the dedicant. Mr. Chief Justice Thayer, considering § 4180, *supra*, in deciding the case, and discussing the effect of a dedication or condemnation of a street, says: "The public may have an irrevocable right to the use of the street, but how can it acquire the fee to the land? The fee must vest in someone having a legal capacity to take it. It must be a natural or artificial person,—must be someone having a legal entity. The declaration that the fee in such case is in the public, meaning the general mass of the people, without regard to any legal organization, although often made use of, is, to my mind, absolutely absurd. The public, as a mass, does not, in my opinion, possess any such capacity." While the question considered in that case was not deemed very important, the reasoning convinces us that the public only acquires an easement in a street which has been dedicated or condemned for its use. The interest of the public in a street or road being an easement only, the title to the fee was not changed by converting the road into a street, and hence no necessity existed for acquiring a right which the public already enjoyed. *People v. Kerr*, 27 N. Y. 188. The public easement in a county road is limited to the uses to which such a highway is commonly subjected, and it must be presumed that the condemnation of the land for such road by the county court was made with reference to such uses. The road was undoubtedly established over the particular route selected to promote travel between objective points, thereby facilitating the transportation of passengers and property by the mode in vogue when the highway was adopted. The imposition of a new servitude upon the land, in addition to and distinct from that to which it was originally subjected when taken for a highway, the obstruction of the abutting proprietor's access to the street, or the impairment of his right to light and air, constitutes a taking of private property for a public use, within the meaning of the fundamental law of the state, for which compensation must be made for the damages which necessarily ensue. *Cooley, Const. Lim. *557; Elliott, Roads & S. 155; Willamette Iron Works v. Oregon R. & Nav.*

Co. 26 Or. 224, 29 L. R. A. 88; *Imlay v. Union Branch R. Co.* 26 Conn. 249, 68 Am. Dec. 392; *Milhou v. Sharp*, 15 Barb. 193; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *State v. Laverack*, 34 N. J. L. 201; *Heard v. Brooklyn*, 60 N. Y. 242; *Strong v. Brooklyn*, 68 N. Y. 1. The ordinary mode of travel in cities at the present time is the same as that in vogue in the rural districts when the road was established. The use of the highway as a street will not be in addition to or distinct from that originally appropriated, and hence the conversion of the road into a street does not constitute a taking which demands additional compensation therefor on account of such use. *Williams v. New York C. R. Co.* 18 Barb. 222; *Fagan v. Chicago*, 84 Ill. 227. "The legislature of the state," says Judge Dillon in his work on Municipal Corporations, 3d ed. § 656, "represents the public at large, and has . . . full and permanent authority over all public ways and public places." In *Portland & W. Valley R. Co. v. Portland*, 14 Or. 188, 58 Am. Rep. 299, it is held that an act of the legislative assembly granting the use of a public levee of the city of Portland for railway purposes was a valid exercise of the lawmaking power. Mr. Chief Justice Lord, in rendering the decision, says: "The interest in the use of the streets and highways and public places, and their uses, being *publici juris*, the power of regulating such use is in the legislature, as the representative of the whole people." To the same effect, see *East Portland v. Multnomah County*, 6 Or. 62; *Multnomah County v. Sliker*, 10 Or. 65. The legislature has plenary power to delegate to a municipal corporation or other agency the right to lay out, establish, and open highways for public use, and may also change its trustees, and impose upon the substituted instrumentality the duty of keeping such highways in repair. *Simon v. Northup*, 27 Or. 487, 30 L. R. A. 171; *Little Nestucca Toll Road Co. v. Tillamook County*, 31 Or. 1. Judge Elliott, in his work on Roads and Streets (p. 313), in speaking of the effect of the incorporation of a city upon the highways therein established by county authority, says: "Where there is no statute, the incorporation of a city seems naturally to imply that the highways within its territorial limits become streets, and as such subject to the control of the municipality. The erection of such a corporation is, in truth, simply the creation of a new instrumentality of government; it comes into existence with the rights, powers, and duties of a governmental subdivision; and it is but reasonable to conclude that as to such matters as streets, which peculiarly pertain to municipal corporations, the authority of other governmental corporations is excluded." In *McGrew v. Stewart*, 51 Kan. 185, the limits of a city were extended so as to include territory upon which a public highway existed. After the extension of the city boundaries, the council caused a sidewalk to be built along the highway, and assessed the cost thereof against the abut-

ting property; and, in a suit to enjoin the collection of the assessment, it was held that upon the annexation of the territory the highway was impressed with the character of a street, and became subject to the exclusive control of the city authorities, and to the liabilities and servitudes of all other streets within the city. To the same effect, see 15 Am. & Eng. Enc. Law, p. 1017; *Cowan's Case*, 1 Overt. 311; *McCullom v. Black Hawk County*, 21 Iowa, 409; *Clark v. Com.* 14 Bush, 166; *Ottawa v. Walker*, 21 Ill. 605, 71 Am. Dec. 121. Section 98 of the charter, however, shows that the county court of Lane county was not divested of jurisdiction of the road, notwithstanding the incorporation of the city, until the council deemed it expedient to establish a street over it. In *State v. Jones*, 18 Tex. 874, it is held, under a similar provision contained in a charter, that until the council acts under the power conferred, the general authority of the county court over the subject-matter continues to exist, and may be exercised.

It is argued that the uses to which streets are ordinarily put are greater and more numerous than those to which a county road is subjected, and particularly so with reference to the laying of pipes and the construction of drains, sewers, and culverts in streets. 2 Dill. Mun. Corp. § 688. But Judge Elliott, in his work on Roads and Streets (p. 311), anticipating such contention, says: "Where land is dedicated or appropriated for a suburban road, the implication must be that it shall be used as the convenience and welfare of the public may demand, although that demand may be augmented by the increase in population, or by a town or city springing up in the territory traversed by the road." In *Malone v. Toledo*, 28 Ohio St. 643, a strip of land 100 feet wide in the city of Toledo was appropriated for use as a canal. Thereafter this strip was transferred by the state to said city in pursuance of an act of the legislature which authorized the city to enter upon, improve, and occupy said premises as a public highway, and for the use of water pipes for sewerage purposes. In a suit, by one claiming to own a portion of said tract, to enjoin the city from interfering with his possession, it was held that, a canal and street being public highways, the uses of either were of a public nature and of a like kind, and that the use of the canal for water pipes and sewers was not inconsistent with that to which it had been originally applied. To the same effect, see *Crooke v. Flatbush Waterworks Co.* 29 Hun, 245; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618. The change of a road to a street renders the adjacent property liable to assessment for improvement to which it was not exposed under existing law prior to the change, and this presents the question whether such burden constitutes an additional servitude, for which compensation must be made. Mr. Mills, in his work on Eminent Domain (§ 34), says: "A change from a highway to a turnpike charging toll is not such an essential change as to require com-

pensation to adjoining owners. When a highway is taken for a turnpike, it does not cease to be a highway, and the land does not revert to the owner. The payment of tolls to the turnpike company is in lieu of payment of taxes to support the road. The change is only a change of mode in sustaining the road, and not a change of use." See also Elliott, *Roads & S.* 161; Cooley, *Const. Lim.* *546; *Benedict v. Gott*, 3 Barb. 459; *Walker v. Caywood*, 31 N. Y. 51; *Wright v. Carter*, 27 N. J. L. 76; *Douglass v. Boonsborough Turnp. Road Co.* 22 Md. 219, 85 Am. Dec. 647; *Callison v. Hedrick*, 15 Gratt. 244; *Panton Turnp. Co. v. Bishop*, 11 Vt. 198; *Carter v. Clark*, 89 Ind. 238; *Ohagrins Falls & C. Pl. Road Co. v. Cane*, 2 Ohio St. 419; *Malone v. Toledo*, 28 Ohio St. 643; *Clin. v. Wilkinson*, 16 Pick. 175, 26 Am. Dec. 654; *Murray v. Berkshire County Comrs.* 12 Met. 455.

The right to compensation being founded upon a change in the use, and not upon an alteration in the manner of maintaining the highway, the assessment of benefits for the improvement of the street does not constitute such an additional taking of private property for public use, within the meaning of the organic act, as to necessitate compensation therefor. To hold that plaintiff is entitled to compensation by reason of the change in the method of keeping the highway in repair would be equivalent to maintaining that the legislative assembly could not alter the mode of collecting road taxes after the highway was once established,—a mere statement of which shows the fallacy of the argument. Judge Elliott, in his work on *Roads and Streets* (p. 315), in discussing this subject, says: "If we have not reasoned ill, a suburban servitude may not only be greatly augmented, but, in a measure, transformed, by the demand of the public welfare. This conclusion has for its ultimate foundation the old maxim, 'That regard be had for the public welfare is the highest law,' and it receives support from the principle that men are presumed, when they do an act, to contemplate the natural consequences which may result. It is also true that the benefit which the owner of the servient estate receives from the increase in population and the building up of cities far more than compensates him for the increased burden of the servitude which these things produce, so that he suffers no damages, and without damages there can be no right of action."

43 L. R. A.

The rule is well settled that the remedy prescribed by statute for the condemnation of private property for a public use must be strictly pursued, or the appropriation may be enjoined; for no prerogative of sovereign power should be watched with greater vigilance than that which takes the property of the individual, and devotes it to a public use. *Decatur County Comrs. v. Humphrey*, 47 Ga. 565; *Dyckman v. New York*, 5 N. Y. 434. In the light of this rule, we will examine §§ 90 and 98 of the charter, to ascertain, if possible, the legislative intent with reference to the manner to be pursued by the council in changing a road to a street. It will be remembered that § 90 requires the council to "cause the city surveyor to survey such proposed new street, or extension or line to which the width is to be changed or straightened;" thereby impliedly, at least, declaring it to be unnecessary to survey a public road already in existence within the limits of the city, since such highway, on being changed from a road to a street, is not thereby rendered a "new" street to be opened or widened, a "new" extension to be laid out or established, or a "new" line. Section 98 authorizes the council "to open, establish and locate streets upon the roadbed of, and upon or across any county road or public highway within the corporate limits of the city of Eugene;" and construing, as we must, §§ 90 and 98 *in pari materia*, it is quite apparent that the legislative assembly intended that the provisions of § 90, *supra*, should only be invoked when a "new" street is to be opened or widened, a "new" extension to be laid out, or a "new" line established, except when, in changing from a road to a street, additional property is required to be appropriated, or a new use is to be imposed upon the right already acquired. In the change made, no more land was taken, no different title acquired, and no alteration in the use effected; and, such being the case, the legislative assembly was not obliged to provide for a new condemnation, in view of which we are led to believe that the council, by adopting the ordinance referred to, accepted the terms of the grant, and changed the road into a street, under the provisions of § 98, and that § 90 relates to the opening of streets where no highway theretofore existed, or where a material change in the use is contemplated, and that the attempt in the case at bar to pursue the method prescribed in § 90 was unnecessary; and hence the decree is affirmed.

MAINE SUPREME JUDICIAL COURT.

AMERICAN GAS & VENTILATING MACHINE COMPANY

v.

John N. WOOD.

(90 Me. 516.)

1. A promissory note and a contemporaneous written agreement referring thereto and providing that the maker may receive back the note on surrendering certain stock constitute an entire contract the stipulations of which are mutual and dependent rather than independent and collateral.
2. An estoppel in pais arises whenever an act is done or a statement made by a party the truth or efficacy of which it would be a fraud on his part to controvert or impair.
3. An estoppel against claiming that the maker of a note has lost his right to receive it back on the surrender of certain stock arises when his failure was induced by the acts and declarations of the other party assuring him that his right would not be waived by retaining the note.

(July 30, 1897.)

NOTE.—Contemporaneous agreements and their breach as a defense to a promissory note.

I. Scope of note.

II. Parol agreements.

- a. General rule.
- b. That note is not to be paid.
- c. That payment is to be conditional.
- d. As to time of payment.
- e. As to place of payment.
- f. As to medium of payment.
- g. As to mode of payment.
- h. As to amount to be paid.
- i. As to capacity of maker.
- j. As to negotiation.
- k. As to subject-matter of the consideration.

III. Collateral and independent agreements.

- a. General rule.
- b. What agreements are collateral and independent.

IV. Mutual and dependent agreements.

- a. General doctrine.
- b. What agreements are mutual and dependent.
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- d. Mortgage contemporaneous with note.

V. Consistent agreements constituting parts of a whole transaction.

VI. Agreements constituting consideration for note.

- a. Scope of the subject.
- b. The general doctrine.
- c. Application to parol agreements.
- d. What agreements are within the rule.

VII. Agreements constituting condition of delivery.

VIII. Agreements constituting satisfaction or discharge.

IX. Executed agreements.

X. Effect on transferee of note.

I. Scope of note.

Owing to the large amount of material on this subject, and with a view to limiting the size of the note, it has been confined to promissory notes proper, negotiable or non-negotiable, ex-43 L. R. A.

REPORT by the Supreme Judicial Court for Androscoggin County for the opinion of the full bench of an action brought to enforce payment of a promissory note. *Judgment for defendant.*

The facts are stated in the opinion.

Mr. J. W. Mitchell, for plaintiff:

The case shows nothing more than an executory agreement between the parties for payment of the note otherwise than in cash; and while such an agreement, if made for a sufficient consideration, might entitle the defendant to an action for damages, if the plaintiff refused to stand by it, it can be no defense to this suit.

2 Parsons, Notes & Bills, chap. 15, § 2, and pp. 529-531; *Walker v. Russell*, 17 Pick. 280; *Sexton v. Wood*, 17 Pick. 116; *Penn Mut. L. Ins. Co. v. Crane*, 134 Mass. 56; *Pitkin v. Frink*, 8 Met. 12; *Waterhouse v. Kendall*, 11 Cush. 128; *Turner v. Rogers*, 121 Mass. 12; *Hodgkins v. Moulton*, 100 Mass. 309; *Wyman v. Winslow*, 11 Me. 398, 26 Am. Dec. 542; *Cushing v. Wyman*, 44 Me. 121; *Jenness v. Lane*, 26 Me. 475; *Noble v. Edes*, 61 Me. 34.

cluding cases as to other negotiable paper such as checks, drafts, bills of exchange, etc., and it has been also confined to the contract comprised in the note itself, excluding contracts growing out of the indorsement of negotiable paper, or the signing of it as surety, and agreements contemporaneous therewith, which constitute different arrangements and relationships. With reference to parol contemporaneous agreements, an effort has been made to distinguish between cases in which there were two distinct contracts leading to different results, the one evidenced by the note and the other by parol, and those in which there was really but one contract, and the effort was to show that it was something different from what it purported to be on its face, with a view to the exclusion of the latter class of cases.

II. Parol agreements.

a. General rule.

In accordance with the general rule which prohibits oral evidence to contradict a writing, a contemporaneous parol agreement between the parties to a note, contradicting its terms, is insufficient as a defense in an action on the note. *Clark v. Gramling*, 54 Ark. 525; *Linnville v. Holden*, 2 MacArth. 329; *Calhoun v. Davis*, 2 Ind. 532; *Hays v. Davis*, 6 U. C. Q. B. 396; *Beals v. Beals*, 20 Ind. 163; *Western Mfg. Co. v. Rogers*, 54 Neb. 456.

And an answer setting up such a defense is demurrable. *Clark v. Gramling*, 54 Ark. 525.

A promissory note affords the only evidence of its terms and conditions, and cannot be contradicted or varied by a previous or contemporaneous verbal agreement of the parties, as such agreements are all regarded as merged in the written contract. *Mager v. Hutchinson*, 7 Ill. 265; *Woodall v. Greater*, 51 Ind. 539; *Linnville v. Holden*, 2 MacArth. 329.

And where the effect of a condition attached to a promissory note would be to change and alter the terms of the contract by changing the legal effect thereof or introducing conditions and stipulations which are not expressed in the written agreement between the parties, to allow its

Messrs. A. B. Savage and H. W. Oakes for defendant.

Foster, J., delivered the opinion of the court:

This is an action upon a promissory note of the following tenor:

Lewiston, Me., Oct. 15, 1890.

Four months after date, I promise to pay the American Gas and Ventilating Machine Co. one hundred and twenty-five dollars at Lewiston, Me., with interest. Value received.
J. N. Wood.

The plaintiff, having proved the note declared on, is entitled to judgment unless, upon the facts disclosed, the other party has shown a legal defense. In support of such defense, the defendant introduces an agree-

ment in writing, signed by the plaintiff, executed at the same time when the note was given, and which reads as follows:

Lewiston, October 15, 1890.

It is mutually agreed between the American Gas and Ventilating Machine Co. that at the end of four months, if Mr. John N. Wood, the giver of note dated —, does not want to pay the same, he shall receive it back on the surrender by him to the American Gas and Ventilating Machine Co. one hundred shares of stock in the Maine Gas and Ventilating Machine Co. held by him.

American Gas and Ventilating Machine Co.
C. W. Waldron, Secretary.

It is argued in behalf of the defendant that this note and agreement constitute together an entire contract, and that they are to be

proof as a defense against the note would violate the rule that where a contract is reduced to writing the legal presumption is that the entire contract as finally settled is embraced therein, and all oral negotiations or stipulations between the parties which preceded or accompanied the execution of the instrument are to be regarded as merged in it. *Durland v. Pitcairn*, 51 Ind. 426.

While a contemporaneous agreement in writing may be adduced under some circumstances to vary or contradict the express terms of a note, it is not competent to give evidence of an oral agreement for that purpose. *Brown v. Langley*, 5 Scott, N. R. 249, 4 Mann. & G. 466, 12 L. J. C. P. N. S. 62.

The failure to reduce to writing a stipulation between the parties to a note in the absence of proof showing misrepresentations from dishonest motives, or of such circumstances as would authorize the implication of fraud, must be attributed to the unskillfulness of the person preparing the instrument, and does not constitute a ground for the admission of oral evidence in a court of law. *Paysant v. Ware*, 1 Ala. 160.

Parol evidence which does not go to the consideration, and the only tendency of which is to prove the existence of a contemporaneous verbal agreement inconsistent with the terms and conditions of a note, is not admissible in an action thereon. *Coapstick v. Bosworth*, 121 Ind. 6; *Hunt v. Adams*, 7 Mass. 518; *Carter v. Hamilton*, 11 Barb. 147; *Dolson v. De Ganahl*, 70 Tex. 620; *Gregory v. Hart*, 7 Wis. 532.

To admit proof of a parol agreement or understanding between the parties to a note entered into at the time it was executed, essentially varying the note itself, would be contrary to the rule of law which forbids any verbal agreement differing from a written one entered into before or at the time the written agreement was executed from being given in evidence. *Caldwell v. May*, 1 Stew. (Ala.) 425.

And parol evidence of an oral agreement alleged to have been made at the time of making a promissory note cannot be permitted to vary, qualify, contradict, or add to or subtract from the absolute terms of the written contract. *Forsythe v. Kimball*, 91 U. S. 291, 23 L. ed. 352; *Brown v. Spofford*, 95 U. S. 475, 24 L. ed. 508.

So, the rule that parol evidence of an oral agreement alleged to have been made at the time of making a promissory note cannot be permitted to contradict or alter the terms of the written contract, is the same in equity as at law. *Forsythe v. Kimball*, 91 U. S. 291, 23 L. ed. 352; *Borden v. Peay*, 20 Ark. 293.

And the making and violation of a contemporaneous parol agreement inconsistent with a promissory note at the time of its execution is not a fraud for which equity will vary or set it aside, where no sufficient reason appears why such agreement was not incorporated in the note. *Dyar v. Walton*, 79 Ga. 466.

So, a promissory note and a contract in writing out of which it arises, if both were executed at the same time, constitute but one agreement, and that agreement cannot be varied or its terms added to by parol evidence of other stipulations not embraced within them. *Allen v. Nofsinger*, 13 Ind. 494.

And a parol contemporaneous agreement changing the legal effect of a promissory note and a written contract constituting one agreement, that the payment of the note might be defeated by the termination of the contract by the voluntary act of one of the parties, cannot be set up as a defense in an action on the note and contract. *Durland v. Pitcairn*, 51 Ind. 426.

But objections to the admissibility of evidence cannot be raised by asking instructions to the jury, and if evidence is inadmissible as tending to show a contemporaneous agreement by parol, varying the terms of a written contract, it should be objected to on that ground. The objection cannot be raised by means of a request to instruct. *Nalle v. Gates*, 20 Tex. 315.

b. That note is not to be paid.

A contemporaneous parol agreement between the parties to a note, that it was not to be enforced as between the parties, constitutes no defense to the note. *Davy v. Kelley*, 66 Wis. 452; *Dolson v. De Ganahl*, 70 Tex. 620.

The maker of a note for which there was a consideration cannot be permitted to show an oral agreement that he was not to be liable at all upon the note. *Tacoma Mill Co. v. Sherwood*, 11 Wash. 492; *Rodgers v. Donovan*, 13 Phila. 51.

And evidence that at the time promissory notes were signed, the payees promised that the makers should not be called upon to pay them, is not admissible in an action on the note under the rule excluding parol evidence to contradict the terms of written instruments. *Remington v. Wright*, 43 N. J. L. 451; *Wright v. Remington*, 41 N. J. L. 48, 82 Am. Rep. 180; *Davy v. Kelley*, 66 Wis. 452; *Moore v. Sullivan*, 21 U. C. Q. B. 443.

And a plea in an action against the maker of negotiable promissory notes that he executed them with the understanding that he was not to be bound, and for a purpose wholly at variance with their plain tenor and import, is no defense where there is no denial that the

construed together as part of one and the same transaction.

The plaintiff, on the contrary, contends that, although made at the same time as the note, it must be considered as independent and collateral to it, repugnant to the very terms of the note, and destructive of it; that it is but a promise to accept payment of the note in a different manner than is provided for in the note itself.

The certificates of stock mentioned in this agreement, and which, from the evidence, appear to have been the consideration of this note, were never surrendered by the defendant to the plaintiff prior to the commencement of this action.

Viewed in the most favorable light for the defendant, the transaction shows only an executory agreement or contract between the parties, requiring some further act to be

done, or some good and sufficient reason for its omission, in order to render it available as a defense.

We are aware that there is a class of decisions which hold that independent, collateral agreements, though executed at the same time as the note, do not affect the construction of the original contract, or afford any defense to an action on the note.

Thus, an agreement in writing, executed at the time of the making of a note which was payable at a certain day, to give indulgence to the maker for an indefinite period, which might extend beyond the specified time of payment, has been held not to be a part of the note, but only a collateral promise, upon which the promisee must rely. *Dow v. Tuttle*, 4 Mass. 414, 3 Am. Dec. 226. There are other cases in the same line, and among which may be mentioned *Pitkin v. Frink*, 8

notes were made and delivered, and no suggestion that the understanding and purpose alleged were evidenced by any writing, or that they were omitted from the note by fraud, accident, or mistake. *Hirsch v. Oliver*, 91 Ga. 554.

Thus, a promissory note given to secure payment of a balance supposed to be due in a general settlement of accounts, errors excepted, with no uncertainty as to its object or meaning, must be presumed to contain the entire contract between the parties, the general settlement of accounts furnishing a sufficient consideration for the note to render it enforceable, and an agreement or understanding between the parties, that it should not be considered a promissory note or enforced as such, would be *nudum pactum*. *San José Sav. Bank v. Stone*, 59 Cal. 183.

And evidence that the maker of a note was only an accommodation maker, and that the president of the bank discounting it agreed orally with him that he should not be called upon to pay it, is not admissible in an action on the note, as it would go to contradict a written instrument. *First Nat. Bank v. Tisdale*, 18 Hun, 161, Affirmed 84 N. Y. 655.

And a parol contemporaneous agreement or understanding between the maker and the payee of a note which was an absolute and unconditional promise to pay a sum certain on a day specified, that it was never to be paid but was at some future date to be applied to the cancellation of an equal amount of indebtedness of the payee to the maker, cannot be permitted to control or defeat the terms of the note. *McDonald v. Elfes*, 61 Ind. 279.

So, parol evidence of an agreement between the parties to a note made payable at a designated bank, that if the note was sent to that bank the maker should be exonerated from payment, is inadmissible in evidence in an action on the note, as it contradicts one of the terms of the contract. *Montgomery R. Co. v. Hurst*, 9 Ala. 513.

But parol evidence of an agreement made at the time of the delivery of a note that it should be returned to the maker at a designated time if he should then demand it, and that he so demanded it, but that its return was refused, is not inadmissible in an action on the note as contradicting or varying the terms of the note. *McFarland v. Sikes*, 54 Conn. 250.

Nor can an agreement between the parties to a note given to the trustees of a college that it was obtained for the purpose of qualifying the trustees to obtain a grant from the legislature, and that the note should be given up after a half year's interest should be paid, which in fact was paid, be established by parol as a defense in an

action upon the note. *Warren Academy v. Starrett*, 15 Me. 443.

And a parol contemporaneous agreement that notes executed to a bank would only be used by the payee for the purpose of showing the assets of the bank, and that the makers should not be held liable thereon, which was violated by putting them in circulation, simply amounts to a promise upon the part of the payee to perform certain things in the future concerning it, and is not of that character of fraud which the law will relieve against. *Jackson v. Chemical Nat. Bank* (Tex. Civ. App.) 46 S. W. 205.

But a note given pending a county-seat election as an inducement for the location of the county seat at a designated place, under an agreement that it was not to be collected, is without consideration, and where the payee pays the note to the county without the privity or request of the maker, he cannot recover of the maker thereon. *Herman v. Edison*, 9 Neb. 152.

So, parol evidence that it was intended between the parties that a note given should be a memorandum note only, giving no extension of credit, and intended only to fix the balance of an account, is inadmissible as tending to contradict the meaning of the instrument. *Fellows v. Prentiss*, 3 Denio, 512, 45 Am. Dec. 484.

And a verbal understanding between the parties to a note that it was not intended to be an obligation to pay the sum of money named, but that it was to be an understanding to furnish the payee with a satisfactory horse, would be a parol contradiction of the terms of the note, and therefore inadmissible as a defense in an action thereon. *Ziegler v. McFarland*, 147 Pa. 607.

And parol evidence of an understanding between the parties to a note that it did not represent a loan, but that it was to be regarded as a mere receipt for an advancement, which should be accounted for as such, is not admissible in an action on the note. *City Bank v. Adams*, 45 Me. 455.

And it may not be pleaded and proved, without a violation of this rule, that a note was not intended by the parties to operate as such, but rather as a receipt for a certain sum of money on which interest was to be calculated. *Beals v. Beals*, 20 Ind. 163.

And an agreement made contemporaneous with a note, that it is to be surrendered upon securing other sureties upon another note, does not relieve the maker from liability though they were obtained, and entitle him to a return of the note. *State Bank v. Belk* (Neb.) 77 N. W. 58.

Nor is parol evidence that a note was given as a receipt for money which the payee gave to

Met. 12, where a note was given by the defendant, and the plaintiff at the same time gave the defendant a writing in which he agreed to take his pay in horse hire, and not call on the defendant for the note so long as he kept the horse and carriage in good order for the plaintiff's accommodation; and the court held the stipulations independent, and constituted separate and distinct contracts, for a breach of which by either an action could be maintained. So, also, *Traver v. Stevens*, 11 Cush. 167, *Waterhouse v. Kendall*, 11 Cush. 128, and *Stanton v. Maynard*, 7 Allen, 335, where similar agreements by the plaintiff, made in consideration of notes given, were regarded as mutual and independent, executory stipulations, the performance of which was not a condition precedent to a recovery upon the notes. *Littlefield v. Coombs*, 71 Me. 110.

the maker to be loaned by him in such manner as the maker might consider most advantageous, and that he loaned it, but that the parties to whom it was loaned failed and no part of it had been repaid, admissible as a defense in an action on the note. *Shaw v. Shaw*, 50 Me. 94, 79 Am. Dec. 605.

So, evidence that the agent of the payee of a note, who agreed with the maker that nothing should be paid on it but interest, is not admissible in an action on the note, as it would constitute an attempt to vary the written contract by parol testimony. *True v. Shepard*, 51 N. H. 501; *Hammond v. Small*, 16 U. C. Q. B. 371.

And its admission is a sufficient ground for a new trial. *Hammond v. Small*, 16 U. C. Q. B. 371.

And the maker of a note cannot show as a defense in an action thereon a prior or contemporaneous agreement that if he would execute the note and make a part payment thereon he should incur no further liability thereon. *Ewing v. Clark*, 76 Mo. 545, *Affirming* 8 Mo. App. 570.

And a parol contemporaneous agreement between the parties to a note whereby in consideration of the furnishing of collateral security the maker is not to be held liable thereon, furnishes no defense against the note, as it sets up a parol agreement to vary the written contract. *Mitchel v. Neill*, 39 Ind. 399.

So, an agreement between the parties at the time of making a note that one of the makers was to be liable for its payment only in the event it could not be collected of the other, is to be construed most strongly against the pleader when set up as a defense in an action on the note, and will be deemed to rest in parol, and therefore to be unavailing unless it is otherwise stated in the plea. *Mager v. Hutchinson*, 7 Ill. 267.

And that the maker of a note was a son of the payee, and that the father advanced certain moneys to him, which were intended as an advancement of his expected share of his father's estate, and that the note was given merely as evidence of such advancement and was not intended or expected to be paid, furnishes no defense in an action on the note, as the parol understanding would tend to destroy its legal effect. *Frankboner v. Frankboner*, 20 Ind. 62; *Norman v. Norman*, 11 Ind. 288; *Porter v. Porter*, 51 Me. 376; *Weaver v. Fries*, 85 Ill. 356; *Street v. Beckwith*, 20 U. C. Q. B. 9; *Grey v. Grey*, 22 Ala. 233.

And it cannot be pleaded as tending to show a failure of consideration. *Weaver v. Fries*, 85 Ill. 356, 43 L. R. A.

But there is another class of decisions wherein it is held that two contemporaneous writings between the same parties, upon the same subject-matter, may be read and construed as one paper; and this rule applies notwithstanding one of the writings is a promissory note, when the action is between the parties to it, or their representatives. *Rogers v. Smith*, 47 N. Y. 324; *Hunt v. Lieberman*, 5 Pick. 395; *Hill v. Huntress*, 43 N. H. 480; *Davlin v. Hill*, 11 Me. 434.

In the latter case the court held that in an action on a promissory note writings connected therewith by direct reference or necessary implication are admissible in defense as parts of the same contract.

So, in *Hill v. Huntress*, 43 N. H. 480, an agreement made at the same time as the note contained a stipulation that the promisors of the note were to pay the amount of it

In *Fennell v. Henry*, 70 Ala. 484, 45 Am. Rep. 88, however, the court said that the statement in *Grey v. Grey*, 22 Ala. 233, *supra*, that parol evidence will not be received to show that at the time a note was taken it was intended that the transaction should be an advancement, and that the note did not represent a debt to be paid, was *dictum*.

Nor is evidence that on the day a note was given by a son to his father for property sold to him at a public sale it was stated by the father that the son could buy in a cow and any other property he wanted and give his note so that it would show that much money, and that would be the same as money advanced, and that the note was given pursuant to and on account of such statement, admissible, as it goes to show by parol that the note was intended only as a receipt. *Mason v. Mason*, 72 Iowa, 457.

And a note given by a son to his father, which is absolute and unconditional in its terms, cannot be varied or contradicted by proof of a contemporaneous verbal agreement that the note was executed for the purchase of the father's real estate with the agreement that only the interest and such parts of the principal as should be necessary should be paid to the father and mother during their lives, and that after the death of both the note should be paid to his sisters or their children, and that the mother was still alive. *Foglesong v. Wickard*, 75 Ind. 258.

So, a parol understanding between the parties to a promissory note, that it was given merely to show that such an amount had been given by the payee to the maker's wife and was not intended to be paid, is inadmissible as a defense to the note as a plain contradiction of the writing. *Gessler v. Rush*, 2 W. N. C. 68.

And that a note was given by a husband to his wife's father for an advancement in the settlement of the father's estate, and was not to be repaid, and that it was made by the husband because the wife was insane, the money being received by him and held in trust for her, is not a good defense in an action upon the note, and evidence thereof is rightly stricken out. *Gurth v. Engler*, 71 Iowa, 61.

And declarations of the payee of a note who has since died, that it was given for moneys advanced by him to the defendant, who was his son-in-law, and was not to be paid until after his death nor then unless the amount received by him as his share should be greater than the amount received by the other children, or unless the payee should become insolvent, cannot be proved by parol in an action on the note. *Graves v. Clark*, 6 Blackf. 183.

in tanning hides for the payee, and the court held that the note and written agreement, made at the same time, relating to the manner of payment of it, were to be construed as one special agreement as between the original parties and those standing in like situation. The court there says, in speaking of the note: "As between the original parties, notwithstanding its form, this instrument is but one part of a special contract, the other part of which, as it was made, was contained in the written agreement of the same date, and purporting to be executed at the same time. Different instruments are to be construed together, as parts of the same contract, where it is necessary to carry into effect the agreement and intention of the parties."

Many of the cases relate to instances where the stipulation, agreement, or memo-

In *Bragg v. Stanford*, 82 Ind. 234, however, it was held that the admission of parol evidence that a note given by a son-in-law to his father-in-law was for the purpose of evidencing an advancement made by the father to his daughter, is not within the rule forbidding the introduction of parol evidence to contradict or vary the terms of a writing, and is admissible in a suit to subject the daughter's real estate in which the money was invested to the payment of her husband's debts, as tending to show absence of consideration.

But see *Weaver v. Fries*, 85 Ill. 356, *supra*.

So, an agreement by which a bank discounts a note as an obligation of the indorser, and that it would look to the indorser alone for payment, is no defense in an action on the note against the maker, as the agreement is in conflict with the note. *Armstrong v. Scott*, 36 Fed. Rep. 63.

And where a broker negotiates a sale of land for \$27,500, and the purchaser has only \$22,500, and a mutual agreement is made between the vendor, purchaser, and broker by which the land is deeded to the broker, who receives the \$22,500, less commission, and the note of the purchaser for the balance, which is secured by the broker's mortgage of the land, and he conveys it to the real purchaser subject to the payment of such note and mortgage, the deed and note and mortgage must all be taken together and construed as one instrument for the purpose of determining the character of the transaction and the intention of the makers, and the broker will be held absolutely liable to the vendor on such note, and cannot set up a contemporaneous oral agreement between them by which the vendor was to collect the note by foreclosure of the mortgage without holding him personally liable. *Gillmann v. Henry*, 53 Wis. 465.

A bill for the foreclosure of a mortgage by an administrator will not lie, however, where the mortgage was given to secure a note given by sons to a father, who had conveyed a tract of land to them by way of advancement, taking the note and mortgage to operate as a check upon their conduct and not to be collected, intending the land as a gift, subject to the support of himself and wife, which support was given, but which note and mortgage were surrendered to the administrator on his demand, by the makers thereof, without being informed as to their rights. *Sherman v. Sherman*, 3 Ind. 337.

This decision is probably explainable on the theory that the contemporaneous agreement had been executed and the note was thoroughly satisfied. See *infra*, VIII.
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random is written upon the face or back of the note itself,—as in *Littlefield v. Coombs*, 71 Me. 110; *White v. Cushing*, 88 Me. 339, 32 L. R. A. 590; *Barnard v. Cushing*, 4 Met. 230, 38 Am. Dec. 362; *Costelo v. Crowell*, 127 Mass. 293, 34 Am. Rep. 367, and the cases therein cited,—and where such terms become a substantive part of the note, and qualify it, as if inserted in the body of the instrument.

But it was otherwise in the cases of *Hill v. Huntress*, 43 N. H. 480, *Hunt v. Livermore*, 5 Pick. 395, and *Davlin v. Hill*, 11 Me. 434, where the agreement was contained in writings independent of the notes, which they were held to modify and govern in accordance with the intention as expressed in the several instruments.

In *Davlin v. Hill*, 11 Me. 434, the language of our court, as expressed by Weston, J., is

So, in *Blair v. Reid*, 20 Tex. 310, it was held that a debtor may plead a covenant not to sue in suspension in an action on a note, and he may doubtless plead in reconvention against the covenantor, and that assignees of the note with notice of the covenant are bound by it in so far as it operates to suspend the right of action, but they are not liable for damages for its breach.

c. That payment is to be conditional.

A note which is absolute in its terms and an unconditional promise to pay money cannot be varied by evidence of a contemporaneous or prior parol agreement that payment should be contingent. *Joyner v. Turner*, 19 Ark. 690; *Harwood v. Brown* (Mo.) 5 West. Rep. 690; *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246; *Walker v. Crawford*, 56 Ill. 444, 8 Am. Rep. 701; *Spofford v. Brown*, 1 MacArth. 223; *Curtice v. Hokanson*, 38 Minn. 510; *Western Mfg. Co. v. Rogers*, 54 Neb. 456; *Rodgers v. Donovan*, 13 Phila. 51; *Ellis v. Hamilton*, 4 Sneed, 512; *Sweet v. Stevens*, 7 R. I. 375; *Columbia v. Amos*, 5 Ind. 184; *Hatch v. Hyde*, 14 Vt. 25, 39 Am. Dec. 203; And *v. Magruder*, 10 Cal. 282.

The failure of contingencies not expressed in a note, upon which the note is given, cannot be set up by parol as a defense to the note. *Henshaw v. Dutton*, 59 Mo. 139.

The subsequent or contemporaneous giving of a promissory note absolute on its face for an indebtedness is a waiver of the stipulation that such indebtedness was to be paid only upon a specified condition. *Swank v. Nichols*, 24 Ind. 199, 20 Ind. 198.

And parol evidence is not admissible, in an action on a promissory note made payable on its face on a certain date, to show that by agreement between the parties it was to be paid at that time only on a contingency mentioned in a written contract previously made between them. *Miller v. White*, 7 Blackf. 491.

So, an understanding between the parties to a note that it was not to be paid unless called for during the life of the payee cannot be established by parol, in an action on the note. *Boody v. McKenney*, 23 Me. 517.

And parol proof of an understanding between the parties to a note that the payee was not to claim payment unless she should become poor and afterwards need it cannot be given in an action on the note, as it would substitute a new and different contract by parol testimony. *Atkinson v. Blair*, 38 Iowa, 156.

And recovery on a promissory note for a desig-

this: "It is manifest that the note, the plaintiff's agreement in writing of the same date, and the instrument upon the back of which it was written, and which is referred to therein, were intended to be evidence of the stipulations of the parties in relation to the transaction. It was not necessary that the contract should be written on one piece of paper. If written on several, connected by direct reference or necessary implication, they form, together, evidence of what the parties have agreed."

In the case at bar the agreement bears the same date as the note, and refers expressly to the note in suit. In that agreement it is mutually agreed that if the defendant, at the date of maturity of the note, does not want to pay the same, he shall receive it back upon surrendering to the plaintiff the shares of stock held by him.

nated sum to be paid semi-annually during each and every year that the payee might live cannot be defeated by evidence of a parol agreement between the parties thereto, at the time the note was given, that no demand should be made for payment unless the money should be actually needed and required for the payee's support during her lifetime. *Osborne v. Taylor*, 58 Conn. 439.

Nor is an oral agreement made when a note was given, that it should not be payable unless the maker should have certain funds in his hands, admissible as a defense in an action on the note. *Adams v. Wilson*, 12 Met. 138, 45 Am. Dec. 240.

And a verbal agreement between the parties to a note that it was not to be paid unless the maker should collect a note given him for property which he had sold for the payee, and that he was unable to collect such note, is inadmissible as a defense in an action upon the note given by him. *Underwood v. Simonds*, 12 Met. 275.

So, an agreement between the parties to a note, that if the payee did not procure payment out of a designated estate the note should be returned, cannot be established by parol, as a defense in an action on the note. *McClanaghan v. Hines*, 2 Strobb. L. 122.

And an agreement between the parties that the payment of a note made by an executor for medical services rendered to his testator should be conditioned upon the allowance by the ordinary of the claim made against the estate by the payee of the note cannot be established as a defense by oral evidence, and the executor will be held personally liable on the note. *McGrath v. Barnes*, 13 S. C. 328, 36 Am. Rep. 687.

Nor can an understanding between the parties to a note that it was to be paid only when a debt due the maker from another person was collected, and that such debt remained unpaid, be so established as a defense in an action on the note. *Harvey v. Lafin*, 2 Ind. 478.

Nor can a verbal contemporaneous agreement or understanding between the parties to a note that it was given conditionally, to be paid, if at all, out of insurance money if that should be paid without suit or litigation, and that it was not paid without litigation, be set up as a defense. *Hyde v. Tenwinkel*, 26 Mich. 95.

And oral evidence of an agreement made contemporaneous with a note which was an absolute promise to pay a stated sum on demand, that the sum named should be paid out of accruing commissions and not otherwise, is not admissible in an action on the note. *Gorrell v. 43 L. R. A.*

Can there be any doubt as to what the intention of the parties was? Are not the note and agreement "connected by direct reference or necessary implication"? We think so, and that the same should be construed together as an entire contract, the stipulations of which are mutual and dependent, rather than independent and collateral. Had there been a surrender or tender of the stock within the time limited by the contract, it would have constituted a defense to this action. There is no evidence or claim on the part of the defense that this was done.

What, then, is the justification offered by the defendant to exonerate him from the consequences of his failure so to surrender the stock? It is that by the acts and declarations of the authorized agent of the plaintiff corporation, the defendant was induced to retain the stock, and that the plaintiff is

Home L. Ins. Co. 24 U. S. App. 188, 63 Fed. Rep. 371, 11 C. C. A. 240.

In the above case, *Burke v. Dulaney*, 153 U. S. 228, 38 L. ed. 698, *infra*, VII. was distinguished upon the ground that in that case the attack was upon the delivery, and not, as in this case, upon the meaning of the terms of a note, of the delivery of which no question had been made.

So, a parol agreement between the parties to a note that it should not be paid unless another note then transferred by the payee to the maker could be set off by him against the maker of the latter, whom the maker of the former owed at the time, and the failure to secure such set-off cannot be set up in defense in an action on a former note, as it would not show failure of consideration, and would consist of a contemporaneous parol agreement tending to contradict or vary the terms of the note. *McClintic v. Cory*, 22 Ind. 170.

And evidence of a parol agreement made contemporaneously with a promissory note given for the payee's interest in his father's estate, that if the interest of other heirs of the estate could not be obtained in a specified manner the note and release should be void, is inadmissible as a defense in an action upon the note. *Ely v. Kilborn*, 5 Denio, 514.

And parol evidence that a note was made upon the understanding and agreement that it was to be binding only in the event of the payee being unable to make the money from another source is inadmissible in an action on the note. *Jones v. Jeffries*, 17 Mo. 577.

Nor can a parol condition that a note was to be void in case the estate of the payee should be indemnified against another claim be admitted in evidence to establish a defense in an action on the note. *Converse v. Moulton*, 2 Root, 195.

And evidence in an action upon a note of a parol contemporaneous agreement between the parties thereto that the note was only to be paid in the event that the affairs of a copartnership in which the maker was concerned should be prosperous, is inadmissible as violating the rule that oral testimony cannot be used to vary or contradict the terms of a written instrument. *Jones v. Shaw*, 67 Mo. 667.

So, a parol agreement between the parties to a note given for an extension of time of payment of an existing indebtedness, that in case certain other obligations were paid before or at maturity the note in question should not be required to be paid, cannot be set up in defense in an action on the note, though such other notes

thereby estopped from claiming that the defendant was at fault in not making a surrender of the same before suit was commenced.

We think this position of the defendant is well founded.

It appears that C. W. Waldron was not only owner of one third of the capital stock of the plaintiff corporation, but was a director, secretary, and general manager of the corporation in this state, and was generally empowered to act in reference to all matters pertaining to the business of the corporation. When the time mentioned in the note and agreement had expired, it was deemed advisable that an extension should be given upon this and other similar notes held by the plaintiff against other parties, in order to test the machines manufactured by the plaintiff, and to ascertain if they could be made to

produce satisfactory results. Such extension appears to have been granted, extending the time to May 15, 1891. But in the meantime letters were written in behalf of this defendant and others similarly situated, explaining the situation, and from all that appears in the case it is evident that all parties were co-operating to obtain a result in relation to the use of the machines that would be of value to all concerned. This appears from the correspondence, as well as from the whole tone of the evidence given by Mr. Waldron. The defendant and other stockholders had the assurance that the plaintiff would act in good faith for the furtherance of their material interests, and they were led to believe that the control and decision as to such matters was vested in Mr. Waldron. It appears from the testimony of Waldron that up to the time this note was

were paid before maturity, as it would go to show that the note, although absolute in terms, was in fact conditional. *Penny v. Graves*, 12 Ill. 287.

And the maker of a promissory note is not entitled to show, in an action upon it by the payee, that at a settlement of accounts between the parties, upon which settlement the note was given, the payee agreed to give it up unless he could find a receipt from the maker for the payment for property which the maker had let him have, the parties differing as to whether the same had been paid for. *Brown v. Hull*, 1 Denio, 400.

And an oral stipulation by a landlord at the time of taking an absolute promissory note for rent of mills, to the effect that if the mills should be destroyed by fire the rent should cease, and that he would not require the tenant to pay rent for the balance of the term, is no defense to an action upon the rent note where it does not appear that there was any intention upon the part of either of the parties to insert the stipulation in the note, and that it was left out by mutual consent, and not by fraud, accident, or mistake. *Stafford v. Staunton*, 88 Ga. 298.

Nor is evidence that when notes and a mortgage were given to secure the purchase money for certain real estate upon which there was a mill, it was orally agreed when the purchaser signed the note that his liability was to be the same as the liability of an insurance company, and that he was only to be liable in case the property was destroyed by fire, in consideration whereof insurance upon the building was waived, admissible in an action for judgment on the note and foreclosure of the mortgage. *Farmer v. Perry*, 70 Iowa, 358.

So, a note made payable from the avails of logs bought of a designated person when there is a sale made is not payable upon a contingency, but absolutely, when a reasonable time has elapsed to make the sale, and parol evidence is inadmissible to show an agreement and understanding of the parties that if it turned out that on manufacturing the logs there was a total loss thereof to the owner, the note was not to be paid. *Sears v. Wright*, 24 Me. 278.

And a note given for professional services to be afterwards rendered payable at a certain time cannot be defended against by parol proof of an agreement of the parties that the note should not be paid unless the payees, who were attorneys, should be successful in the suit they were to bring, and for the bringing of which the note was given; as to allow it would be to allow parol evidence to change the intention of the parties as expressed in the note. *West v. Kelly*, 19 Ala. 353, 54 Am. Dec. 193.
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And that the payee of a note orally agreed contemporaneously with the note, and as part of the same contract, that he would have the sale of certain property in which the maker of the note was interested stayed until a designated date, and that in case the sale should be made before that date he would forfeit the sum of money specified in the note, and that he did not cause the sale to be suspended or delayed, cannot be set up to defeat an action on the note. *Calhoun v. Davis*, 2 Ind. 535.

Nor can a note absolute on its face be defended against by parol proof that it was conditioned to be void upon the immediate discontinuance of a suit between the parties without cost to either party. *Farnham v. Ingham*, 5 Vt. 514.

And an agreement between the parties to a note that if they compromised a suit the note should not be paid, and that they did compromise, cannot be established by parol as a defense in an action on the note, as it would go to vary the written contract. *Dale v. Pope*, 4 Litt. (Ky.) 166.

Nor can parol evidence be given in an action on a note made payable fourteen days after date to show that it was not to be paid in case a verdict was obtained in an action pending between other parties. *Foster v. Jolly*, 1 Crompt. M. & R. 703, 5 Tyrw. 239.

And it is not admissible to show that a note payable absolutely at a specified time would not be required until a certain case in court was decided. *Van Etten v. Howell*, 40 Neb. 850.

And a stipulation between the parties to a promissory note payable on demand having a memorandum on the bottom that one half was to be paid in twelve months and the balance in twenty-four months, which was written before the note was delivered, that the term of credit was provisional, conditioned on the maker remaining solvent, is not admissible as a defense in an action on the note. *Heywood v. Perrin*, 10 Pick. 228, 20 Am. Dec. 518.

So, a note absolute on its face cannot be defeated by oral evidence that it was given conditionally, to be void if it should be shown that the maker then in insolvency had included in his inventory the amount due the payee on his note. *Erwin v. Saunders*, 1 Cow. 249, 13 Am. Dec. 520.

And parol evidence that at the time a note was given it was agreed between the maker and payee that the note should be given up unless the maker should obtain a discharge from all his debts is not admissible in an action on the note, and cannot be considered either for purposes of varying the terms of the written con-

sued the other directors agreed with him entirely. He had frequent conversations with the Lewiston stockholders, including this defendant, and he was in hopes they would be glad to pay their notes, and keep their stock; and it was understood that the result would be that, if they found the machines were good for nothing, they would want to get out of it. He had repeated conversations with the defendant, and told him, not only during the time covered by the extension, but afterwards, that he might hold on to the stock, and give it up when it was found that nothing could be accomplished with the machines.

tract or upon the question of the failure of the consideration upon which the note was given. *Tower v. Richardson*, 6 Allen, 353.

Nor is parol evidence admissible to show that the note was given for a turnpike subscription, and that it was agreed between the parties that payment was conditioned upon the building of a bridge at a designated point, which was not done. *Rallsback v. Liberty & A. Turnp. Co.* 2 Ind. 656.

And a plea in an action on a promissory note given in payment of the subscription to a railroad and made payable when the track of said railroad should be laid through a designated county and cars should be run thereon, that the only consideration of such note was that the construction and completion of the said railroad through said county should be within three years from the date of giving such note, presents no defense and is demurrable. *Cairo & V. R. Co. v. Delap*, 7 Ill. App. 60.

And an agreement at the time a bond and coupon notes were given to a railroad company that the maker was not to be held liable until the whole amount of the capital stock required to build the road should be subscribed for and taken, and if the road was not built and completed within two years from the date of the bonds and coupons, then the bonds and coupons were to be given up, cannot be established by parol, as it would vary the terms of the note. *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246.

So, a parol agreement between the parties to a note executed in satisfaction of a lien note by which a lien on land was released, that it was not to be paid unless the boundaries of the patent were ascertained so that the owner might be enabled to defend against hostile claimants, is not admissible in defense in an action upon the note. *Slusher v. Conant*, 18 Ky. L. Rep. 660.

And proof of a parol agreement between the vendor and purchaser of lands for the purchase price of which notes were given, that if any of the tracts of land should be redeemed by minor heirs at any time before such notes became due then the agreement should be set aside and such notes given up, and that the notes were given in consideration of such agreement, is not admissible in an action on such notes. *Lane v. Sharpe*, 4 Ill. 566.

And an agreement between the parties to a note given for the purchase price of a horse, that in case the horse dies before a designated time no part of the price was to be paid, and the death of the horse within such time, cannot be established by parol as a defense in an action on the note. *Gatlin v. Kilpatrick*, 4 N. C. (1 Car. Law Repos.) 534, 6 Am. Dec. 557; *Columbia v. Amos*, 5 Ind. 184; *Hatch v. Hyde*, 14 Vt. 25, 39 Am. Dec. 203. But see *Barlow v. Flemming*, 6 Ala. 146, *infra*, VI. c.

So, in *Mitford v. Finden*, 8 Mees. & W. 511, a plea in an action by the payee against the 43 L. R. A.

It is needless to further discuss the testimony, and it is sufficient to say that, in view of the repeated statements of Mr. Waldron, and his requests to the defendant to retain the stock till it was found that the success of the enterprise could no longer be assured, and finally his assurance in his letter to the defendant that the note had been sent for collection by mistake, and that there was nothing due upon it, we think the plaintiff may properly be held to be estopped from claiming that the defendant was at fault in not surrendering the stock before suit was commenced, or is without remedy in conse-

makers of a promissory note that there was no consideration, and that it was made subject to a condition that the defendants should not be called upon to pay the same if they were not able, but that it should be renewed, was set aside, but it was put upon the ground of the plea being false and tricky and calculated to embarrass the plaintiff.

See also *Isaacs v. Jacobs*, 15 Daly, 490, *infra*, V.

As to effect of payees preventing the happening of the contingency, see *Stockwell v. Gidney*, 73 Me. 84, *infra*, IX.

d. As to time of payment.

Where notes are payable unconditionally and at a time certain, it is incompetent to prove by parol testimony a promise by the payee, contemporaneous with or antecedent to the execution of the notes, stipulating for a postponement of the time of payment, as such evidence would contradict the terms of the written instruments and vary their legal effect. *Doss v. Peterson*, 82 Ala. 258; *Litchfield v. Falconer*, 2 Ala. 280; *Skillen v. Richmond*, 48 Barb. 428; *Ellis v. Hamilton*, 4 Sneed, 512; *Nelson v. White*, 61 Ind. 139; *Gardiner v. Papin*, 30 Mo. 243.

And see also *Cox v. Wallace*, 5 Blackf. 199, *infra*, II. g.

Parol evidence of an agreement to pay a note at a different time than that which the note indicates is inadmissible in an action on the note, within the rule that the legal effect of a written contract cannot be varied by parol evidence. *Sice v. Cunningham*, 1 Cow. 397; *Joyner v. Turner*, 19 Ark. 690; *Borden v. Peay*, 20 Ark. 293.

And an agreement to forbear to sue on a promissory note for a designated time after maturity, though founded on a sufficient consideration, cannot be pleaded as a release or in bar of an action thereon brought within the time limited; in such case the defendant is left to his action for a breach of the agreement. *Irons v. Woodfill*, 82 Ind. 40.

And evidence of a parol agreement or conversation between the parties to a note that the maker was to be permitted to pay it at any time and thus stop interest though it was not yet due, and evidence of an offer of such payment and refusal, is not admissible in an action on the note, as it would tend to contradict it. *Strachan v. Muxlow*, 24 Wis. 21.

Thus, parol evidence of an agreement between the parties to a note payable in two years, that it should not be paid for four years or until after the death of the payee's father, is not admissible in an action on the note. *McQueen v. McQueen*, 9 U. C. Q. B. 536.

And a note consisting of a promise to pay a sum certain sixty days after date cannot be defended against by proof that the maker was to pay it in ten equal instalments. *Barton v. Wilkins*, 1 Mo. 74.

quence of such failure to return it to the plaintiff within the time stipulated.

This doctrine of estoppel *in pais* has been frequently applied to prevent a party from taking advantage of his own wrong. It was applied in *Caswell v. Fuller*, 77 Me. 105, wherein Haskell, J., makes use of the following language: "That a man should be allowed by his own speech and conduct to lead another astray, and thereby take substantial benefit from the error of which he was the cause, is subversive of natural justice." To the same effect may be cited *Stanwood v. McLellan*, 48 Me. 275; *Ripley v.*

And where a note is made payable in one year, parol evidence is inadmissible to prove that when it was given the payee declined to give two years, but promised that he would wait two years for the money. *Eaton v. Emerson*, 14 Me. 335.

So, parol evidence that it was understood and agreed between the parties to a note made payable in one day, that it was not to be paid until the maker got the money from a designated source, is inadmissible in an action on the note as tending to contradict or vary its express terms. *Coughenour v. Suhre*, 71 Pa. 462.

And a parol agreement made by the parties to a note payable one day after date, by which the note was not to be made the subject of legal proceedings to enforce collection for two years unless the payees became embarrassed and were in failing circumstances, is inadmissible in evidence in defense to the note for the same reason, and the enforcement of a judgment thereon will not be restrained. *Cooper v. Tappan*, 4 Wis. 362.

Nor is a parol agreement to extend the time for the payment of a note payable on demand for two years admissible in evidence in an action on the note brought before the expiration of the two years. *Porteous v. Muir*, 8 Ont. Rep. 127; *Stott v. Fairlamb*, 52 L. J. Q. B. N. S. 420, 48 L. T. N. S. 574, *Reversed* on another question, 53 L. J. Q. B. N. S. 47.

Nor is oral evidence of an agreement entered into by the parties at the time a promissory note payable on demand was made, that it should not be paid until a given event should happen, admissible. *Moseley v. Handford*, 10 Barn. & C. 720; *Woodbridge v. Spooner*, 8 Barn. & Ald. 235, 1 Chitty, 661.

So, the time of the payment of a note is a part of the contract, and if no time be expressed the law adjudges that the money is payable immediately, and evidence of an agreement between the parties that the money was to be paid on their arrival at a certain place, and that both arrived at that place at the same time, is inadmissible in an action on a note. *Thompson v. Ketchum*, 8 Johns. 180, 5 Am. Dec. 332.

And that a note calling for a definite sum of money at a fixed time was by the terms of an oral agreement to be paid from time to time until the note was paid and satisfied is a variance of its terms, and cannot be proved in defense. *Trentman v. Fletcher*, 100 Ind. 105.

And parol evidence tending to show that the maker of a note was not to be called upon for the principal while he should continue to pay the interest is not admissible as a defense in an action on the note. *Church & Congregation in Second Precinct in Pembroke v. Stetson*, 5 Pick. 506.

And a parol agreement to wait for the payment of a note made payable by its terms as soon as the maker could, until a certain draft should have been received, cannot be established 43 L. R. A.

Etna Ins. Co. 30 N. Y. 136, 164, 86 Am. Dec. 362.

An illustration frequently given is that if a landlord, even without consideration, agrees that his tenant may pay after rent day, and by reason thereof he should omit to pay at the day, the landlord is estopped from enforcing a forfeiture.

Such an estoppel arises whenever an act is done or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair. *Marston v. Kennebec Mut. L. Ins. Co.* 89 Me. 266, 272. *Judgment for defendant.*

as a defense in such an action. *Kincaid v. Higgins*, 1 Bibb, 396.

Nor can such an agreement that the note was not to be paid until a certain suit was decided. *Van Etten v. Howell*, 40 Neb. 850.

Nor is a parol agreement on the part of the payees of a note not to dispose of or call for payment of the note until certain debts for the payment of which the maker had become surety for the payee were settled, made at the time of giving the note, admissible in evidence. *Frost v. Everett*, 5 Cow. 497.

And that it was agreed between the parties to a note at the time of its execution that it should not become due and payable until the maker should sell a designated quantity of a specified article, the right to vend which formed the consideration for the note, and that he had not sold any of it and could not have done so by the use of due diligence, and that the holder of the note had notice of the agreement previous to the assignment of the note, is no defense in an action on the note, as it constitutes an attempt to vary its terms by parol. *Harlow v. Boswell*, 15 Ill. 56.

So, a plea to the declaration upon a promissory note that contemporaneous with the making of the note an agreement in writing was made between the maker and other designated persons and the plaintiff that the note should not become due and payable until a designated person attained the age of twenty-five, or in the event of his death before that age until certain moneys became divisible under the will of another, and that the former was still living and had not attained the age of twenty-five, is no bar to the right to recover. *Webb v. Salmon*, 19 L. J. Q. B. N. S. 34, 13 Q. B. 886.

And a verbal agreement between the parties to a note payable on demand for value received and for kindness of the payee, that the note should not be demanded until after the death of the maker, cannot be proved in an action on the note to show that it was not given for a valuable consideration. *Woodbridge v. Spooner*, 1 Chitty, 661, 8 Barn. & Ald. 233.

And evidence of a parol agreement between the parties at the time of making and indorsing a note that payment should not be demanded until after the sale of the estate of the maker cannot be received in evidence to establish a waiver of the right of the indorser to notice of nonpayment by the maker. *Free v. Hawkins*, 8 Taunt. 92, Holt, N. P. 550, 1 J. B. Moore, 535.

Nor is a verbal agreement contemporaneous with the making or indorsing of a note by which the note is not to be paid or become payable until the maker has realized the amount thereof from a specified source, admissible in evidence in an action on the note by the payee against the maker, or by an indorsee against his immediate indorser, where the alleged agreement and the bond connected with it do not show a failure of consideration. *Lewis v. Jones*, 7 Bosw. 370.

And an oral agreement to extend the time of payment of notes given for patent rights until the purchaser could make the money out of the business in which he intended to embark such patent rights, made at the same time and as part of the contract evidenced by the notes, is not admissible in evidence in an action upon them. *Ockington v. Law*, 66 Me. 551.

And an agreement between a vendor and a purchaser that the purchaser should buy a larger quantity of property than was first intended, and pay the vendor a designated sum for a specified purpose, in consideration for which the purchaser would wait for payment of the balance until he had made it out of the property purchased, which he carried out by a purchase of the property, for which the purchaser gave his absolute note, cannot be proved by parol as a defense in an action thereon, as it would be an attempt to prolong the date of payment of the promissory note by parol beyond the time specified in it. *Campbell v. Upshaw*, 7 Humph. 185, 46 Am. Dec. 75.

So, an agreement by the parties at the time a note was given that payment thereof was not to be asked or demanded until it was possible or convenient for the maker to spare from his business the amount thereof, and a demand for the payment and suit brought thereon at a time when the maker could not so spare the money, cannot be set up by parol as a defense. *Clarke v. Allen*, 132 Pa. 40.

And while parol evidence is admissible to show the consideration of a note, and to show a total or partial failure of consideration, an agreement by the payee with the maker of the note not to enforce payment faster than the maker should be able to pay is not provable by parol in an action on the note, as it would tend to contradict the note. *Holsworth v. Koch*, 26 Ohio St. 33.

And a bill in equity to restrain the collection of a judgment rendered on a promissory note will not lie upon the ground that a parol contemporaneous agreement was made by the parties that the note should not be the subject of legal proceedings to enforce its collection for two years, unless the payees became embarrassed and were in falling circumstances, though the two years had not expired before the commencement of the action. *Cooper v. Tappan*, 4 Wis. 362.

Nor can a parol agreement entered into by the parties when a promissory note was made, that it should be renewed and payment should not be demanded when it became due, be given in evidence in an action on the note. *Hoare v. Graham*, 3 Campb. 57; *Bond v. Worley*, 26 Mo. 253; *Stiles v. Vandewater*, 48 N. J. L. 67; *Helst v. Hart*, 73 Pa. 286; *Anspach v. Bast*, 52 Pa. 356; *Ellis v. Hamilton*, 4 Sneed, 512; *Dukes v. Dow*, cited in *Chitty on Bills*, 9th ed. p. 143.

And an agreement between the makers and payees of a promissory note, that the payees would receive 10 per cent of the amount of the note when it became due and accept a new note payable seven months thereafter for the residue, will not bar an action on the note where there was no pretense of performance upon the part of the makers. *Dawson v. Bank of Illinois*, 5 Ill. 56.

So, parol evidence cannot be received in an action on a promissory note expressing an unconditional promise to pay money, to show that by a written agreement entered into prior to the execution of the note the payee and other creditors promised to grant extensions on their claims if all the creditors would do the same, which was never signed by all the creditors. *Garner v. Flite*, 93 Ala. 405. 42 L. R. A.

And an agreement between a debtor and creditor by which the debtor was to convey certain lands to the creditor in trust to secure a note given for the indebtedness or any renewals thereof, pursuant to which the transfer was made and notes given and renewals made, but afterwards and before the expiration of the time for which the creditor contracted to renew he refused to do so, is not a good defense in an action on the note thus refused to be renewed, as it would go to vary the terms of the note sued upon by a parol agreement made prior to the note itself. *Harper v. Paterson*, 14 U. C. C. P. 538.

And an agreement entered into by the parties to a note at the time of its indorsement, that three notes should be executed and used as renewals of each other so as to make the amount fall due when the cotton crop should come in, cannot be proved by parol evidence as a defense in an action on the note. *Diercks v. Roberts*, 13 S. C. 338.

A court of equity may refuse to enforce a contract consisting of a promissory note, however, over a verbal agreement based upon a good consideration extending the time of payment for a definite period, which has not yet expired. *Nelson v. White*, 61 Ind. 139.

e. As to place of payment.

Where a note fails to designate the place of payment, parol evidence is not admissible to show an agreement between the parties that it was to be paid at a place different from that which the law implies from such failure to state the place. *Moore v. Davidson*, 18 Ala. 209.

And counsel in an action on a note will not be permitted to argue to the jury that an agreement existed between the parties that it was to be payable at a different place than that indicated in the note itself. *Pierce v. Whitney*, 29 Me. 188; *Specht v. Howard*, 16 Wall. 564, 21 L. ed. 348.

f. As to medium of payment.

The legal effect of a promissory note cannot be varied by proof of a contemporaneous oral agreement that the note should be discharged in any other manner than by the payment of money according to its terms. *Rugland v. Thompson*, 48 Minn. 539. And see *Patrick v. Petty*, 83 Ala. 420; *Tuscaloosa Cotton-Seed Oil Co. v. Perry*, 85 Ala. 154, *infra*, IX.

Thus, recovery on a promissory note cannot be defeated by showing a contemporaneous verbal agreement on the part of the payee that when the note became due he would receive payment thereof in a designated kind of money, and that such money was tendered and refused. *Burns v. Jenkins*, 8 Ind. 417.

And a parol agreement or understanding between the maker of a note and a bank discounting it for his use that the bank would receive payment of the note in the bills of a designated bank, is inadmissible in evidence in an action on the note as tending to contradict its terms. *Racine County Bank v. Keep*, 13 Wis. 210.

And parol evidence that a note for the payment of money was by the agreement of the party to be paid in the commonwealth's paper, is inadmissible in an action on the note as an attempt to vary a written agreement by parol, and the rule is the same in chancery as in common-law courts. *Baugh v. Ramsey*, 4 T. B. Mon. 155.

An agreement that a promissory note was not to be paid in money clearly contradicts the legal terms of the note, and cannot be established by parol. *Linville v. Holden*, 2 MacArth. 329.

Nor is parol evidence of an agreement that a

note to be canceled by a cotton bond was to be paid in the notes of a certain bank which had been tendered by the principal debtor, who was still ready and willing to pay in such notes, admissible in an action upon the note, as this would establish an entirely different contract. *Cole v. Hundley*, 8 Smedes & M. 473.

And an understanding between the parties to a note which is absolute upon its face for a designated amount, that it was to be paid in confederate states' money, and that the word "dollars" therein should be understood to mean confederate dollars, constitutes no defense in an action on the note, and is demurrable when set up as such. *Roane v. Green*, 24 Ark. 210; *Leslie v. Langham*, 40 Ala. 524; *Miller v. Lacy*, 33 Tex. 351.

And that a purchaser of a note agreed at the time of the purchase that he would take confederate money from the maker in payment, provided payment be made immediately on presentation, cannot be given in evidence as a defense in an action against the maker on the note, as the promise was on a condition never performed, and was without consideration to support it. *Johnston v. Josey*, 34 Tex. 533.

So, parol evidence in an action on a note payable in the notes of the charter bank of Mississippi at par, that it was intended by the makers that it was to be paid in a different kind of funds, is not admissible in an action on the note, as there is no latent ambiguity in the note in this respect. *Smith v. Elder*, 7 Smedes & M. 507.

And that during the progress of a sale the auctioneer proclaimed to the by-standers that bank notes of a certain railroad company would be taken in payment for the notes given for the purchase money, if the same were punctually paid, and urged the by-standers to purchase upon the ground that they could obtain property with spurious money, cannot be proved by parol as a defense in an action on a note given for property purchased at such sale. *Hair v. La Brouse*, 10 Ala. 548.

And an agreement between the parties to a note which was absolute on its face that it was to be paid in work, and that collection was to be delayed to give the debtor the benefit of such agreement, cannot be established by parol in an action on the note. *Borden v. Peay*, 20 Ark. 293.

Nor is a verbal agreement between the parties to a note which was made payable in the usual way, that it should be paid in lumber, admissible in evidence as a defense in an action on the note, as parol evidence would thereby be used to change the notes in a material point. *Lang v. Johnson*, 24 N. H. 302.

And an agreement which was part of the contract which gave rise to a note, that if the maker after having made every reasonable exertion to pay the note at maturity should not be able to do it the payee would take goods for the debt, or give the maker further time until he should be able to pay it without sacrificing property, and that the maker had been at all times ready to pay the amount in goods, but had not been able to pay in money without a sacrifice of property, constitutes no defense in an action on the note. *Cox v. Wallace*, 5 Blackf. 199.

So, parol evidence that a note was given for a bill of goods and that it was agreed that land should be taken in payment if the purchaser had not the money to pay for the goods when the bills matured, is not admissible as a defense in an action on the note, as it would transform the note into an agreement payable in property. *Barhydt v. Bonney*, 55 Iowa, 717.

And a verbal agreement between the parties to a promissory note that upon the maker's giving

a deed of certain property the note should be given up, is not admissible as a defense in an action on the note. *Spring v. Lovett*, 11 Pick. 417.

So, parol evidence in an action on a promissory note that at the date of its execution the parties were tenants in common of a tract of land, and that it was agreed between the parties that the payee should convey to the maker her one-fourth interest, and that in consideration therefor he should pay her thereafter an annuity, and that the note sued on was drawn up and signed for the purpose of securing the payment of the annuity, is not admissible. *Coapstick v. Bosworth*, 121 Ind. 6.

And parol evidence of an agreement between the parties to a note given in payment for goods that the note should be paid by a quitclaim and writing then made, and that a mortgage upon the goods should cease to have any legal effect, which was admissible only for the purpose of proving fraud in the written agreement, cannot be used in an action of trespass for damages for carrying away the goods under the mortgage to vary or control the terms of the agreement. *Leonard v. Smith*, 11 Met. 330.

On this subject, see also *infra*, VIII.

g. As to mode of payment.

Parol evidence of an agreement that a note for a sum of money certain should be paid in a particular mode is inadmissible in an action on the note. *Murchie v. Cook*, 1 Ala. 41, cited in *Beard v. White*, 1 Ala. 436; *Borden v. Peay*, 20 Ark. 293.

Thus, parol evidence of an understanding between the parties to a note which was unambiguous and made payable in money twelve months after date, that it was not to be paid in money, but that it was to be discharged by the crediting of certain unsettled accounts, is not admissible in an action on the note. *Clark v. Hart*, 49 Ala. 86.

And that at the time a note was given it was agreed by the parties that the payee was to hold it until it fell due, and receive his own note for the same amount in exchange therefor, and that the maker was ready to fulfill the agreement, having taken up the note from the holder, is not a good defense in an action on the note, as it would in effect change the mode of payment by a contemporaneous agreement not contained in the writing. *Fields v. Stunston*, 1 Coldw. 40.

And one who receives a sum of money from another, and gives his note therefor, cannot be allowed to show in defense by parol that he received the money at the request of the other and applied it as requested, in payment of a judgment against the other's son, and that it was not intended to operate as a note but merely as a memorandum of the amount received, and that it was agreed at the time that the payment of the money in the way agreed upon should be a satisfaction of the note, as such defense would transform the note by parol testimony into a mere memorandum or receipt. *Dickson v. Harris*, 60 Iowa, 727.

So, an agreement to allow a set-off to an indebtedness is waived by the subsequent or contemporaneous giving of a note therefor. *Dayhuff v. Dayhuff*, 27 Ind. 158.

And that the maker of a note for \$100 was indebted to the payee at the time it was given in the sum of \$75, and that the payee then and there agreed to pay him the difference between the note and the indebtedness, and the note was made and accepted on condition of such payment, but that the payee did not pay such difference, and that therefore he is entitled to recover

\$75 only, is not a good defense in an action on the note. *Kelly v. Lisk*, 18 U. C. Q. B. 418.

Nor is an oral agreement between the parties contemporaneous with a note for money borrowed of an insurance company which was indorsed for accommodation, that such sum as should be found justly due from the company to the maker on a certain policy of insurance made by them to him should be set off and applied in satisfaction of the note, admissible in evidence in an action on the note by the insurance company against the indorser. *St. Louis Perpetual Ins. Co. v. Homer*, 9 Met. 39.

And an answer to an action on promissory notes, alleging that they were made for the purchase money of certain lands sold by an administrator, and that the purchaser had a probated demand against the estate of the intestate, and that at the time of the sale the maker had a verbal understanding and agreement with the administrator that payment of the notes would not be exacted, but that he might retain the amount thereof on his claim, and that the administrator had conveyed the lands but refused to surrender the notes pursuant to the agreement, presents no defense. *Bishop v. Dillard*, 49 Ark. 285.

So, that a note was signed and delivered on an understanding and agreement that the payee would hold it and present it as so much due from the maker in settlement of their partnership accounts, cannot be proved by parol in an action on the note. *Wharton v. Douglass*, 76 Pa. 273; *Currier v. Hale*, 8 Allen, 47.

And that a note was given upon the understanding that it was to be reckoned in by the maker as part of a sum of money which the payee was to pay in as his share of the funds to be contributed by them toward a contemplated partnership, but that the payee afterwards refused to complete the contemplated arrangement, is not a good defense in an action on the note, as it sets up a parol agreement in variance with the written instrument. *Adams v. Forde*, 13 U. C. Q. B. 485.

Nor can an agreement between the parties to a note that before it became due the payee would procure an adjustment of an account between the maker and a company of which the payee was a member, and the application of the amount due the maker in part or full payment of the note, and that suit should not be brought on the note until after the settlement, and the fact that no settlement had been made, be set up by parol as a defense in an action on the note. *Mahan v. Sherman*, 7 Blackf. 378.

And a contemporaneous verbal agreement, made by the parties to a note given by one partner to another, after dissolution, for money advanced to him, that the note should be paid out of the effects of the firm, and that if such effects were not sufficient then the lender should pay three fourths and the maker one fourth of the balance, cannot be proved by parol in an action on the note. *Gridley v. Dole*, 4 N. Y. 486.

And an oral agreement between the maker and payee of a note given in settlement of partnership affairs, that the note was to be delivered up and canceled on the delivery of a bill of sale of certain property of the partnership by the maker to the payee, is not admissible in evidence, as it would go to change an absolute note into a conditional one by oral evidence. *Perkins v. Young*, 16 Gray, 392.

So, an understanding between the parties to a note contemporaneous with it that it should be payable only out of a surplus arising from the assets of a debtor from property conveyed to the maker cannot be set up as a defense in an action on the note, as this would vary or

add to the terms of the written contract by parol. *Guy v. Bibend*, 41 Cal. 322.

And a note payable in good, well-finished plows cannot be controlled by parol evidence that it was also agreed when the note was given that if there should be improvements in the pattern of plow the holder of the note should be entitled to have plows of the improved pattern. *Gilman v. Moore*, 14 Vt. 457.

Nor can a note payable to a designated person or order be shown by parol to have been made, by the agreement of the parties, payable to somebody else. *Strachan v. Muxlow*, 24 Wis. 21.

And a verbal agreement by the payees of a note that they would pay it themselves at maturity constitutes no defense in an action on the note, as it would tend to vary its terms by parol evidence. *Miller v. Wells*, 46 Ill. 49.

Nor can the maker of a note show by parol, in an action thereon, that a guaranty indorsed upon the note was accepted by the payee at the time it was made in full satisfaction of the note. *Smith v. Stevens*, 8 Ind. 332.

And an agreement by the payee in a note to collect a subscription from members of the church and apply the proceeds to the payment of the note, which he failed to do, cannot be established by parol as a defense against the note. *Cianin v. Esterly Harvesting Mach. Co.* 118 Ind. 372, 3 L. R. A. 863.

In *Murchie v. Cook*, 1 Ala. 41, however, it was held that parol evidence is admissible in an action on a note to establish an agreement contemporaneous therewith, to receive in part payment thereof a debt of another person, as such evidence would explain why the note was given and its consideration, but would not vary its terms.

On this subject, see also *infra*, VIII.

b. As to amount to be paid.

While a verbal contract may constitute the consideration of a promissory note, and may be shown as such, a note for a given amount cannot be trammelled with a verbal condition which shall make it obligatory for a less sum or otherwise alter or vary it. *Swank v. Nichols*, 20 Ind. 198, 24 Ind. 199.

And parol evidence in an action on a promissory note absolute in form is inadmissible to show that the promise was a conditional one, and that in a certain event only part of the amount named in the note was to be paid. *Smith v. Thomas*, 29 Mo. 310.

Thus, that the payee of a note sold it to the holder for much less than the sum due upon it, and made a verbal arrangement with him that he should exact of the maker only about as much as he had given for it, in consequence of the insolvency of the maker, is no defense in an action thereon by the holder against the maker. *Babson v. Webber*, 9 Pick. 163.

And a parol agreement made at the same time with the execution of a promissory note, that a certain sum should be indorsed on it as paid of that date, is inadmissible in evidence in an action on the note. *Walters v. Armstrong*, 5 Minn. 448.

Nor is parol evidence admissible to prove that at the time a note was made there was an agreement that the value of certain pettries should be credited on the note when the amount should be ascertained. *Featherston v. Wilson*, 4 Ark. 154.

And where a promissory note is made, the consideration of which is to be defeated if certain bills of exchange shall not be paid in the hands of an assignee without notice, the nonpayment of the bills cannot be set up as a defense. *Thomas v. Page*, 3 McLean, 369.

So, no reduction in the amount of the recovery

on a note given for an insurance premium can be secured by evidence of an understanding that the amount thereof was fixed with liberty to the insured to go to a certain place, and that it should be less if he did not go, and that he did not go. *Phillips v. Halsey*, 1 Root, 194.

And parol proof of an agreement between the parties to a note given for the hire of a negro, that if the negro was taken sick he was to be sent home and his owner was to lose the time of such sickness, is inadmissible in an action on the note, as it constitutes an attempt to add a condition to the contract not expressed therein. *Lane v. Price*, 5 Mo. 101.

And that a note was given for the hire of a negro, and that it was agreed between the parties that as the negro was sickly the hirer should deal tenderly with him, and that the value of the time which should be lost by him on account of sickness should be deducted from the promissory note, and that he was sick for a long time during the hiring, constitute no defense in such an action, and a plea setting up such facts is demurrable. *Caldwell v. May*, 1 Stew. (Ala.) 425.

Nor is parol evidence of an agreement between the maker and payee of a note that the payee, who was an attorney, should receive from the maker, who had engaged his professional services, \$100 if he should be discharged on the preliminary examination, but if he should be held for bail and indicted the attorney should receive \$300, pursuant to which the note was executed for \$300, admissible in evidence in an action on the note, as it would tend to alter the conditions of the contract embodied therein. *Atherton v. Dearmond*, 33 Iowa, 353.

So, an agreement between the parties to a joint and several note that one of the makers was to be discharged from any further claim upon the note upon the payment of a less sum than was due by the other maker, and the payment of such less sum in pursuance of the agreement, is in direct contradiction to the promise contained in the note, and, whether verbal or in writing, cannot be set up in defense in an action thereon by the maker who was to be discharged by such payment, where the other maker had not appeared in the action. *Shed v. Pierce*, 17 Mass. 629.

And where a promissory note is given for a specific sum, evidence that at the time of giving the note it was agreed between the parties that an account which the maker held against the payee should be deducted from the note is not admissible in an action on the note. *Eaves v. Henderson*, 17 Wend. 190.

And a verbal agreement between the parties to a note given for the purchase price of certain accounts that the maker should have a set-off against the note to the amount of notes and accounts sold to him by the payee which he failed to collect, goes directly to add to and vary the writing, and unless a sufficient foundation is laid for its introduction, is clearly inadmissible in evidence in an action on the note. *Paysant v. Ware*, 1 Ala. 160.

Nor is parol evidence of an agreement between the parties to a note that if it was too large to pay the account between them a deduction was to be made, admissible in an action on the note, as it tends to vary the written contract. *Godard v. Hill*, 33 Me. 582.

And notes and mortgages given to close and settle an account cannot be defended against on the ground that when they were given it was agreed by parol that if they were found to be for too much they should be credited down and stand only for the true debt. *Gyar v. Walton*, 79 Ga. 466.

But see *infra*, VI.
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So, that a note was made and delivered to the payee in part consideration for a stock of goods bought of the payee, and of certain notes, books of account, etc., belonging to the payee and another and assigned to him, and that it was agreed between them that if any mistakes were discovered in the amounts due upon such notes, books of account, etc., the sum should be allowed and indorsed, one half upon these notes and one half upon another note given at the same time, is not provable by parol as a defense to a note. *Gregory v. Hart*, 7 Wis. 532.

And an answer in an action on a note given for the purchase price of plaster to be delivered that it was agreed between the parties that when the note matured the maker should only pay for the plaster which had been delivered, is bad on demurrer. *Royal Canadian Bank v. Minaker*, 19 U. C. C. P. 219.

And a contemporaneous oral agreement made at the time of giving notes for the purchase price of certain lands and timber thereon, by which in case the timber on the lands should fall short of a certain amount the maker was to be allowed a certain rate per thousand, and the fact that there was a shortage, cannot be set up as a defense in an action on the notes. *Hubbard v. Marshall*, 50 Wis. 322.

So, a verbal agreement between the vendor and purchaser of lands for the purchase price of which a note was given, that the vendor would get the land surveyed and if the amount fell short all difference should be indorsed on the mortgage given to secure the note, is merged in the deed given for the lands, which must be presumed to contain all the terms finally agreed upon, and would be inadmissible in evidence as tending to contradict and vary the note and verdict. *Martin v. Hamlin*, 18 Mich. 354, 100 Am. Dec. 181.

And a parol agreement between the parties to a note given in payment of the purchase price of lands, which was payable absolutely at stated periods, that if any repairs were necessary to the mills or dam upon the property purchased within three years they were to be made by the purchaser and allowed out of the last payment, is inadmissible in evidence in an action on the note, as it would tend to add to or diminish the written contract. *Beard v. White*, 1 Ala. 436.

Nor can the maker of a note prove as a defense in an action thereon that at the date thereof he purchased among other things a lot of wheat growing on the payee's farm at a designated price per acre represented to be a designated number of acres for which the said note was given, and that it was orally agreed that the wheat should be afterwards measured and the price should vary as the acres varied from the designated quantity, and that the measurement was afterwards made and the amount found to be much less. *Carter v. Hamilton*, 11 Barb. 147.

And a parol understanding between the parties to a note given for the support of a bastard child that if it should be born dead, or should die within a short time and should not occasion much expense and trouble, the maker should be required to pay only a part of the amount named in the note, together with proof of the death of the child, cannot be set up in defense in an action on the note. *Potter v. Earnest*, 45 Ind. 418. But see *Fellows v. Carpenter*, Kirby, 364, *infra*, VII.

And that it was agreed between the parties that a note made by a bankrupt was to be paid out of the bankrupt's allowance so far as it went, and the residue only to be paid by him, cannot be given in evidence as a defense in an

action on the note. *Rawson v. Walker*, 1 Starkie, 361.

And a parol agreement between the parties to a promissory note given for a stock of goods which were sold to the maker, that neither of the makers would be required to pay any part of it farther than such sum as could be realized out of the goods, cannot be set up as a defense in an action on the note, as it would absolutely annul the written contract. *Bowers v. Linn*, 14 Ky. L. Rep. 889.

So, an oral understanding between the parties contemporaneous with the execution of a note given for goods which had been sold by a trustee under a chattel mortgage of merchandise given by a debtor for the benefit of certain creditors, one of whom was the purchaser, that it was anticipated that the goods remaining would produce enough to pay the other creditors interested in the trust in full; and if so the maker of the note would not be called upon for anything on it; but if the remaining goods in the trustee's hands did not produce sufficient to pay those interested in the trust in full the maker of the note would be called upon for enough in cash, so that the other creditors named in the mortgage would receive the same ratable proportion of their debts or claims as the purchaser,—is not admissible as a defense in an action on the note. *Atkinson v. Weldner*, 79 Mich. 575.

And an oral agreement annexed as a condition to the payment of promissory notes that if the maker should be forced to assign for the benefit of his creditor, the payees should file their claims on the notes with the assignee as provided by law and execute and file with the clerk of the court a full release to the maker of all claims other than such as might be paid by the assignee under the provisions of the statute, is inadmissible as a defense in an action on the note under the rule that a written contract cannot be contradicted, altered, added to, or varied by oral evidence, as the oral agreement relates to the very matters covered by the writings, and is inconsistent with their express terms; and it is not a case where the agreement was oral, and the writings executed in performance of part of it, leaving another and separate part of it still wholly in parol, or of a separate collateral agreement upon a matter distinct from that to which the writings relate, and upon which they are silent. *Harrison v. Morrison*, 39 Minn. 819.

So, where parol evidence of an agreement between the parties to a note given in settlement of partnership affairs, that it was subject to change with reference to the amount of assets collected, is relied upon as a defense if it were otherwise admissible, the maker of the note would effectually preclude himself from a resort thereto by an indorsement made just before the statute of limitations ran against it of a payment on account for the purpose of reviving the note. *McSherry v. Brooks*, 46 Md. 103.

And where, on an adjustment between partners of partnership affairs, a note is given by one to the other, under an agreement making it subject to future possibilities from a change of the amount that might be realized from the debts due, the amount to be made larger in case more was realized and to be charged with a proportionate amount in case of loss, the burden rests with the maker of the note as to any bad or doubtful debts, which would entitle him to a credit thereon. *Ibid*.

So, a verbal agreement between the parties to a note providing for the payment of lawful interest, to pay a usurious rate, does not invalidate the note. *Butterfield v. Kidder*, 8 Pick. 512.
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See also *Makepeace v. Harvard College*, 10 Pick. 298; *Blake v. Blake*, 110 Mass. 202, *infra*, IX.

1. As to capacity of maker.

An oral contemporaneous understanding between the parties to a note absolute on its face, that the maker acted only as the agent of another, cannot be set up in defense against the note, as it would tend to control the express terms of the written instrument. *Hiatt v. Simpson*, 8 Ind. 256.

And oral testimony is not admissible in an action on a note signed by the president and treasurer of a corporation in their individual names to show that at the time the note was given, and afterwards, it was understood and agreed by the parties that the note was the note of the corporation. *Davis v. England*, 141 Mass. 587.

And a note signed by an individual, adding to his name treasurer of a designated parish, is his note, and evidence that it was understood and agreed between the parties that it was to be the note of the parish is inadmissible in an action thereon between the original parties. *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409.

But an oral agreement between the holder of a note made in the name of a company by its treasurer and indorsed with the name of the company by its directors, made in a talk with the directors that there should be no personal liability on the note, means that there should be no statutory liability on the part of the stockholders, and is admissible in defense of a pleading in equity against the stockholders to enforce payment of a judgment, and is not merged in the judgment. *Brown v. Eastern Slate Co.* 134 Mass. 590.

So, where one signs his name to a promissory note with the addition of the word "trustee" he cannot defend against personal liability thereon by showing a parol agreement made at the time of the execution of the note that he was not to be personally liable but that the payment was to be made out of a trust fund of which he was trustee. *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529.

And that a note was given for money loaned by the payee to a congregation, and that the maker of the note was a priest of such congregation and the lands upon which security was given were held by him in trust for the congregation, and that it was understood and agreed between the parties that such congregation and not the maker was to repay the loan, cannot be set up by parol as a defense against the note. *Benoit v. Schneider*, 47 Ind. 13.

So, that two or more parties make a joint and several note, and two others indorse it, with an agreement, either verbal or written, that the maker shall be only jointly bound with them for its payment, would not affect the several character of the note or the liability of the makers thereon. *Latham v. Houston Flour Mills*, 68 Tex. 127. See also *First Nat. Bank v. Tisdale*, 18 Hun, 151, *Affirmed*, 84 N. Y. 655, *supra*, II. b.

And when the payee of a note sells it for value and before maturity, and at the request of the purchaser writes his name below that of the maker, he becomes joint maker and not indorser by the written contract, and where no fraud or mistake is shown parol evidence cannot be introduced to show that by the contract of the parties he was to be an indorser only. *Cook v. Brown*, 62 Mich. 474.

And though the absolute written contract between the parties contained in a note cannot be varied by parol in equity any more than in law, where an equity arises from a relation of surety and principal between the maker and another,

and the holder had notice thereof at the time he took the note, a plea that the maker made the note jointly with such other person for his accommodation and as surety for him, and that the note was delivered and taken on an agreement that the maker should be liable as surety only, and afterwards and without the maker's consent it was given to the principal but for which the surety might have obtained payment, is good on demurrer. *Pooley v. Harradine*, 7 EL. & HL. 431, 26 L. J. Q. B. N. S. 156, 3 Jur. N. S. 458, 5 Week. Rep. 405.

So, a plea in an action against one of three makers of a joint and several promissory note, that the note was made by him as a trustee of a loan society and delivered to secure the repayment of money loaned to another, and that it was agreed in writing between the holder of the note and the person who received the money and the society that the loan should be repaid by the person receiving it by weekly instalments, and that if default should be made notice should be given to the maker, and that if the money was not paid according to such notice, legal proceedings might then be taken upon the note but not before, is not sustained by the production of the book of regulations of the society containing like provisions, where there was nothing to connect the book with the note sued on without the aid of oral testimony. *Brown v. Langley*, 5 Scott, N. R. 249, 4 Mann. & G. 466, 12 L. J. C. P. N. S. 62.

j. As to negotiation.

An agreement between the parties to a note that it was not to be transferred or assigned is not good as a defense in an action on the note. *Dolson v. De Ganahl*, 70 Tex. 620; *Knox v. Clifford*, 38 Wis. 651, 20 Am. Rep. 28.

And a condition that a promissory note was to be held by the payee and not made use of until the maker should return from abroad or should send a power of attorney to someone to receive the note and collect the amount, which had not been performed, cannot be given in evidence in an action on the note where it consists of a mere verbal understanding. *Reed v. Reed*, 11 U. C. Q. B. 26.

And a note made payable to the order of a specified person cannot be defended against on evidence of a contemporaneous oral agreement that it was not to be assigned or transferred except to a particular person named, as to allow such proof would be to violate the law of evidence that written contracts cannot be varied by parol agreement made at the same time. *Johnson v. Washburn*, 98 Ala. 258. See also *Frost v. Everett*, 5 Cow. 497, *supra*, II. d; *Dow v. Tuttle*, 4 Mass. 414, 3 Am. Dec. 226, *infra*, III. b; *Wood v. Sheehan*, 68 N. Y. 365, *infra*, IV. b.

k. As to subject-matter of the consideration.

A verbal agreement between the maker and payee of a note that the maker would save the payee harmless from any loss he might sustain by trading with the property for which the note was given, is inadmissible in evidence in an action on the note, as tending to contradict it. *Harris v. Caston*, 2 Ball. L. 342.

And parol evidence that the payee in a note purporting to have been given for the rental of land agreed to repair the fencing on the land, and that he failed to do so, in consequence of which the maker's property was damaged by the breaking in of stock, is not admissible in an action on the note. *Evans v. Bell*, 20 Ala. 509.

And where it is verbally agreed that a vendor should erect a house and build a well upon the 45 L. R. A.

premises conveyed according to certain plans and specifications agreed upon, and that the price of the house and well should be added to that of the real estate, and notes evidencing payments agreed to be made are given, a violation of the verbal agreement to erect the house and build the well cannot be set up in defense in an action on the notes, as the oral negotiations must be treated as merged in the writing. *Worthington v. Gross*, 72 Ill. App. 337.

But see *infra*, VI.

Nor will an oral agreement by the parties to a note given for an insurance premium, that the policy should constitute a part of the contract, and that the rights of the parties should be determined by a reference to it and the charter, be permitted to change the terms of the note. *American Ins. Co. v. Gallahan*, 75 Ind. 168.

And a purchaser of slaves for the purchase price of which he gives his note cannot show by parol in an action thereon that by the contract of sale the vendor was to deliver one of the slaves, and that he failed to do so, where the bill of sale contains no words of delivery. *McCoy v. Moss*, 5 Port. (Ala.) 88.

So, parol evidence of an agreement contemporaneous with a note given for a subscription to a railroad company and payable when the track of the railroad should be laid for a designated distance and the cars should have run thereon, to the effect that such completion of the road was to have been done within two years, is inadmissible in an action on the subscription note. *Cairo & V. R. Co. v. Parker*, 84 Ill. 613.

And verbal promises of a corporation receiving a note in payment of a subscription for stock payable one year after its railroad shall be completed to a designated place if completed by a specified date, that it would construct and complete its line from such place to another more distant place within one year after the date fixed in the note for the completion to the former place, and proof that it had failed to perform such undertaking and entirely abandoned the project of continuing the road to the latter place, cannot be availed of as a defense, as it would be contradicting the terms of the written instrument by parol evidence. *Blair v. Buttolph*, 72 Iowa, 31.

And a parol contemporaneous agreement between the maker and payee of a note that the maker should be entitled to all the educational advantages of the educational institution of the payee for one person until the note became due and perpetually thereafter, and that the note should not be payable until the university issued to him such perpetual scholarship, and that in case of failure or refusal to give such rights the note should be null and void, and that such conditions were broken,—is inadmissible in evidence to establish a defense in an action on the note. *Wayland University v. Boorman*, 56 Wis. 657.

And in *Craig v. Baptist Edu. Soc.* 7 B. Mon. 73, it was said that where a note is absolute and unconditional on its face it may well be doubted whether any promise or representation as to the intended special application of the fund could be sustained by parol proof, as the absolute promise imports an undertaking on the part of the promisor to pay without stipulation or condition; but the case was decided upon the ground that parol proof could not be made to show the moving consideration when the objects and consideration were various.

So, a parol agreement between the maker and payee of a note given for the purchase price of a negro, that if the negro did not suit the purchaser when the note fell due the vendor should take him back and give up the note, cannot be

proved by parol in an action on the note. *Daniel v. Ray*, 1 Hill, L. 32. See also *Caldwell v. May*, 1 Stew. (Ala.) 452, *supra*, II. h.

And that a note was given for a stove sold and delivered on the date of the note, and that it was then agreed between the parties that at the expiration of a year from the date of the note the purchaser might elect to pay the amount specified in the note or to return the stove in satisfaction of the note, and to pay him \$6 for the use of it, and that he elected to return the stove, which he did and tendered the \$6 which the vendor refused to receive, cannot be established by parol to defeat the collection of the note. *Bradley v. Bentley*, 8 Vt. 243.

Nor is parol evidence that upon the day of the date of a note given in part payment for a horse it was agreed, as an inducement to the sale, that if the purchaser within three months should become dissatisfied with the horse he might return him to the vendor and rescind the contract, and that within such time he offered to return the horse and demanded the note and money, admissible in an action upon the note, as it would go to annex a condition to an absolute promise in writing. *Allen v. Furbush*, 4 Gray, 504, 64 Am. Dec. 87; *Isaacs v. Elkins*, 11 Vt. 679.

No, a verbal agreement between the parties to a note given for a part of the purchase price of land that the purchaser should have the option of retaining the contract and paying the note, or of surrendering the contract and thereby discharging his liability, is not admissible in evidence as a defense in an action on the note in connection with proof of the exercise of the option to surrender the contract. *McEwan v. Ortman*, 34 Mich. 325.

And where at the time a note was given a writing was executed between the parties showing that the payee had sold the maker a designated amount of stock in a bridge company, and agreeing that if the company should reduce the amount of the old stock he was to account to the maker for the amount so reduced, parol evidence cannot be given to show that the reduction was to take place upon a particular consideration, and that none had taken place upon that consideration. *Ferris v. Ludlow*, 7 Ind. 517.

III. Collateral and independent agreements.

a. General rule.

The same rule applies to agreements contemporaneous with a promissory note, though in writing, and whether in writing or by parol when they are collateral and independent contracts, such agreements being held to be no defense on the ground that each contract is to be performed independently of the other, the nonperformance of either entitling the party injured to his remedy for the breach.

Thus, a written agreement between the parties to a note that if at the time of the maturity thereof it should not be convenient for the maker to pay it the payee would wait his convenience, in consideration of which the maker agreed to pay interest, and proof that at maturity it was not convenient for the maker to pay, constitutes no bar to an action upon the note, remedy for violation of such agreement, if any, being by suit for its breach. *Atwood v. Lewis*, 6 Mo. 392.

And a covenant to forbear to sue upon a note for a definite time for a valuable consideration is valid, but cannot be pleaded in bar of an action on the note before the time for forbearance has elapsed, the only remedy in such case being an action upon the covenant for damages. *Brown v. Shelby*, 4 Ind. App. 477; *Mills v. 43 L. R. A.*

Todd, 83 Ind. 25; *Bridge v. Tierman*, 36 Mo. 439.

And an agreement by the payee of a note to give it up at his death to the maker, reserving the right to collect the interest in the mean time, though made upon a valuable consideration cannot be pleaded as a defense to an action upon the note. *Carrier v. Sears*, 4 Allen, 338, 81 Am. Dec. 707.

Nor can the defendant in an action upon a promissory note in which the defense is confined to a denial of the execution of the note and of a consideration therefor, interpose the defense that the plaintiff failed to comply with an accompanying agreement that payment should not be compelled during the lifetime of the maker under an assignment that the court erred in refusing a general request to direct a verdict in his favor unless he failed on demand to secure such payment. *Shattuck v. Hart*, 98 Mich. 557.

And that the consideration of a promissory note was in part the compromise of a lawsuit, and that the residue was the execution and delivery to the maker by one of the parties to the action of a promissory note, and that in violation of the agreement the note was negotiated and delivered before payment of the other note, constitute no defense in an action by a holder for value. *Stewart v. Anderson*, 59 Ind. 375.

And an agreement that a note given in settlement of a slander suit and in consideration of the giving up of certain notes against the maker and an agreement to sign a retraction of the slander, that if the retraction was not signed the note was to be returned and to have no valid effect until such retraction was signed, does not invalidate the note on failure of the payee to sign the retraction, and an action may be maintained upon it. *Payne v. Ladue*, 1 Hill, 116.

And that a note was made upon consideration of the release of the maker from liability upon another note and of certain designated transfers, after receiving which the payee refused to release the maker from his liability and the transfers fell through, cannot be set up in defense in an action on the note. *Henshaw v. Dutton*, 59 Mo. 139.

So, an action may be maintained on a note given in consideration of the payee's promise to the maker to pay the latter's debt to a third person without showing performance of such promise. *Hubon v. Park*, 116 Mass. 541.

And the remedy for the breach of an agreement between the maker and payee of a note, that in consideration of certain designated notes being deposited with the payee as a security which had a certain time to run, he would not sue upon the note in question until the other notes should become due, is by a special action for breach, and does not constitute a defense in an action on the note. *Durand v. Stevenson*, 5 U. C. Q. B. 336.

And proof that a note was given to raise money to pay a former note upon which the maker and payee were the first and second indorsers respectively, and that upon the request of the maker thereof the payee agreed that if they would get the maker on the second note to indorse the first he would also indorse it, and that the note was made accordingly, does not establish a defense in an action by the indorser against several makers, one of whom signed as surety. *Sweet v. McAnister*, 4 Allen, 333.

Nor can a note payable one day after date, given for the price of certain town lots, the title to which was to be made by the vendor to the purchaser on payment of the purchase money, be defended against on the ground that the deed had not been made or offered before the

suit was commenced. *Daniels v. Stone*, 6 Blackf. 450.

And a certificate of scholarship for which a note was given and to which was appended an agreement that the note is to be returned if \$10,000 worth of scholarships were not sold in designated counties within a specified time, does not constitute a defense to an action on the note where there has been no return or offer to return the certificate. *Wood v. Ridgeville College*, 114 Ind. 320.

So, it is no defense to a promissory note that the payee had failed to fulfil an agreement, made at the time of the execution of the note, to furnish an itemized account of the goods for which the note was given, in the absence of any allegation or proof of the correctness of the account. *Crawford v. Saunders*, 9 Tex. Civ. App. 225.

And that at the time a note was made the maker paid the payee \$6, in consideration for which the payee was to send him \$6 worth of fencing material, which it failed to do, does not constitute a fraud in the transaction sufficient to avoid the note. *Van Vechten v. Smith*, 59 Iowa, 173.

Nor is a promise of the payee in a note, made contemporaneous therewith, that if the maker would make it payable in dollars he would receive commonwealth's paper in payment if it continued to be current in the country at the maturity of the note, and his failure to comply with his promise, such fraud as will entitle the maker to relief in equity against any part of the note. *Williams v. Beazley*, 3 J. J. Marsh. 579.

And an agreement to manufacture certain books to be delivered, pursuant to which some of the books were delivered and during the period of such delivery certain promissory notes were signed and delivered in consideration therefor, after which the payee refused to carry out the rest of the agreement, does not constitute a sufficient defense in an action on the note in the hands of an attorney for the payee who was not a bona fide holder for value before maturity. *Lovell v. Renwel*, 1 Pa. Dist. R. 354.

b. What agreements are collateral and independent.

No rule for determining whether a promissory note and a contemporaneous agreement are collateral and independent seems to have been laid down by the courts. But they seem to have acted upon the theory that the question depends upon whether or not it was the intent of the parties that performance of the one contract should be dependent upon performance of the other, in determining which the time and place of performance and the subject-matter of the transaction are all to be considered.

Thus, where a debtor gives his promissory note in renewal of a past-due note which had been given partly in consideration of the conveyance to him of certain lots by the payee named in both notes, he cannot defeat an action against him on the renewal note in the hands of an assignee thereof before due by showing that at the time when said renewal note was executed the payee promised to cause improvements to be made which would enhance the value of the lots, the time fixed for the performance of such promise being subsequent to the date when the note was assigned. *Nebraska Nat. Bank v. Pennock* (Neb.) 75 N. W. 554.

And a stipulation by the payee of a note that he would deliver up to the maker a certain other note in consideration for which the former note was given, is an independent stipulation, executory in its character, the two promises being made to be performed at different times, and a

recovery may be had thereon without proof of the surrender of the other note. *Traver v. Stevens*, 11 Cush. 167.

And a stipulation to procure and deliver up an execution on receiving a note is independent, and executory in its character; and while a failure to perform it gives a right of action against the party so stipulating, it is no defense to an action on the note. *Waterhouse v. Kendall*, 11 Cush. 128.

So, an agreement by the maker with the payee of a note, made at the time of its execution, that payment should not be demanded for five years, and that the payee should not sell or part with the note, and that he would wait on the maker for the money due until he turned his property to the best advantage, is not to be considered as a part of the contract with the note, and will not therefore bar an action on the note, but must be considered as a collateral promise, for the breach of which, if there be a legal consideration, an action will lie. *Dow v. Tuttle*, 4 Mass. 141, 3 Am. Dec. 226.

And an agreement by the payee of a note, made at the time of taking it, that he would transfer the note to a third person if on settlement he was found to be indebted to him, is collateral to the note, and cannot be set up in defense in an action upon it. *Porter v. Pierce*, 22 N. H. 275, 55 Am. Dec. 151.

And a note given in the settlement of an action on a note, and an agreement contemporaneous therewith, that in consideration of the giving of such note the payee would show the maker property belonging to a person indebted to him sufficient to secure his claim, though mutual promises, are independent, each party having a right of action against the other for non-performance, and the nonperformance of the agreement being no defense in an action on the note. *Plumb v. Niles*, 34 Vt. 231.

And where a suit on notes is discharged, and a new note is signed and delivered in settlement upon the condition that the original note be procured and sent to the maker in two weeks, the condition is a condition subsequent, the non-performance of which cannot be set up as a defense to an action on the last note. *Goddard v. Cutts*, 11 Me. 440.

Nor can a note given for a scholarship in a college be defended against on the ground of the violation of a scholarship bond received by the maker at the time of giving the note, reciting the note and that if he should pay the note with interest he should be entitled to the benefit of tuition in said college annually to the amount of the interest thereon, on the ground that the company had rented out its college building to ignorant and incompetent teachers who received their compensation from the tuition paid, and that the school was very bad, as he was called upon to pay his note according to the terms of the bond before being entitled to the tuition. *Oskaloosa College v. Hull*, 25 Iowa, 155. And see *Wood v. Ridgeville College*, 114 Ind. 320, *supra*, III. a.

And a note given for the purchase price of the business of a dentist, and a bond given by the vendor conditioned that he would not practise as a dentist within a certain distance of the business sold, are independent contracts so far as performance is concerned, and a violation of the condition of the bond is no defense in an action on the note. *Clough v. Baker*, 48 N. H. 254.

And a promissory note given for the purchase price of the furniture, fixtures, contents, and goodwill of a saloon, and an agreement upon the part of the vendor not to engage in the saloon business in the vicinity of the business sold, are each independent mutual agreements, on

which the party has his remedy at law, and a violation of his agreement not to go into business in that locality, by the vendor, cannot be set up in defense in an action on the note, where the vendee remains in possession and does not rescind the sale. *Monahan v. Lovece*, 70 Ill. App. 69.

So, notes given in consideration of the transfer of certain railroad bonds and an agreement between the parties that the payee, the railroad company, would cause the bonds to be indorsed by another railroad company, are independent contracts, and therefore an action can be maintained on the notes, though the agreement respecting the indorsement of the bonds has not been performed. *Stanton v. Maynard*, 7 Allen, 335.

And where a note is given under an agreement between a railroad company and a car-equipment company for the purchase of rolling stock, which requires the railroad company to give the car-equipment company a three-months note for a portion of the purchase price, payable on the delivery of the rolling stock, concurrently with the railroad company's taking possession of the stock, the right of the equipment company or its transferees to enforce the note is in no wise dependent upon any of the subsequent provisions of the contract respecting future payments and future relations existing between the two companies. *Post v. Green*, 10 App. Div. 816.

And a plea in an action on a note that the note was made by the defendant in consideration of the giving of an indemnifying bond by the payee and others to defendant and others, who, as guarantors, were liable for the payment of specified bonds issued by a corporation, and that by the conditions of the indemnifying bonds the obligors were to pay such bonds if the corporation failed to do so, and were to indemnify the guarantors against the payment thereof, and that the obligors failed and refused to pay the same, shows that the payment of the note was not made dependent upon the performance of the conditions in the indemnity bond, and that a failure to fulfil such condition would not release the maker, and sets up no legal defense to the note sued on, as the execution and delivery of the bond to the guarantors, and the risk and burden assumed by the obligors, constitute the consideration for the note which is still retained by the guarantors. *Kamp v. Branch Crooks Saw Co.* 47 Ill. App. 548.

So, where notes are given pursuant to a stipulation for the settlement of two suits upon an agreement that upon the payment of \$3,000 the suits should be discontinued, and that each of the plaintiffs should execute to the defendants a release under seal from all demands because of the subject-matter thereof, the release, however, not to become operative until the notes are paid, the notes to be paid absolutely and at a time specified, and not depending upon any condition, the case is one of mutual but independent promises, and the discontinuance of the suits is not a condition precedent to the payment of the notes. *Bruce v. Carter*, 72 N. Y. 616.

And a promissory note for \$100, and an agreement between the parties to the effect that the payee would sell and deliver to the maker a certain vessel and execute and deliver to him a bill of sale, and that the maker would pay \$200 in cash therefor, and \$100 at a later date, for which \$100 the note was given, are mutual promises, the one being in consideration of the other, and the payee may recover on the note without showing performance of the promise on his part, though he had failed to give the bill of sale, so that the maker could not obtain 43 L. R. A.

a license or lawfully use such vessel. *Close v. Miller*, 10 Johns. 90.

Nor can a note absolute upon its face be defended against upon the ground that it was given upon the agreement of the payee to deliver lumber, and that a part of the lumber was delivered, but he failed to deliver the residue; and an action may be maintained thereon without averring or proving performance. *Pratt v. Gulick*, 13 Barb. 297.

And an action upon a promissory note cannot be defeated upon the ground that it was given for two shares of stock in a company, and that at the same time the maker paid the payee \$6, taking its due bill for that amount of fencing material, and that giving the note and taking the due bill constituted all together one transaction so that upon the failure of the payee to send the fencing material he had a right to rescind his agreement to take stock, and did so rescind it,—especially where he did not surrender or offer to surrender the due bill. *Van Vechten v. Smith*, 59 Iowa, 173.

And a note and agreement given at the same time by the payee to the maker to the effect that the payee had sold a horse and carriage to the maker and providing that the maker was under obligation to depend upon the payee for horse and carriage, etc., whenever he could be accommodated as well as elsewhere on reasonable terms at the price the maker made for his best customers, and that he was not to be called on for the note so long as he kept the horse and carriage in good order for the accommodation of the payee, are distinct and independent contracts, and the payee can declare on the note as an unconditional promise or give it in evidence on the money counts, and the maker cannot set off the damages for breach of the agreement in an action on the note. *Pitkin v. Frink*, 8 Met. 12.

So, the action of the court in a suit on a promissory note given for part of the arrears of alimony had in a separate maintenance suit, in which it was alleged as a defense that among the terms of the settlement was one that the payee should file a bill for divorce from her husband which he would not defend, and that upon that bill a decree should be entered against him with a gross sum for alimony, in both the divorce and separate maintenance cases secured by notes, one of which was the note in suit, in holding all propositions of law presented and deciding the case against the maker of the note upon evidence giving color to the theory that the settlement of the arrears of alimony was independent of the subsequent divorce, that being an inequitable defense, will not be disturbed on appeal where the judge trying the case without a jury had the advantage of seeing the witness. *Paul v. Paul*, 71 Ill. App. 671.

And an action may be maintained upon a note given for the purchase price of land, although the bond conditioned to convey the land upon the payment of the money at designated times contained a provision that it should be void upon the nonpayment of the money as therein provided. *Shepherd v. Merrill*, 20 N. H. 450. But see *infra*, IV. and VI.

And that it was agreed between the maker and holder of a note that the holder should receive in payment or part payment thereof certain real estate belonging to the daughter of the maker, is no defense in an action on the note, especially where it appeared that the holder never agreed to receive it in full satisfaction of the note, and the parties differed as to the sum at which it should be received. *Woodin v. Foster*, 16 Barb. 146.

So, where a person seised of an equity of redemption in land gives a bond to a stranger

conditioned to convey to him a part of the land in fee with general warranty on the payment of certain notes given by him for the purchase money, and afterwards dies insolvent, the original mortgage remaining unpaid, the regular representatives of the obligor can recover the amount of the notes, the remedies of the two contracts being independent. *Read v. Cummings*, 2 Me. 82.

And that the proprietors of a township publicly proclaimed on the day of the sale of lots that they would build a storehouse in the town within a designated time and construct a bridge therein, but that they failed to do so, is no defense in an action on a note given for the purchase price of a lot sold at such sale. *Miller v. Howell*, 2 Ill. 499, 32 Am. Dec. 36.

And where a deed of lands for the purchase price of which promissory notes had been given with a payment in cash, contains an express condition that upon the breach of any of the covenants therein the damages might be payable by cash to the amount received in money and the residue by delivering up such notes as should remain unpaid, the defendant in an action upon one of the notes, the others having been paid, will not be permitted to show a breach of the covenant of seisin as to a parcel of the land to the value of the note declared upon, as the agreements of the parties are independent of each other, and an action will lie for breach of either. *Lloyd v. Jewell*, 1 Me. 352, 10 Am. Dec. 73.

And where a holder of real estate had executed a bond for title on a part thereof to another, and afterwards, desiring to borrow money on the security of a mortgage upon all the land, procured the consent of the purchaser to include the lands contracted to him in consideration that the vendor would at the maturity of the note given by him for the loan pay off and discharge the same and procure the release of the lien of the mortgage on the purchaser's land and turn over a part of the money raised to the vendee, which was done, the vendee giving his note for the moneys turned over to him, after which the vendor without the knowledge and consent of the vendee procured an extension of time on his note and continued the mortgage, such acts cannot be treated as absolving the vendee from his obligation to pay his note where it fell due some two weeks before the note given by the purchaser for his loan became due. *Thompson v. Gage*, 84 Tex. 654.

So, notes given for the purchase price of lands payable at a future day, and an article of agreement between the parties by which the payee covenanted that if the notes should be paid at maturity by the maker he would convey the land, and it was agreed that on failure of payment of such note the agreement was to be void, and the maker should be liable to pay all the damages that should have been thereby caused to the payee and to forfeit all he had previously paid, are independent covenants, and a suit on the note may be maintained without showing a conveyance, or offer to convey. The payee has his election either to compel payment of the notes and be answerable on the covenant to give a deed, or forfeit his right to the notes, and hold the maker answerable under his covenant to pay all damages; and if he takes the former course, and succeeds in enforcing payment, the maker may resort to his remedy under the agreement. *Manning v. Brown*, 10 Me. 49. See also *Kelso v. Frye*, 4 Bibb, 493, *infra*, VI. d; *Lyons v. Stills*, 97 Tenn. 514, *infra*, V.

And that a note was given for a part of the price of a grain warehouse, and that at the time of the sale the payee had an agency for another party to buy grain on commission at such warehouse, and that it was agreed that he should transfer such agency to the maker of the note, which he failed to do, and that such agency would have enabled the maker of the note to make the amount thereof during the grain season, constitute no defense in an action on the note, as, the agency being for no determinate period and dependent upon the will of another, it furnishes no method by which its value can be estimated. *Burr v. Wilson*, 26 Ind. 389.

See also *infra*, IV. *Mutual and dependent agreements*, which subject is the converse of this. And see *Kelso v. Frye*, 4 Bibb, 493, *infra*, VI. d, and *Lyons v. Stills*, 97 Tenn. 514, *infra*, V.

IV. Mutual and dependent agreements.

a. General doctrine.

On the other hand, when the promissory note and the contemporaneous agreement are mutual and dependent, and relate to the same subject-matter, they are to be read and construed together as one contract so that the nonperformance of one of the contracts will operate as a complete defense in an action for a breach of the other.

This is the doctrine of the principal case, and practically the same rule is laid down in *Munro v. King*, 3 Colo. 238; *Rogers v. Smith*, 47 N. Y. 324; *Carrington v. Waff*, 112 N. C. 115; *Thomas v. Page*, 3 McLean, 167.

And the same rule applies whether the action is between the parties to it or their representatives. *Rogers v. Smith*, 47 N. Y. 324.

A note, though absolute on its face, may be made payable on condition by a separate agreement as between the original parties, and in the hands of an assignee with knowledge of the condition it takes effect the same as between the original parties. *Thomas v. Page*, 3 McLean, 167.

And a judgment entered upon a note by warrant of attorney, which is subject to some defense growing out of the note or transaction or out of some agreement between the parties in relation to it, affecting it with equities, may be set aside on motion and leave given to answer, so as to adjust all matters in the same suit. *Jones v. Keyes*, 16 Wis. 563.

To escape the prohibition of the statute of frauds, however, against modifying written instruments by parol, the contemporaneous agreement should be in writing.

Thus, it has been held that a contemporaneous agreement modifying a note which is relied upon by the maker as a defense must be alleged to have been in writing. *Peddle v. Donnelly*, 1 Colo. 421.

And where the maker of a promissory note relies upon a contract with the payee that the payment shall not be required except on certain conditions in bar of an action brought against him, and pleads it as such, it must be alleged to have been in writing. *Osborne v. Taylor*, 58 Conn. 439.

And see also *Gardner v. Matthews*, 11 Mo. App. 269, *infra*, IV. b.

A book of a loan society which loaned money on the joint and several promissory note of the borrower and another, in which the society's rules were printed to the effect that after default by the principal notice would be given to the surety, and that if the money was not then paid proceedings would be taken, which book was delivered to the borrower but not signed, does not constitute an agreement in writing contemporaneous with the note so as to be admissible to vary the contract expressed in the note. *Brown v. Langley*, 4 Mann. & G. 466, 5 Scott, N. R. 249, 12 L. J. C. P. N. S. 62.

b. What agreements are mutual and dependent.

The question whether or not a note and contemporaneous agreement are mutual and dependent seems to depend upon whether they relate to the same subject-matter, and whether it was the intent that performance should be mutual, dependent, and simultaneous.

Thus, a note and an agreement entered into in consideration therefore are to be construed together, and the nonperformance of the agreement by the payee will prevent a recovery upon the note. *Fink v. Chambers*, 95 Mich. 508; *Montgomery v. Hunt*, 93 Ga. 438.

And the maker of a note in an action thereon by a purchaser before maturity for value may plead the failure of consideration and knowledge or notice on the part of the plaintiff of such failure. *Montgomery v. Hunt*, 93 Ga. 438.

So, where the consideration for a note is the promise to convey certain lands, the contract is wholly executory, and the payment of the purchase money and the tender of the deed should occur simultaneously, rendering the acts to be performed mutual and concurrent, so that upon an allegation of a failure of the consideration of the note it is the duty of the payee to meet the issue and prove a performance upon her part of all the terms of the agreement. *Sayre v. Mohnney*, 30 Or. 238.

And a note given on the same day as a written contract for the sale and purchase of certain lands, which was made due on the day the contract was to be consummated by the delivery of the deed and payment of the residue of the purchase money, cannot be recovered upon without showing a performance of the contract consisting of the execution and delivery of the deed, or a tender of performance such as the law requires. *Hoag v. Parr*, 13 Hun, 95.

Where a contract is made to convey lands and a note taken for a part of the purchase price made payable on the day the deed is to be given and the balance of the purchase price paid, if the purchaser wishes a conveyance it is his duty to go to the vendor and tender payment on his note and the residue of the purchase price, and demand a deed; and, on the other hand, if the vendor desires the money he is bound to go to the purchaser and tender him such a conveyance as is called for in the contract, and as would give him a clear title, and demand the money. *Ibid.*

And no action can be maintained upon a note given in consideration of an agreement by the payee to convey to the maker a lot of land on payment of the note, where he had not conveyed or offered to convey before the commencement of the suit. *Mix v. Ellsworth*, 5 Ind. 517.

And the action of the court in a suit on a promissory note in which it was established that the note was given for the purchase price of real estate sold by title bond, and that the deed which was to have been executed on payment of the note had not been tendered, in holding the case under advisement until the deed could be made and tendered, and then giving judgment for the plaintiff, is erroneous, as it would be equivalent to permitting a party to sue on a note before it was due, and then suspending judgment until it became due. *Cook v. Bean*, 17 Ind. 604.

And where the husband of a vendor of land for a part of the consideration of which a note was given made payable on the same day the deed was to be delivered and the balance of the purchase price paid, goes to the purchaser's house and states that he has his deed ready to deliver, but finds the wife of the purchaser there, the husband being away, and the wife tells him where he is, but he makes no further effort to

find him, it is not a sufficient tender of performance to relieve him from liability on the note, though the wife tells him that he had better not try to see her husband as he is much excited over an important suit he has in court. *Hoag v. Parr*, 13 Hun, 95.

Nor can one who gives a bond for the conveyance of designated lands to the obligee upon the latter's payment of certain notes given for the purchase at maturity, and afterwards conveys away the land, enforce payment of the notes upon failure of the obligee to pay them according to their tenure. *Little v. Thurston*, 58 Me. 36.

And where an agreement is made between a vendor and a purchaser of lands that the vendor will deed the land upon the payment of the note given by the vendee for the purchase price accruing after its tender, and the note is not paid and the vendor brings ejectment against the purchaser and recovers possession of the land, he thereby rescinds the contract and cannot subsequently enforce payment of the note. *Arbuckle v. Hawks*, 20 Vt. 538.

So, where lands are sold and notes are given for the payment of the purchase money, and the vendor executes a deed with covenants waiving and relinquishing all right thereof to recover the purchase price or any part thereof from any other lands or property of the vendee, the covenants in the deed are to be deemed a part of the original agreement, and the vendor is confined in his remedy on the notes, as to the extent of his recovery, to the property named in the deed. *Richardson v. Thomas*, 28 Ark. 387.

And a bond for the conveyance of a parcel of land and a promissory note not negotiable, payable on demand for the amount of the agreed consideration, for which a receipt was given, stating that if the bargain should be rescinded the note should be given up upon the surrender of the bond, all bearing the same date, constitute one contract, and an action will not lie on the note without a previous tender of a deed of the land. *Hunt v. Livermore*, 5 Pick. 395.

Nor will an action on promissory notes payable at different times, given for the purchase money of land sold to the maker by commissioners under an order of the probate court on condition that in payment in full of the purchase money the purchaser is to be entitled to a conveyance, lie if there has been no offer to execute the conveyance on payment at the same time of the purchase money. *May v. Cole*, 8 Blackf. 479.

Where by one and the same instrument a sum of money is agreed to be paid by one party and the conveyance of an estate to be at the same time executed by the other, the payment of the money and the execution of the conveyance may be considered concurring acts, and in that case no action can be maintained by the vendor on a note given for such sum of money until he executes or offers to execute the conveyance; but where the vendee, by a distinct instrument, agrees to pay part of the purchase money at a designated time, it will be deemed that he is to pay the money at that time at all events. *Spiller v. Westlake*, 2 Barn. & Ad. 155.

And the payee of notes cannot recover thereon on an allegation setting forth the execution of a contract for a deed and the making of the notes, and averring that the execution of the contract and the making of the notes were parts of the same transactions, and that the contract was the only consideration for the notes, where it does not appear whether or not he had tendered a deed, and he fails to set forth that part of the contract referring to the tender of the deed as a condition of his right to recover. *Nafziger v. Gregg* (Cal.) 31 Pac. 612.

And that notes were given for the purchase price of land, and that a written contract was then made reciting the purchase and a payment of one fifth of the purchase price and the giving of the notes for the residue, providing that should the maker pay the notes as they became respectively due the payees would convey the land to them by deed in fee simple with covenants of general warranty, is a good defense in an action on the notes, where neither the payees nor their successors had conveyed the land or tendered or offered to make a deed thereof, according to the tenure of the agreement on or before the day the last notes became payable, as the acts of making payment and of executing the deed were to be simultaneously performed. *McCulloch v. Dawson*, 1 Ind. 413.

And a lease by which the lessor binds himself to make certain improvements or repairs prior to the time when possession is to be given for the rental under which the lessee gives a note, is to be construed with the note as each constituting a part of the contract and both together the whole, and if the lessor fails to perform the covenant of the lease on his part, and the lessee refuses to accept possession for that reason, he may set up such failure on the part of the lessor as a defense in an action on the note. *Hickman v. Rayl*, 55 Ind. 551.

So, an obligation entered into to deliver a quantity of corn at a future date, and a note given by the purchaser for the contract price of the corn payable on the day the corn was to be delivered, are mutual and dependent contracts, and neither party can enforce his rights against the other without performance or offer to perform on his part. *Kelly v. Webb*, 27 Tex. 368.

And a note given for the purchase price of a negro girl, contemporaneous with which an agreement was made between the parties that before payment of the note should be demanded the payee should produce the necessary papers and indenture to prove that the girl was a slave or bound to serve under the laws of the state, is without consideration and void, and no recovery can be had thereon where such papers were not produced though demanded. *Bailey v. Cromwell*, 4 Ill. 71.

So, where a note is given subsequent to the date of a written contract, and identified therewith by its own terms, it is proper to permit evidence in an action upon the note to show the settlement or agreement under which it was given, as the plaintiffs are not enforcing a written contract in all its parts. *Davidson v. Bodley*, 27 La. Ann. 149.

And an agreement in writing between the maker and payee of a note, which describes the note and clearly refers to it though on a separate piece of paper, is to be read in connection with it as though it had been incorporated into it, and a breach thereof may be set up as a defense in an action by the payee on the note. *Goodwin v. Nickerson*, 51 Cal. 166.

Nor will an action lie by the payee of a note to recover the balance due on it in money, where it was agreed by a contemporaneous contract to be paid otherwise, and payment has been delayed solely in consequence of other arrangements made by mutual consent. *Hill v. Huntress*, 43 N. H. 480.

And notes given in settlement of a past-due bill of obligation, which the obligee had reason to believe was lost, mislaid, or destroyed, upon an agreement to return the bill if found, cannot be recovered upon where the creditor after finding the bill fails to return it. *Beauford v. Patterson*, 63 How. Pr. 81.

And when a note is made and the maker simultaneously subscribes a writing in which he

promises on the same consideration to pay an additional sum on the happening of a contingent event, the writing will be regarded as the last expression of the understanding between the parties merging all prior stipulations, and what either may have previously said with reference to the consideration cannot be proved. *Cuthbert v. Bowle*, 10 Ala. 163.

So, an agreement that a note is not to be paid at maturity, but that the maker was to substitute another note secured upon real estate when the original note was to be returned to an accommodation indorser, constitutes a defeasance which can only be proved as a defense to the note by writing. *Gardner v. Matthews*, 11 Mo. App. 269.

And the giving of a note payable one day after date with interest annually, and the execution and delivery of a contemporaneous agreement reciting that in consideration of the receipt of the amount of the note the payee agreed to pay the maker annually during life a stated sum, the same being 6 per cent interest upon the amount named in the note, and a parol agreement between the parties that the note should be treated as a cash payment, are to be considered as in effect but one transaction, where no money was ever paid by either party to the other, though interest was regularly indorsed annually upon the note, and no recovery can be had thereon for failure of consideration. *Montpelier Seminary v. Smith*, 69 Vt. 382.

So, where a note is given for a draft, with the distinct agreement that in case the maker of the note could not collect or realize on the draft he was to be released from the payment of the note, no recovery can be had thereon, where the maker is unable to realize on the draft; and the fact that an assignee of the draft afterwards becomes indebted to the drawer does not change the rule, where no suit was ever brought by the drawer thereon. *Hall v. Henderson*, 84 Ill. 611.

And a note for \$1,000 payable six months from date, given by one partner to another, and an agreement between them, made at the same time and delivered with the note, whereby it appears that the payee advanced \$2,000 to the maker to be invested as his share of the capital in a firm of which he was a partner, and that the payee was to receive and retain the maker's share of the profit, until the \$2,000 was paid, and thereafter one half of all the profits of the business, and that the note was given to secure the payee against one half the losses which the capital might sustain, are contemporaneous contracts to be construed as one paper, and no recovery can be had on the note for more than one half the loss shown to have been sustained. *Rogers v. Smith*, 47 N. Y. 324.

And where a sum of money is put into the hands of a solicitor, who lays it out on mortgages, and the deeds are deposited in the hands of the owner of the money, and, interest being in arrear, the solicitor gives a promissory note payable three months after date to the creditor for the amount of principal and interest, and it is agreed at the time that the creditor shall deliver up the deeds to the solicitor and hold the note until the sale of the mortgaged premises shall be completed, and the creditor sues the solicitor upon the note though the deeds had not been delivered up on its falling due, it is a question for the jury to say whether the note was given on a condition precedent that the deed should be delivered up, and what constituted the consideration of the note, and whether or not it had wholly failed. *Richards v. Thomas*, 1 Cramp. M. & R. 772.

So, the failure of an irrigation company to comply with a demand for water, made by the

maker of notes given in consideration of an agreement to furnish him with water on demand, is a good defense to an action after demand for accrued interest, although the agreements to pay interest and to furnish water were not concurrent and dependent, and an action might have been maintained for interest before the company is required to do anything. *Russ Lumber & Mill Co. v. Muscuplabe Land & Water Co.* 120 Cal. 521.

And the payee of a note given in part payment for work done under a written contract by which he guaranteed all work and materials against defects for five years, cannot recover on such note when the work was not done according to such agreement, and there were defects for the repairing of which the maker was required to pay out more than the amount of the note. *Louchheim v. Maguire*, 6 Pa. Super. Ct. 635.

So, where an insurance agent agrees to furnish a person with two policies, one upon his own life payable to his wife, and one upon his wife's life payable to him, in consideration for which the insured is to give a premium note for a designated amount, and the note is given on the representation of the agent that the policies are sufficient, the stipulation of the agent and of the insured are dependent one upon the other, and as between them the failure of the agent to furnish a policy on the life of the wife of which the husband should be the beneficiary operates to relieve him from the payment of the promissory note. *Sydnor v. Boyd*, 119 N. C. 481, 37 L. R. A. 784.

And a promissory note given for insurance upon the express understanding that it was to be of no effect and not be binding upon the maker until he passed the medical examination and received the policy of insurance from the company, has no inception in the hands of the agent to whom he gave it, where he did not pass the examination and never received the policy; and where it was transferred by the agent to an innocent holder at a discount, greater than that allowed by law, it was usurious in its inception, and the holder cannot recover thereon. *Sweet v. Chapman*, 7 Hun, 576.

And an agreement between a life insurance agent and an insurer that the company would insure him, issuing a policy containing special provisions for refunding the money paid for premiums if at the end of three years he desired to terminate the policy for which he gave his note, and the company tendered a policy without the provisions, which he refused to take, the transaction does not constitute a contract between him and the company, and the insurer is entitled to his money and note back, and if the company refuses to deliver them, or if they have been transferred to a bona fide holder, it will be liable for the amount thereon. *Tift v. Phoenix Mut. L. Ins. Co.* 6 Lans. 198.

So, notes given by shareholders of a corporation pursuant to an agreement to donate to the company their promissory notes for the same amount as they held shares in such company, provided that shareholders then holding the paper of the company would donate as much paper as they held shares in the company, and such agreement, are to be considered as parts of the same transaction, and should be considered together as forming one contract, in a controversy between parties chargeable with notice thereof; and where some of the shareholders never executed their notes, no recovery can be had on the notes executed. *Traders' Nat. Bank v. Smith* (Tex. Civ. App.) 22 S. W. 1056.

And one who gives his own notes for the amount of other notes on which he was surety 43 L. R. A.

in consideration of the promise of the payee to release him from liability thereon and also to diligently collect such notes may set up the nonperformance of such agreement as a defense against the new notes, and that he had sustained damage by reason of the insolvency of the maker of the original notes. *Holmes v. Redwine*, 103 Ga. 252.

And that a note was given in a transaction by which the makers were given the sole agency to sell pianos made by the payees for a designated number of years, pursuant to which they bought a large stock of pianos and spent much money and labor in advertising and trying to sell, and that during such time the payees took away the agency and gave it to another, whereby they were unable to sell the stock on hand and lost the money spent in advertising, are a sufficient defense in an action on the note brought by one who represents the payees for the purpose of bringing suit. *Ludington v. North*, 141 Pa. 184.

So, where an agreement in writing is made at the time of making a note given for the purchase price of Bohemian oats as a part of the same transaction, to sell for the maker of the note out of the crop to be raised by him from such oats a designated number of bushels at a specified price within a specified time, and that he should not be called upon to pay any part of said note until and unless such sale should have been made, as a condition precedent to the validity of the note, the agreement and note are dependent covenants and the agreement and its breach may be set up in defense in an action on the note. *Johnson v. First Nat. Bank*, 24 Ill. App. 352; *Sutton v. Beckwith*, 68 Mich. 303; *McNamara v. Gargett*, 68 Mich. 454; *Jacobs v. Mitchell*, 46 Ohio St. 601.

In *Johnson v. First Nat. Bank*, 24 Ill. App. 352, *supra*, it was said that this case differs from those in which the consideration of a note simply rests on the covenants and agreements of a third party to do and perform some act, where the agreement does not make the consideration of the note invalid in case it is not performed.

And a condition to a subscription to aid in the formation of an endowment fund for a college for which a note is given, that it should be used solely for the purpose of maintaining a college then in operation at a designated place, and that no part thereof or interest therein should be expended for other purposes, which was violated by the establishment of a law school with such funds at a definite place, is a good excuse for withholding the consummation of the gift, and a defense in an action on the note. *Simpson Centenary College v. Tuttle*, 71 Iowa, 596. But see *Oskaloosa College v. Hull*, 25 Iowa, 155, *supra*, III. b, and *Wood v. Ridgeville College*, 114 Ind. 320, *supra*, III. a.

But a plea in an action on a note, that although by its terms it was due and payable, yet by virtue of another written instrument entered into by the parties at the same time it was not to be paid until the happening of a certain condition, which omits to deny that said condition had happened, sets up no defense. *Averill v. Field*, 4 Ill. 390.

And notes given for the purchase price of lands transferred under a contract to give a deed upon the payment of the notes are valid without reference to proof that a deed had been tendered, as the giving of the deed is conditioned upon the payment of the notes. *Bacon v. Porter*, 1 Root, 370; *Bacon v. Pettibone*, 2 Root, 285; *Bourland v. Gibson*, 91 Ill. 470.

Though a contract to convey land may be rescinded by the vendor upon failure or refusal of the purchaser to pay notes given on an agree-

ment to make the conveyance on the payment of the notes, the signer of the notes cannot by any act of his alone discharge himself from payment. *Crawford v. Robie*, 42 N. H. 162.

So, where a vendee of land executes a note in consideration of the purchase money, and receives a bond for title from the vendor, and is put into possession, he cannot resist a recovery upon the note on the ground of the want of title in the vendor, where no effort was made to place him *in statu quo* by a surrender of the premises to him. *Wade v. Killough*, 3 Stew. & P. (Ala.) 431.

And it is no defense to a suit upon a note given for the purchase money of lands under a contract providing that the deed is to be given on payment being made of the purchase price as described therein, that the vendor brought a suit of forcible entry and detainer, and got possession of the lands, where the agreement did not provide for possession by the vendee. *Babcock v. Hamende*, 3 Ill. App. 426.

And an agreement under seal contemporaneous with a note, that if the note should not be paid at the expiration of ten years the payee would give it up to the maker provided the latter should execute to him a quitclaim deed of specified lands, whether or not the two constitute an entire transaction, does not preclude the promisee from enforcing payment of the interest, and such instalments thereof as become due yearly before the expiration of the ten years. *Ewer v. Myrick*, 1 Cush. 16.

So, where the vendor of land executes a bond conditioned to make title to the vendee generally, and in consideration thereof the vendee gives the vendor his promissory note payable on a date certain, the failure to complete the title before the note falls due is not available as a bar to an action at law upon the note, and the vendor can recover thereon so long as the contract remains unrescinded. *George v. Stockton*, 1 Ala. 136; *Loveridge v. Coles* (Minn.) 74 N. W. 1109.

And the maker of a note payable at a particular future day cannot defeat a recovery thereon upon the ground that in consideration thereof the payee agreed to perform certain services for the maker, and had not yet rendered such services, where no time was fixed for their performance and the payee was able and ready to comply with the contract. *Walker v. Clay*, 21 Ala. 797.

And delay in the completion of a railroad is not available as a defense to a promissory note given on a subscription for shares, unless the time of completion was made a condition by the parties as a term of the subscription, and mere statements made by an agent obtaining the subscription, that the railroad would be completed within a certain time and built upon a certain route, do not render the subscription voidable or constitute a defense to the note, though the road was not so built or completed. *Jefferson v. Hewitt*, 95 Cal. 535.

And an agreement between a railroad company and a subscriber in aid of the railroad that the road should be extended to a specified point within four months, weather permitting, which is not expressly made a condition precedent to the payment of the subscription nor declared to be of the essence of the contract, is not to be construed as a condition precedent in an action on notes given for the amount of the subscription, where other similar conditions in the contract were made conditions precedent, and a failure to complete the road to the designated point within the specified time would not operate as a defense. *Witmer Bros. Co. v. Weid*, 108 Cal. 569.
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And the breach of a condition subsequent to a gift of a note is not available as a defense to the maker of the note in an action on a renewal note given directly to the donee, as such defense would be personal to the donor. *Grand River College v. Robertson*, 72 Mo. App. 7.

But a finding in an action on a non-negotiable note given in payment of shares of railway stock, sustaining an answer alleging that the note and agreement to take stock were conditional upon the construction and completion of the railroad before the maturity of the note, and that such condition had not been performed, will not be disturbed on appeal where the evidence is conflicting and there is sufficient evidence to sustain the finding. *Jefferson v. Hewitt*, 103 Cal. 624.

So, a condition in a deed conveying a part of two patent rights, that the sale is to become void upon a default in either or any of the payments, is for the benefit and security of the vendors, which they alone can waive, and it cannot be given in evidence as a defense to an action upon notes given for the purchase price. *Ockington v. Law*, 66 Me. 551.

And an agreement between the parties to a note that if a suit pending between them should be decided in favor of the payee he would take the note in payment, cannot be set up as a defense in an action upon the note after it becomes due, though the suit had not yet been decided, as the promise to receive the note instead of cash if the suit was decided in favor of the payee was for his benefit, and not that of the promisor. *DaCosta v. O'Rourke*, 12 Phila. 224.

And a condition annexed to a promissory note, that if the amount of the note is not legally due upon other designated notes given by the maker upon which certain payments had been made, the note in question is not to be paid, otherwise to be paid in full, is in the nature of a defeasance or condition subsequent for the benefit of the maker of the note, and the burden of proof will rest with him as the person for whose benefit it was annexed. *McDuffie v. Magoon*, 26 Vt. 518.

So, where a note is made by an attorney for one of the parties to a litigation to the opposing party on settlement between them as collateral security for his client, and it is agreed between the parties that the client shall deliver up all the effects belonging to his opponent to the attorney, the delivery up of the effects is not a condition precedent to the right of the client to claim the money and maintain an action on the note. *Irving v. King*, 4 Car. & P. 809.

And an answer in an action on a note averring that it was given in consideration of a promise by the payee to cause a mortgage held by another securing several notes to be released and the land conveyed by a third party to the maker, and that these things were done, but that afterwards one of the notes which had not been surrendered was deposited with a bank and the mortgage foreclosed as against the purchaser, sets up no defense in an action on the note. *Hutson v. Pressnall*, 83 Ind. 163.

And where a debtor assigns a bond and mortgage to his creditor, and gives his promissory note as collateral, and the creditor agrees not to dispose of the note until due, and, if he sells the mortgage before that time to return the note, and in the event of his not disposing of the mortgage by a designated time to return either the mortgage or the note, the creditor is not bound to tender the one security in order to hold the other; and while the debtor could compel an election on the day named and the surrender of one of the securities, the creditor is not in default until a failure to elect in compliance with the agree-

ment upon request made. *Wood v. Sheehan*, 68 N. Y. 365.

And that a note was given in consideration that the payee who carried on a machine shop would repair a threshing machine for which it was given, no time being fixed therefor, and that he had failed and refused to make such repairs though requested, is no defense against the note in the absence of anything to show that the machine was brought to the payee's shop. *Mountjoy v. Mullikin*, 16 Ind. 226.

So, in *Coleman v. Sherwood*, 8 U. C. C. P. 359, a replication *de injuria*, or that the defendant of his own wrong broke the promises in the declaration mentioned, was held good in an action on a promissory note by the indorsee against the maker, in which the defendant alleged that the note was given subject to the result of a suit in chancery, and that it was agreed that it should not be used except by order of some court of competent authority or with the consent of the defendant, and that no such order had been made or consent given, on the ground that the agreement and notes formed together one special agreement and not collateral agreements the one to the other, in which case the plea would not only have been in denial of the making and indorsing of the notes, but would be bad in itself as being argumentative and amounting to a double plea.

And in *Clifton v. Litchfield*, 106 Mass. 34, it was held that a written receipt given for a promissory note on account of bills rendered, providing that any errors shall be corrected and a discount of 5 per cent made on all bills without interest, should be construed so that the discount of 5 per cent did not apply to lumber thereafter to be delivered, but where there is other evidence as to the discount, the whole might properly be left to the jury.

The burden rests with a vendor of lands who takes a note from the purchaser in part consideration thereof, which is made payable on the same day the deed is to be given, and the balance of the purchase money paid, to prove a performance or tender of performance of the contract on his part in order to recover upon the note. *Hoag v. Parr*, 13 Hun, 95.

And in an action upon a promissory note given for professional services to be rendered by the payee as an attorney at law payable on a day certain, it rests with the defendant to show a failure of performance, and not upon the plaintiff to show performance. *Douglass v. Eason*, 36 Ala. 687.

And where the note was given in consideration of a promise to forbear to sue a third person for a designated time it rests with the maker to show that the promise to forbear has been broken, and not with the payee to show that he has performed it. *Jennison v. Stafford*, 1 Cush. 168, 48 Am. Dec. 594.

See also, on this subject, *infra*, VI. on *Agreements constituting consideration for note*, the two subjects being somewhat analogous, as the close connection required to make an agreement mutual and dependent frequently brings it within the domain of the consideration; and see *supra*, III. *Collateral and independent agreements*, which subject is the converse of this; and see particularly *Lawrence v. Griswold*, 30 Mich. 410, *infra*, VI. b; *Cooper v. King*, 73 Iowa, 137, *infra*, VI. d; *Bradley v. Marshall*, 54 Ill. 173, *infra*, IX.

c. Must be between same parties.

Unless an agreement contemporaneous with a promissory note be between the same parties the doctrine of circuity of action, which alone makes it an answer to an action on the note, does not

apply, and in such case the only mode of enforcing it is by a cross action. *Webb v. Salmon*, 19 L. J. Q. B. N. S. 34, 13 Q. B. 886.

Thus, a collateral promise never to sue a note, made to a stranger who is not a party to the note or to the suit, is not a good defense in an action on the note brought against the maker, though a promise made upon good consideration to the maker of the note himself would operate to defeat the action. And a son who is the maker of a note cannot avail himself in an action upon the note of a promise not to sue it, made for his benefit to his father by the payee of the note. *Marston v. Bigelow*, 150 Mass. 45, 5 L. R. A. 43.

And the indorser of a note when sued thereon by a payee, who is not shown to have been a party to the contract when the note was made, cannot defeat a recovery by showing that the maker of the note agreed to have placed in his hands a sufficient amount of valuable notes and accounts to satisfy the note in suit, which he failed to do. *Holt v. Moore*, 5 Ala. 521.

So, where a property owner and capitalist agrees to donate a number of lots in consideration of the location of a glass factory at a designated place, and a subscription is circulated for the purchase of the lots donated, and a person subscribed for five lots and gave his note therefor to the banking firm of which the person agreeing to donate the lots is a member, pursuant to a representation on his part that if purchasers were not able to make payment when due and would make good notes, he would take them and advance the money, the notes thus given were not given for the purchase price of the real estate, but for money borrowed at the bank, and failure to convey the lots is no defense. *Hockman v. Quick*, 18 Ind. App. 560.

And the failure of an educational corporation to comply with representation and forms made by the trustees acting individually and not as a board for the corporation, that if a person who was one of their number would purchase certain lands, paying a price therefor greatly above their value, the corporation would build and maintain a college worth a designated sum, which purchase was made and the note of the purchaser given therefor, does not constitute a defense in an action on the note where the failure to purchase was ascribed to the insolvency, and the representations were made without fraud, and the facts of the situation at the time were equally open to all the trustees including the maker of the note. *Kolp v. Specht*, 11 Tex. Civ. App. 685.

But a written agreement between the parties to a note given for the purchase price of a machine by which the payee agreed to take a designated amount in work, which work was to apply on the machine, should be taken and construed with the note as tending to establish that the actual consideration to be rendered by the purchaser was labor and not cash, and it is unimportant whether the labor was to be received by the company or by its agent. *Singer Mfg. Co. v. Haines*, 36 Mich. 385.

d. Mortgage contemporaneous with note.

While the question as to the effect of a contemporaneous mortgage upon a note frequently arises where the mortgage is given to secure a series of notes maturing at different times, the mortgage providing that in case of default as to one all shall become due, differing provisions of a mortgage are very seldom interposed as a defense to the note. But it would seem from the few cases on the subject that they are to be regarded as mutual and dependent, and to be construed together as one contract.

Thus, where a mortgage and notes are contemporaneously executed, all relating to and constituting one entire transaction, they are to be read together, and if from the whole transaction it appears that the notes were only to be paid in a given event, they cannot be enforced except on the happening of that event. *Robinson v. Smith*, 14 Cal. 94; *Bailey v. Cromwell*, 4 Ill. 71.

And the holder of one of a series of notes secured by a trust deed, providing that none of them shall become due, and that the deed shall not be foreclosed, until the maturity of the note last payable, who purchased with knowledge of such provision, cannot recover judgment thereon until the last note matures, as the note and deed of trust are to be read together as one instrument. *Brownlee v. Arnold*, 60 Mo. 79.

And a deed of trust and the note secured thereby are to be deemed contemporaneous acts, and must all be read and construed together, and it is competent for the parties to contract that none of the notes shall fall due until such time as the last one by its terms becomes payable; but where by the agreement interest is to be paid annually, this constitutes a debt, and where the deed declares that if the parties of the first part fail or refuse to pay the debt or the interest when they become due, then the whole shall become due and payable, the whole principal and interest will become due at the election of the holder in case of failure to pay interest. *Waples v. Jones*, 62 Mo. 440.

So, a mortgage given by the maker of promissory notes to his indorsers for their indemnity, containing a covenant to pay at a period subsequent to the maturity of the notes, cannot be foreclosed before the time stipulated in the mortgage, and such covenant also prevents all recovery against the maker on account of the funds prior to that period, though the indorsers are compelled to pay at an earlier date. *Duvall v. Farmers' Bank*, 9 Gill & J. 31.

And such a covenant renders it unnecessary for the holder of the note to demand payment of the maker and give notice of dishonor to the indorsers to fix their responsibility; and where there is more than one indorser, and the mortgage is given to them all, demand and notice is not necessary to enable the succeeding to recover from the preceding indorsers, as they have all taken the mortgage and granted the maker indulgence, and the succeeding indorsers can have no recourse against the preceding ones until the expiration of the time limited in the mortgage for the maker's responsibility. *Ibid.*

That a mortgage was given to secure a promissory note which could not be enforced until after the decision of the United States authorities upon a certain title, but which contained no implication that because the mortgage could not be enforced until such decision the notes could not be collected before, however, does not prevent an action upon the notes after they are due, but before such decision. *Robinson v. Smith*, 14 Cal. 94.

But in *Chick v. Willetts*, 2 Kan. 384, it was held that a mortgage given to secure the payment of a note made payable one day after date, stipulating that if default was made in the payment of the note for two years from the date of the mortgage that instrument might be foreclosed, changes the terms of the note, and extends the time of payment to two years from the date of the mortgage; but the case was decided upon the question of the running of the statute of limitations against the note and mortgage.

V. Consistent agreements constituting parts of a whole transaction.

The rule that when a contract between the

parties is reduced to writing it must be proved by the writing, and cannot be varied by any previous or contemporaneous verbal agreement or understanding, does not apply in a case in which the writing consisting of a promissory note does not pretend to record the whole transaction, and the verbal testimony in no way contradicts or varies it, but simply furnishes the whole transaction of which the note forms a part, and upon which it is dependent for its meaning and just application. *Ruggles v. Swanwick*, 6 Minn. 526; *Juilliard v. Chaffee*, 92 N. Y. 530.

Where it is proved that an instrument in writing contains but a part of the agreement entered into by the parties, then parol proof may be received to prove the entire contract, but the parts of the agreement proposed to be proved by parol must not be inconsistent with or repugnant to the intentions of the parties as shown by the written instrument. *West v. Kelly*, 19 Ala. 353, 54 Am. Dec. 193.

And while parol evidence is inadmissible to change or contradict the terms of a written contract, a parol contract may be made between the parties contemporaneously with the execution of the written agreement providing that it is separate and independent and its terms in no way conflict with or are contradictory of the written stipulations. *Weeks v. Medler*, 20 Kan. 57.

And where a note does not constitute the whole agreement between the parties, but is evidence of a part of the agreement, when relied upon by one party, the other may properly show in defense the whole transaction, the defense being made out, not by controlling the contract indicated by the writing, but by collateral agreement, with which it was incidentally connected, the execution of which insured as payment of the note in the manner directed. *Juilliard v. Chaffee*, 92 N. Y. 530.

So, parol evidence is admissible in an action on a note to show an agreement by an indorser waiving suit against the maker made contemporaneously with the written indorsement, such evidence not being a contradiction of the written instrument. *Schmied v. Frank*, 86 Ind. 250.

And a parol agreement between the assignor of the promissory note and the assignee, that the assignee should not sue the maker thereon until requested by the assignor, and that the assignor would stand liable as such without suit until he gave notice to sue, does not vary the effect of the written instrument, but merely goes to fix the degree of diligence required of the assignee to hold the assignor, and is admissible in evidence in an action against the assignor. *Ibid.*

And a parol contemporaneous understanding between the parties to a note given at the time of the taking of an assignment by the payee of an alleged claim for an amount equal to the face of the note held by the maker against strangers to the action, that payment of the note should be enforced only out of the proceeds of such claim, and that it should not be enforced at all unless the payee collected something out of such assigned claim, is admissible in evidence in an action on the note, as it does not contradict or vary the terms of the note, but goes to prove that the note was made in pursuance of a contract, and to show what the contract was. *Isaacs v. Jacobs*, 15 Daly, 490.

Nor is a parol agreement and direction by the assignor of a note at the time of assigning it, with the assignee, that the assignee is not to sue the maker, and that the assignor would stand liable as such without suit until he gave notice to sue, invalid as varying the effect of the written indorsement, but merely fixes the degree of diligence required of the assignee to hold the assignor. *Schmied v. Frank*, 86 Ind. 250.

And parol evidence that a note was given for the price of goods sold, and that at the time of the sale the payee made a promise to the defendant in respect to the goods which had been violated, is not objectionable as tending to alter, modify, or impeach the note, as it does not deny that such a contract was made, but sets up an engagement entered into by the other party on his part. *Batterman v. Pierce*, 8 Hill, 171.

So, an agreement between the vendor and the purchaser of a pony for which the note of the purchaser was given, that he took it on probation with the privilege of rescinding the sale at the end of six months, does not go to contradict the note, but sets up an independent agreement made at the same time, and parol evidence of such agreement is competent as between the original parties. *Lyons v. Stills*, 97 Tenn. 514.

And parol evidence as to how a slave was to be employed under a contract of hire is admissible in evidence in an action upon a note given in payment for his services, as the note does not constitute the whole contract between the parties. *Western v. Pollard*, 16 B. Mon. 315; *Richardson v. Dingle*, 11 Rich. L. 407; *Knight v. Knotts*, 8 Rich. L. 35. But see *Caldwell v. May*, 1 Stew. (Ala.) 425, *supra*, II. h, and *Daniel v. Ray*, 1 Hill, L. 32, *supra*, II. k.

And a negotiable promissory note and a written agreement between the parties by which the payee agrees to furnish hides and skins to the makers of the note as fast as they need them to tan, to such an amount that the proceeds after deducting costs, etc., shall pay the note and interest, reciting that it is the intention to pay said note in tanning, will be construed as one special agreement as between the original parties and those who stand in like situation, and the maker of a note cannot be held to pay the balance in money after the payee has ceased to furnish him with hides in accordance with the agreement. *Hill v. Huntress*, 43 N. H. 480.

And an agreement between an insurance agent and an insurer, who had taken a policy for \$2,000 and given his note for the premium thereof, that if the insured after seeing his wife should prefer a \$1,000 dollar policy the first policy and premium note were to be canceled and a new policy and note for the smaller amount were to be given, after which the agent sent the note to the general agent and refused to return it upon the decision of the insured to take the smaller policy, may be shown in an action on a note either by the agent or the general agent, as a defense, as it would not be contradicting the terms of the contract, but proving an additional verbal agreement. *Bresel v. Crumpton*, 121 N. C. 122.

So, parol evidence is admissible in an action on a conditional note to show that it was signed by the maker upon the understanding with the payee that it did not contain the terms of their agreement, and that they would afterwards at their convenience draw another instrument which would truly express the contract, but that the instrument had not been drawn. *Hopper v. Elland*, 21 Ala. 714.

And in *Edwards v. Jones*, 2 Mees. & W. 414, which was an action by an indorsee against the acceptor of a promissory note, the defendant pleaded that by agreement between him and the drawer the note was not to be enforced except upon certain terms which the drawer had not complied with, whereupon the plaintiff remitted all claim except as to the amount actually paid by him for the note, and obtained a verdict for that sum, it not appearing that the plaintiff was not cognizant of the agreement between the acceptor and drawer, and it was held that the 43 L. R. A.

defendant who had been arrested for the whole amount of the note, was not entitled to costs under 43 Geo. III. chap. 46, § 3.

And in *Holt v. Miers*, 9 Car. & P. 191, which was an action on a promissory note in which the defendant pleaded that the note was given under a parol agreement that he should renew it when due by paying discount and giving another note, which he had offered to do, evidence supporting the plea was admitted against the suggestion that the bill was bad as setting up a parol agreement to vary a written instrument upon the ground that the plaintiff had taken issue on the plea.

The rule that where an oral agreement has been but partially reduced to writing the whole agreement is open to proof, however, is not applicable to proof tending to convert an absolute note into an agreement that the sum named should be paid out of a particular fund. *Gorell v. Home L. Ins. Co.* 24 U. S. App. 188, 63 Fed. Rep. 371, 11 C. C. A. 240. See also *Davidson v. Bodley*, 27 La. Ann. 149, *supra*, IV. b.

VI. Agreements constituting consideration for note.

a. Scope of the subject.

In dealing with the subject of this section it is not intended to go into the general subject of consideration for negotiable paper or failure of such consideration, and on account of the extent of the note cases with relation to agreements but remotely connected with the consideration of the note, such as warranty of title or quality, when a note is given for the purchase price, etc. etc., have been omitted. All that is intended to be treated in this section is the question of the effect of the breach of an agreement, whether written or parol, as a defense to an action on a note where the agreement constitutes either in whole or in part the consideration for which the note was given.

b. The general doctrine.

While parol evidence of a contemporaneous agreement or understanding is inadmissible to vary, contradict, or explain the terms of the note, it may be introduced to show that the note was given without a consideration, or that the consideration had in whole or in part failed. *Penny v. Graves*, 12 Ill. 287; *Juilliard v. Chaffee*, 92 N. Y. 529.

A note cannot be enforced if the agreement of the payee upon which its consideration is based has been violated. *Simpson Centenary College v. Bryan*, 50 Iowa, 293.

And the existence of a contemporaneous parol agreement between the parties under the influence of which a note or contract has been signed, which is violated as soon as it has accomplished its purpose in securing the execution of the paper, may always be shown when the enforcement of the paper is attempted. *Clinch Valley Coal & L. Co. v. Willing*, 180 Pa. 165.

Thus, that a note was given to renew a previous note upon the payee's agreement to return the previous note to the maker, which had never been done, is a good defense in an action upon the subsequent note as tending to show that it was without consideration. *Miller v. Ritz*, 3 E. D. Smith, 253.

And an agreement by the payee of a note with the maker that a third person should and would in all things conform to and execute a contract made by him with the maker of the note, which he wholly failed to do, and in consideration for which the note was given, is a good defense in an action on the note. *Gale v. Harp*, 64 Ark. 462; *Goodwin v. Nickerson*, 51 Cal. 166.

And where a note is given as a part of a particular fund the amount of which the payee agrees with the maker shall never be diminished and that it is to be used for specified objects, such agreement being the consideration for the note, an appropriation of such fund to other objects and its use so as to diminish its amount would constitute a defense to the enforcement of the note. *Simpson Centenary College v. Bryan*, 50 Iowa, 208.

So, where the consideration for a promissory note was an agreement by the payees to deliver certain goods, and they only delivered a portion of them, there can be no recovery on the note in excess of the value of the goods delivered. *Shoe & L. Nat. Bank v. Wood*, 142 Mass. 563.

And an agreement at the time of making a note given for the price of goods sold, that a deduction should be made in case the goods did not turn out to be as good as represented, is admissible in evidence in an action on the note. *Shepherd v. Temple*, 3 N. H. 455.

And a parol agreement contemporaneous with a note given for the purchase price of a given number of tons of hay at a given price per ton, that if it should fall short of the estimated or supposed quantity a corresponding credit should be given on the note, may be set up in an action on the note, where it appears that the estimated quantity fell short, to show that the maker was entitled to the proportionate reduction as against the payee or a holder with notice. *Brady v. Henry*, 71 Cal. 481.

And that a note was given in payment for logs cut by the payee and to be delivered by him to the makers, and was put in the hands of a third person with the understanding that he was to pay all claims against said logs, which should be considered a payment upon the note, and that he did pay certain claims, and that the payee did not deliver to the makers all the logs agreed upon, and that a part of those delivered were cut from the land of another person from whom the makers were obliged to purchase them, may be proved by parol in an action on the note, as tending to show failure of consideration. *Smith v. Carter*, 25 Wis. 283.

All that one who purchased a machine and gave his note therefor, relying upon the agreement of the vendor to have a defect in it repaired, can require, however, is to be allowed a discount, in case of failure to make such repairs of so much as such repairs would cost. *Thomson v. Sexton*, 15 N. C. 93.

So, a note given in consideration of an agreement upon the part of the payee to furnish certain secret recipes and chemical formula with instructions for their use, which the payee totally fails to perform, is invalid and uncollectible for failure of consideration. *Booth v. Fitzer*, 82 Ind. 66.

And evidence in an action on a promissory note given for a policy of insurance, of an agreement between the maker and the general agent of the insurance company that the maker could have sixty days to determine whether he would or would not be insured, and that if within that time he should decide not to be insured and so notify the company the policy should be taken back and the note returned, is admissible upon an issue as to whether there was a contract between the parties and a completed delivery of the policy and note under it. *Watkins v. Bowlers*, 110 Mass. 383.

And a note given for an insurance premium and a contemporaneous receipt referring to the note and stating how and for what it was received, in which the payee agreed to procure the appointment of the maker as agent of the insurance company as a part of the consideration of the note, and containing the mutual agreement

and understanding that the note was not to take effect and be binding unless the maker should be so appointed, and that it was to be returned in default of such appointment, are to be considered together, and both must be read as evidence of what the contract of the parties was; and where such appointment was never received in pursuance of such agreement no recovery can be had on the note. *Lawrence v. Griswold*, 30 Mich. 410.

Nor can recovery be had on a note given for the purchase price of lands and deposited in escrow to be delivered to the payee when he and another executed a warranty deed sufficient to pass the title in fee of the premises contracted to be conveyed, where no deed in the proper form was deposited with the person holding the note. *Glover v. Chase*, 3 McCrary, 599.

And that a note was given for the purchase of a tract of land under an agreement in writing that the vendor should cancel and discharge the title of another to a part of the land before any portion of it should be payable, and that the vendor had failed to procure such discharge, constitutes a valid defense in an action on the note. *Rogers v. Broadnax*, 24 Tex. 538.

So, while ordinarily, where a person gives his note for a quitclaim deed he cannot on account of a defect in the title avoid the payment of the note, where there is an express written stipulation that the note should not be paid unless the land should be held by the purchaser, failure of title is a good defense. *Bean v. Flint*, 30 Me. 224.

And a note given by one of two joint owners of real estate to the other in consideration that he would say what he would give or take so that one might own the whole property, pursuant to which the payee named a price for which the maker agreed to sell, but the payee afterwards refused to carry out the bargain, is subject to the defense of failure of consideration. *Hawks v. Truesdell*, 12 Allen, 564.

And that an agreement was made contemporaneous with a note given for the purchase price of land, that the maker was to pay \$100 for the land and a further sum of \$100 in consideration that the payee should procure a highway to be established upon it, and that the payee had failed to procure the establishment of such highway, and the maker had paid all except the \$100 upon the note, is a good defense in an action thereon, and is not open to the objection that it varies the terms of the contract embodied in it. *Dicken v. Morgan*, 54 Iowa, 684.

And the maker of a promissory note given for an instalment of rent of a warehouse for a term to begin in the future under a lease stipulating that in case of injury to the property by fire the lessor should rebuild in a reasonable time, a shed belonging to which was destroyed before the term commenced and the lessor failed to rebuild, may set up as a defense in an action on the note that he was induced to take possession at the beginning of the term and held under the lease because of a verbal promise made by the lessor to rebuild the shed, but for which he would have declined to enter. *Lightfoot v. West*, 98 Ga. 546.

So, where the settlement of a slander suit operates by agreement as the sole consideration for a note, failure to sign the settlement may constitute a defense to the note on the principle of showing want of consideration. *Payne v. Ladue*, 1 Hill, 116.

And an oral agreement contemporaneous with a note given by one against whom an action in garnishment was pending, for the whole claim against him, that in case of a judgment against him as garnishee the amount of it should be deducted from the note, and the fact that such

judgment was afterwards rendered against him, may be shown by parol in an action on the note as a partial failure of consideration. *Peterson v. Johnson*, 22 Wis. 21, 94 Am. Dec. 581.

So, that work done and materials furnished were not in accordance with the contract therefor by which the persons supplying them guaranteed all work done and materials furnished for a period of five years and agreed to repair the work and keep it in good order for said period, is a good defense in an action on the note given for such work done and materials furnished. *Louchheim v. Maguire*, 186 Pa. 311, 6 Pa. Super. Ct. 635.

And an agreement contemporaneous with a promissory note given for one half of the commission to which the maker would be entitled on the sale of a designated quantity of an article of which he bound himself to use his best endeavors to sell, constitutes a complete defense in an action on the note, where he never sold or endeavored to sell any part of it, and never became entitled to any commission. *Carrington v. Waff*, 112 N. C. 115.

And that a promissory note was given in consideration of the agreement of the payee, who was an attorney at law, that he would procure certain papers for the maker of the note of value to him on or before a designated time, which he failed to do, is admissible in evidence in an action on the note as a defense by way of failure of consideration. *Dodge v. Oatis*, 27 Kan. 702.

So, the failure of an agent to perform his agreement with his principal to examine the records and report all encumbrances on lots, the agent was to take in exchange for his principal, whereby an encumbrance on one of the lots was not discovered, is a good defense in an action by the agent against the principal on a note given for his service, and it is not necessary to prove the exact value of the lot so lost. *Harkness v. Briscoe*, 47 Mo. App. 106.

And an agreement to build certain blind ditches on another's land under a warranty that they would carry off all surplus waters, and providing that if they did not fulfil the conditions of the warranty, the persons constructing them would return and dig open ditches in their place, and proof that the blind ditches constructed pursuant thereto were worthless for all purposes, and that the person constructing them left the state and did not dig the open ditches agreed upon, are a complete defense in an action on the note given for payment for the digging. *Slater v. Foster*, 62 Minn. 150.

And an oral agreement at the time of the execution of a note, between the maker and the payee, that the note which was given pursuant to an agreement in writing by which the maker gave the payee a right of way across his land to dig a ditch for irrigating purposes and to give him a certain sum per acre for all land irrigated thereby, should not be paid unless the canal was constructed and completed across the lands of the maker so that a designated number of acres could be irrigated therefrom before the maturing of the note, and proof that the payee had failed to complete the canal in accordance with such agreement, are competent as a defense to the note by way of failure of consideration. *Billings v. Everett*, 52 Cal. 661.

c. Application to parol agreements.

Where the note in suit is a completed contract entered into upon a valid and subsisting consideration, the writing must speak for itself, and contemporaneous parol agreements inconsistent with it are inadmissible to affect the liability thereby assumed; but in determining whether the contract was complete and founded

upon such consideration the transaction out of which it grew is open to investigation. *Leighton v. Bowen*, 75 Me. 504.

And parol agreements and their breach may be pleaded and admitted in evidence as a defense in an action on a note where the agreement constitutes the consideration for the note, and the breach consequently constitutes a failure of consideration therefor.

Thus, parol evidence that a note was given 'n payment of the price of a horse, and that it was agreed between the parties that the note should be returned if the horse died, and that the horse afterward died and the return of the note was refused, is admissible as a defense in an action on the note. *Barlow v. Flemming*, 6 Ala. 146. But see *Gatlin v. Kilpatrick*, 4 N. C. (1 Car. Law Repos.) 534, 6 Am. Dec. 557; *Columbia v. Amos*, 5 Ind. 184; *Hatch v. Hyde*, 14 Vt. 25, 39 Am. Dec. 203, *supra*, II. c.

And where a note is given for a designated number of tons of hay at a given price per ton, for the estimated amount, and it is agreed by parol that if it falls short of the estimated quantity, a corresponding credit should be given on the note, and it is found to be a less number of tons than that estimated, a rebate is to be made and the parol agreement may be proved. *Brady v. Henry*, 71 Cal. 481.

And a parol contemporaneous agreement between the parties to a note given for the purchase price of a sewing machine, that the vendor would furnish the purchaser with work for such machine at a stipulated price and within an agreed time sufficient to pay for the machine, may, upon his failure to perform it, be pleaded as a set-off to the damages sustained thereby in an action upon the note. *Weeks v. Medler*, 20 Kan. 57.

So, an agreement by a bank discounting a note payable in gold, and giving the bills of a certain bank therefor, that it would within ninety days thereafter, whenever requested, redeem the bills at its counter with gold at a specified discount, which it afterwards failed and refused to do, is not liable to the objection that it constitutes an effort to contradict the terms of the written instrument by parol. *Racine County Bank v. Keen*, 13 Wis. 210.

And where a promissory note expressly recites that it was given in consideration of the indebtedness of a third party to the payee, which the maker thereby assumes, parol evidence is admissible to show that the assumed indebtedness was evidenced by a promissory note held by the payee, which was to be delivered to the makers of the new note, but which was not delivered but still retained by the payee. *Powell v. Subers*, 67 Ga. 448.

So, that a note was given to secure the support of the mother of the person making it during her natural life, and that it was agreed between the parties that the note was to be surrendered at her death, and proof of her death, constitute a sufficient defense in an action on the note by way of failure of consideration. *Kirkpatrick v. Taylor*, 43 Ill. 207.

And where a debtor pays part of his debt before it is due, and a note is given instead of a receipt, under an agreement that it should be mere evidence that interest should be allowed upon the amount paid until the whole should become due, the agreement is not a parol agreement, void under the statute of frauds as intended to vary a written one, but goes to show want of consideration, and in that view would defeat a recovery upon the note as between the original parties. *Slade v. Haisted*, 7 Cow. 322.

So, the failure to construct a railroad in accordance with an oral agreement accompanying a subscription for railroad stock for which a

note is given which is not to be paid unless the road is constructed before its maturity constitutes a failure of consideration for the note; it is not necessary that the condition as to payment should be incorporated in the note to be valid. *Jefferson v. Hewitt*, 103 Cal. 624. But see *Calro & V. R. Co. v. Delap*, 7 Ill. App. 60; *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246, *supra*, II. c.

And parol evidence that notes apparently made in payment of insurance premiums were made upon the express agreement that the insurance company would loan to the maker upon his insurance and the execution of the notes a designated sum for as long a time as he would continue to pay premiums on the policy upon his furnishing satisfactory security for the loan, and that he complied with all the directions prescribed, and that the company refused to make him the loan, and upon such refusal he tendered his policy and demanded the surrender of his notes, is admissible in an action on the notes, as the notes and agreements constitute parts of the same contract, and only a part of it was put in writing. *Life Asso. of America v. Cravens*, 60 Mo. 388.

And an oral agreement between the parties to a note given for the whole claim of the payee against the maker, pending an action in garnishment against the maker by a judgment creditor of the payee, that in case of a judgment against him as garnishee the amount of it should be deducted from the note, after which judgment is rendered against him and paid by him, is not within the rule excluding evidence of a verbal contemporaneous agreement of the parties to vary or contradict the terms of their written contract, and may be shown by parol in an action on the note as evidence of a partial failure of consideration. *Peterson v. Johnson*, 22 Wis. 21, 94 Am. Dec. 581.

So, where the owner of a tract of land for the purchase price of which he had given three notes to the former owner sells it to another and it is agreed that the purchaser shall execute three notes for the same amount to fall due at the same time with the former notes, which the vendor agrees to substitute for those held by the original owner, and he fails to substitute one of them for one of the old ones, and the purchaser pays one of the notes then held by the original owner, such failure constitutes a valid defense in an action on one of the new notes when sued upon by the payee, who was the vendor for the use of another, and the agreement to substitute the new notes for the old is not subject to the objection that it is a varying of the terms of the written agreement by parol. *Honeycut v. Strother*, 2 Ala. 135.

And an agreement by one procuring the purchase of lands by another for the purchase price of which the latter had given notes which the former signed as surety made after the conveyance of the land to the former, and the execution by him of his notes corresponding to the notes already given by the latter to the vendor, that the first purchaser should deliver the second purchaser's notes to the vendee and take those originally given, does not vary the terms of the written contract, but goes to the consideration of the note and to show the relation of the joint makers to the payee, which might be done by parol evidence even if the legal effect of the writing was changed thereby; and where the first purchaser, in violation of the agreement, assigns the notes for his own before a second purchaser is compelled to pay the notes given to the vendor upon which he was surety, it is a good defense in an action on the notes last given. *Rawlings v. Fisher*, 24 Ind. 52.

And a contemporaneous parol agreement, on 43 L. R. A.

the faith of which notes given for a portion of the purchase money for certain town lots were signed, that the lots were to be at once reconveyed to a trustee, who should hold them as security for the sums due upon the notes, and should exhaust the security thus furnished before the payment of the notes should be required of the maker, and that he should only be required to pay the balance, if any remaining due upon the notes after the application of such security, and the fact that the lots were retained by the trustee, furnishes a good defense to the action on the note, and one which it is competent for the maker to make. *Clinch Valley Coal & I. Co. v. Willing*, 180 Pa. 165.

In the above case, *Clarke v. Allen*, 132 Pa. 40, *supra*, II. d, and *Ziegler v. McFarland*, 147 Pa. 607, *supra*, II. b, were distinguished upon the ground that in those cases the agreement set up was wholly inconsistent with the terms of the note, the written contract and the alleged parol contract set up as its inducement, being so inconsistent that both could not stand, while in the case at bar the note is left in full force by the averment of the contemporaneous parol agreement. See also *Holzworth v. Koch*, 28 Ohio St. 33, *supra*, 11 d, and *Brady v. Henry*, 71 Cal. 481; *Smith v. Carter*, 25 Wis. 283; *Peterson v. Johnson*, 22 Wis. 21, 94 Am. Dec. 581; *Billings v. Everett*, 52 Cal. 661, *supra*, VI. b.

d. What agreements are within the rule.

Whenever a defendant can maintain a cross-action for damages on account of a defect in personal property purchased by him or for a non-compliance by the plaintiff with his part of the contract, he may in defense to an action upon his note made in consequence of such purchase or contract, claim a deduction corresponding with the injury he has sustained. *Peden v. Moore*, 1 Stew. & P. (Ala.) 71, 21 Am. Dec. 649.

Thus, the failure to return a note, in consideration for the return of which another note was given, constitutes a total failure of consideration for the latter note and a good defense in an action thereon. *Perry v. Connell* (Tex. Civ. App.) 31 S. W. 685.

And that a note was given to replace another worthless note and upon an agreement and promise on the part of the payee that he would furnish the makers on credit with all the goods they might desire, and that thereafter they refused to fill their orders, is a good defense in an action on the notes by way of failure of consideration. *Barnes v. Stevens*, 62 Ind. 226.

And that a part of the sum in consideration for which a note was given was included in it, upon the express agreement between the parties that suit should not be brought upon it for sixty days, which time had not elapsed, is a good defense in an action on the note by way of showing a partial failure of consideration. *Hill v. Enders*, 19 Ill. 163.

And evidence that an action had been commenced against a debtor, and that another indorsed a note for the debtor upon the agreement of the creditor that he would discontinue the action and give at least one renewal thereof, but that he did not perform such agreement, but, on the contrary, entered up judgment in such action, goes to establish a failure of consideration of the note indorsed, and should be admitted in an action thereon as a defense. *Bookstaver v. Jayne*, 60 N. Y. 146.

So, that a note was given for designated articles which the payee agreed to deliver to the maker and which he never delivered, is a good defense in an action on the note by way of failure of consideration. *Mitchell v. Stinson*, 80 Ind. 324.

And no recovery can be had on a note given for medical services to a physician and surgeon upon the agreement that he would permanently cure the wife of the maker of the note, and that if he failed to so cure her he would not charge anything for his services, upon the representation to the maker of the note that she was cured, which afterwards proved to be false, such facts establishing a failure of consideration. *Andros v. Childers*, 14 Or. 447.

And a promissory note given by a client to an attorney for services to be rendered in a suit is void, though in the hands of an innocent transferee, under Georgia act of 1831, § 1, providing that contracts between a client and an attorney shall be held and deemed null and void whenever the said attorney shall fail to attend in person or by some competent attorney to the suit or suits which he contracted to attend to until the rendition of a judgment, where he thus fails to attend. *Weed v. Bond*, 21 Ga. 195.

So, where the payee of a promissory note procured the same to be executed by stipulating with the maker that he would procure employment for a third person for whose benefit the note was given and who received the entire consideration therefor by which the latter would earn enough money to pay the note, a total breach of such stipulation is a defense to an action brought upon the note by the payee. *Toombs v. West*, 94 Ga. 280.

And that a note was given for the difference between the value of two sewing machines on a trade, and that it was agreed at the time that the payee should repair the machine given by him in the trade, which he refused to do and the machine proved to be worthless, constitute a good counterclaim in an action on the note. *Howe Mach. Co. v. Reber*, 86 Ind. 498.

And where a note is given in consideration of the sale and delivery of a quantity of flour which was to be shipped on board a designated steamer then at the wharf to be transported to the purchaser, and only a small quantity was put on board, the transaction may be set up as a defense in an action on the note by way of failure of consideration. *Corwith v. Colter*, 82 Ill. 584.

So, where the consideration for a note consisted in part of an agreement to convey a valid and clear title to certain lands to the maker thereof, and such agreement was not complied with, there is a failure of consideration to the extent of the amount which the maker is required to pay to perfect his title, and such amount may be set up as a defense against any assignee of the note without regard to any question of notice of time of assignment. *Holman v. Creagmiles*, 14 Ind. 177.

And where the payee of a note was to convey to the maker a good title to land by a good and sufficient deed at the time of receiving a designated amount of cash and a note for the price, but failed to do so, but delivered instead a paper which conveyed no title, and never tendered or offered to execute and deliver a valid deed, both parties are to be treated as having rescinded the bargain, and the consideration for the note entirely fails. *Curtis v. Clark*, 133 Mass. 509.

And where a vendor agrees to convey her interest in certain land to the vendee upon the payment of a designated sum and the execution of notes for the balance, and she conveys a part of the land of less value than the sum paid and refuses to convey the rest, the consideration for the notes fails and no recovery can be had thereon, for the reason that the conveyance of the land was to be made upon the execution of the notes, and therefore the obligation of the maker to pay the notes is dependent upon the performance of, or an offer to perform, her contract. *L. R. A.*

tract by the payee. *Cooper v. King*, 73 Iowa, 136.

And the failure to fulfil an obligation to give a deed of certain lands in consideration for which a note was given is a sufficient ground to warrant relief in chancery against the note where the obligor is bankrupt, though the failure to perform the obligation was due to the fact that it had become impossible from the act of God. *Williams v. Smith*, 2 Root, 464.

So, that a promissory note was given for the purchase of a tract of land under an agreement in writing that the vendor should cancel and discharge the title of a third person to a part of the land before any portion of the note should be payable, and that he had failed to comply with the condition, is a valid defense in an action thereon by one who received it after maturity. *Rogers v. Broadnax*, 24 Tex. 538.

And that a note was given for the purchase money of a tract of land conveyed to the maker at the instance of the payee by a person who was insolvent, and that the payee had agreed to pay off a mortgage upon the premises of an amount greater than the note sued on, which he had failed to do and the maker had been compelled to pay it, constitute a good defense in an action on the note by way of failure of consideration. *Miller v. Gibbs*, 29 Ind. 228.

And that a note was executed in consideration of a lease of certain premises, and that at the time of the execution thereof the maker of the lease was not entitled to possession of the demised premises, and that the maker of the note never took possession of them, are a competent defense in an action on the note. *Andrews v. Woodcock*, 14 Iowa, 397.

And that the note in suit was one of six which had been signed by the maker, pending negotiations for a sale by the payee of a tract of land, and that the conveyance of the land had been drawn up, signed, and acknowledged by the payee and a mortgage blank had been drawn, signed, and acknowledged at the same time with the note, but that the transaction had not been completed by the delivery of such papers, and that they did not agree or mean to purchase absolutely, nor to bind themselves by the notes beyond the security of the land itself, amount to a failure to execute the instruments, and give the maker of the note the right to have it canceled, and are a defense in an action on the note. *Scalfe v. Byrd*, 39 Ark. 568.

And that an agreement signed and sealed by the payee of a note, to sell to the maker thereof his possession as occupant of certain lands and deliver up such possession by a certain day, and that possession had not been delivered, are a good defense in an action on the note by way of failure of consideration. *Miller v. Wood*, 23 Ark. 546.

So, an answer in an action upon a note setting up that the consideration therefor was a verbal promise of the payee to the maker to procure the execution to the latter of a lease for a definite time of a building belonging to a third person and alleging a breach thereof, sets up a good defense by way of failure of consideration. *Stanford v. Davis*, 54 Ind. 45.

And where a note is given for a part of the purchase price of certain property and a milk route, and the payee delivers to the maker a writing stating the sale of the milk route, property, and fixtures, describing them, and for the same consideration it was orally agreed that the vendor would not peddle milk in the same locality while the vendee should continue in that business, which latter agreement is violated, the writing delivered by the payee is a mere bill of particulars, and oral evidence is admissible in an action on the note to prove the agreement.

actually made between the parties. *Stacy v. Kemp*, 97 Mass. 166.

But an agreement between the parties to a note given for the purchase price of lands reciting the sale, and that the payee was not able to procure a release of dower from certain persons and agreed to procure such release within nine months or forfeit the amount of the note, is not a promise to pay the amount, but is a forfeiture of the right to collect it in case of failure to procure such release, the note becoming discharged by his failure to comply with his contract. *Phillips v. Longstreth*, 14 Ala. 337.

That a note was given for an interest in a patent washing machine bought by the maker of the payee upon a verbal agreement that the maker should be required to pay no money on it unless it should be realized from the sales of the machine, however, and that it was wholly worthless and nothing was realized, cannot be set up in defense in an action on a note, as such parol agreement does not pertain to the consideration of the note, but goes to its validity and the obligation of the maker to pay it. *De Long v. Lee*, 73 Iowa, 53.

And an arrangement between debtors and a creditor that if the debtors would secure to the creditor the amount then due, each partner securing his one half of the debt, the creditor would sell them such goods on time as would enable them to continue in business, pursuant to which the debtors executed two notes in settlement, after which they applied for goods to replenish their stock and were refused credit, is not a defense in an action upon the notes, as it does not go to show a failure of consideration of the notes sued on, it being the precedent debt, and not the promise to furnish the goods, that constitutes the consideration. *Wortham v. Cameron* (Tex. App.) 16 S. W. 101.

And that a note was given in consideration of the purchase price of a horse, and that at the time of its execution the payee was indebted to the maker for work done and materials furnished at the payee's request in a sum greater than the amount of the note, and that it was agreed between the parties in consideration of such indebtedness that if the payee did not pay it by performing certain labor the horse should go in payment of such indebtedness, does not show a defense of want or failure of consideration, as the consideration consisted of the horse purchased, and does not show an accord and satisfaction, as it does not appear that payment was made by performing the work agreed upon, and cannot be proved by parol, as it would go to vary the legal effect of the note sued upon. *Parks v. Zeek*, 53 Ind. 221.

So, that a promissory note was made upon the payee's promise that the maker might collect the amount of it from a third person in payment for property which such person was to buy from the payee, and should not be liable on it if he could not make the collection, and that such third person had since become bankrupt and he could not collect, will not sustain the defense of want of consideration. *Hodgkins v. Moulton*, 100 Mass. 309.

And where notes are executed and delivered in consequence of the adjustment of a dispute and in settlement thereof, the fact that the maker was induced to give them by a promise by the payee's agent that he would sell property involved in the dispute for him at an advance price, which promise had never been performed or intended to be performed, does not authorize the maker to go behind the notes and avail himself of a defense in the way of failure of consideration and fraud in their procurement. *Edison General Electric Co. v. Blount*, 96 Ga. 272.

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And a breach of warranty of a clock, and an agreement that if the clock should not prove good the vendor would either make it good or replace it with a good one before the money should be paid, are not provable by parol as a defense in an action on a note given for the purchase price thereof, as the breach of such stipulations would form the basis of a particular action. *Kelso v. Frye*, 4 Bibb, 493.

Nor can a verdict for the defendant in an action upon a note given for agricultural instruments which the payees of the note promised to send to the maker within a certain time, but which were not delivered, be sustained on the ground of failure of consideration, where it appears that a small portion of the articles were forwarded and actually received by the maker before the commencement of the suit; the verdict should have been against him at least for some amount. *Burrill v. Parsons*, 73 Me. 286.

And one who gives a note for the purchase price of a machine purchased on the understanding that he was not to pay for it unless it proved satisfactory, the payment being put off a year, so that if the machine did not work well the purchaser would not have to pay the note, is limited in time within which he may refuse to accept the machine to the one year the note was to run, and after the maturity of the note he is precluded from setting up as a defense to an action thereon a claim that the machine was unsatisfactory. *Hastings v. Adams*, 67 Vt. 119.

So, the nondelivery of a deed does not constitute a failure of consideration of a note given for the purchase price of the land where the deed was not to be delivered until payment of the note. *Bourland v. Gibson*, 91 Ill. 470.

And, the maker of a note given for the purchase price of lands sold to him by parol agreement, after which a bond for title is given, conditioned for the making of title when the note should be paid, cannot resist a recovery on the ground of failure of consideration in the absence of a disturbance of his possession. *White v. Beard*, 5 Port. (Ala.) 94, 30 Am. Dec. 552.

And that a note was given for a deed of land described as bounded on one side by a street recently laid out, thus impliedly containing the covenant that there was such a street, when in fact no such street actually existed, and the failure of the grantor to join in the construction of such street, cannot be set up in an action on the note as a failure of consideration or as a set-off. *Loring v. Otis*, 7 Gray, 563.

So, where a grant is made by the owner of a patent milk can accompanying a sale of a number of cans, of the exclusive use of the invention within a designated territory, and it appears that the grantor had furnished cans and permitted their use in the same territory by others in violation of their agreement, such violation will not be held to constitute a defense in an action on notes given for such cans, where there is nothing tangible in the testimony upon which a jury can base an estimate of the loss of profits on account of competition in that territory with such cans used by other persons. *Davis v. Davis*, 84 Mich. 324.

And proof in an action on a promissory note given for the services of an attorney-at-law to be rendered, that the attorney was absent at the first ensuing term of the court in which the cause with reference to which he was engaged was pending, and that the cause was compromised by the parties before the next term, does not establish or tend to establish a failure of consideration. *Douglass v. Eason*, 36 Ala. 687.

See also *Tower v. Richardson*, 6 Allen, 353, *supra*, II. e.; *Bailey v. Cromwell*, 4 Ill. 71, *supra*, IV. b.

VII. *Agreements constituting condition of delivery.*

Where an agreement contemporaneous with a promissory note, whether oral or in writing, constitutes a condition which is to happen before the note is delivered or goes into effect, a failure to perform the agreement is a good defense to the note by way of showing that the contract was never completed by delivery, or that it never went into effect and therefore there never was a contract.

Thus, where it is shown that a promissory note was delivered to take effect only on the performance of some condition or on the happening of some future event, the contract is not operative and binding until the condition is performed or the event has occurred. *Seymour v. Cowing*, 1 Keyes, 535.

And parol evidence is admissible to show that a note was not to be delivered until the happening of a designated contingency or the performance of a specified condition which had not yet happened or been performed. *Sweet v. Stevens*, 7 R. I. 375.

And evidence that a note was never in fact delivered as a personal contract unconditionally binding upon the obligor according to its terms, but was left in the hands of another to become an absolute obligation in the event of the maker's electing upon examination or investigation to take an interest in property for which the note was given, does not contradict the terms of the writing or vary their legal import, and is therefore admissible in an action on the note. *Burke v. Dulaney*, 153 U. S. 228, 38 L. ed. 698.

And parol evidence that a note was delivered to the payee by the maker upon the understanding that it was to be delivered up to the latter on his demand within a specified time, and that it was so demanded, does not contradict the note or tend to vary its terms within the meaning of the statute of frauds, but merely goes to the point of its nondelivery. *McFarland v. Sikes*, 54 Conn. 250.

So, no recovery can be had on a note delivered by the maker to the payee upon the understanding that it was to be delivered up to the maker on his demand within a specified time, where he demanded its return within such time, as the contract cannot become binding until it has been delivered, and such delivery was conditional. *Ibid.*

The rule that parol evidence is not competent to alter, vary, add to, or take from a written instrument is not applicable in an action on a note where it was understood between the parties that it was to be binding only conditionally, and that it was to be held as an escrow, and that in violation of the agreement under which it was held the holder was seeking to enforce it before the condition was complied with. *Breeden v. Grigg*, 8 Baxt. 163.

And proof of an agreement between the parties to a promissory note that it was to be of no effect unless upon consultation with a designated counsel the maker should be assured of the legality of the transaction out of which it arose, and that upon such consultation he was advised that the transaction was illegal, shows that the instrument never went into effect and the condition upon which it was to become operative never occurred, and is not within the principle excluding evidence contradicting or varying a written instrument by parol. *Ware v. Allen*, 128 U. S. 590, 32 L. ed. 563.

And a note signed by a vendor of land and placed in the hands of a third person as an escrow, together with one signed by the purchaser upon the understanding that upon the 43 L. R. A.

failure of either to perform his part of the agreement his note should take effect and be delivered by depository to the other party, which conditions were performed by the vendee but not by the vendor, is not altered or varied by proof of such conditions by parol, and such proof is admissible in an action thereon, as they are not a part of the written contract but only the terms upon which it was to take effect. *Couch v. Meeker*, 2 Conn. 302, 7 Am. Dec. 274.

And that a note given as a subscription to an endowment fund was delivered to the payee in trust to hold until the endowment fund should be fully subscribed, in which event the delivery should be deemed final and complete, and that such endowment fund had never been subscribed, is not a sufficient defense to an action on the note. *Roche v. Roanoke Classical Seminary*, 56 Ind. 198.

And an agreement between the parties to a note given for the support of a certain child, that if the child should die before a designated time nothing should be paid on the note, and if within a further designated time only a sum proportionate to the time it should live though it was not annexed to the note, is to be considered as in the nature of a condition, and where the child dies during the second-named period the designated portion only is to be paid. *Fellows v. Carpenter*, Klrby, 364. But see *Potter v. Earnest*, 45 Ind. 418, *supra*, II. h.

And an agreement by shareholders to donate their notes for an amount equal to their shares if other shareholders would do the same is to be construed with the notes thus donated, and constitutes a defense to an action thereon, where some of the shareholders never executed their notes. *Traders' Nat. Bank v. Smith* (Tex. Civ. App.) 22 S. W. 1026.

In the above case *State Nat. Bank v. Cason*, 39 La. Ann. 867, and *Patten v. Gleason*, 106 Mass. 439, *infra*, X., were distinguished upon the ground that in those cases the notes were delivered with the understanding that they were to take effect immediately, the maker relying on the agreement of the payee to comply with his part of the contract; but in this case the note was not to take effect at all unless the condition was complied with.

So, promissory notes delivered by a person who has executed them upon the express condition that they shall not be deemed his notes or be considered as delivered, unless they are also executed by another person named as comaker, cannot be enforced by the payee against such person unless also executed by the person designated. *McCormick Harvesting Mach. Co. v. Faulkner*, 7 S. D. 363; *Mosher v. Rogers* (Ill.) 20 Cent. L. J. 316; *Leaf v. Gibbs*, 4 Car. & P. 466; *Miller v. Gamble*, 4 Barb. 146.

Unless the jury are satisfied that such person, knowing the facts and being aware of his rights, had consented to waive his objection. *Leaf v. Gibbs*, 4 Car. & P. 466.

And the person suing upon such note is bound to show how it came into his hands without a compliance with the condition. *Miller v. Gamble*, 4 Barb. 146.

And parol evidence thereof is properly admitted, as it does not tend to vary the terms of the written instruments, but tends to prove that the notes were never in fact delivered as such, and therefore never took effect or became operative as promissory notes. *McCormick Harvesting Mach. Co. v. Faulkner*, 7 S. D. 363.

And one who signed a note jointly with his brother on the representation by the brother that another designated person would also join, and that he should not be held responsible unless such other person joined, is not liable on the note

in the hands of a holder with notice to whom it was delivered by the brother upon the refusal of a third person to sign. *Awde v. Dixon*, 5 Eng. L. & Eq. 512, 6 Exch. 869, 20 L. J. Exch. N. S. 295.

So, where a note was signed under an agreement that it should not be used except to take up another designated note or unless all the signers to the other note signed it, such understanding inducing the maker to sign, and the note was taken by the holder without the signature of such other persons knowing that the signer had been so induced to sign, the execution of the note and the agreement as to its use must be deemed to have been contemporaneous acts, and to have constituted one transaction, and such agreement may be shown by parol and constitutes a sufficient defense in an action on the note. *Harrington v. Wright*, 48 Vt. 427.

And where a note is delivered in escrow to be delivered to the payee on the happening of a certain event, otherwise to be null and void, and the event never happened and the depositary died, declarations of the depositary respecting the terms and conditions on which he held the note are admissible in evidence in an action subsequently brought on the note by an indorsee. *Goodson v. Johnson*, 35 Tex. 622.

So, a note delivered by the maker to the supervisor of a town to be delivered to the payee on condition of his completion of a certain road, according to his contract with the town, by a certain date, is not binding upon the maker where the payee did not perform his contract, but after the expiration of the time therefor and after the maturity of the note the road was built by another person, and accepted by the supervisors, and the note delivered without the consent of the maker. *McLean v. Nugent*, 33 Wis. 338.

And the maker of a note may make its delivery conditional upon the completion of a road by the payee within a designated time, whether or not it appears that he had any special interest in the performance of the work, or whether or not he had an interest in its performance by that particular person. *Ibid.*

And a note made by a person not liable for the amount of a certain judgment, with others who were liable, which was left with one of the persons so liable, to be negotiated by him to raise money to pay the judgment, has no legal existence as such for want of delivery, where, instead of procuring its discount and negotiation, such person pays the judgment with his own funds, and he can recover nothing against the other maker on account of such payment. *Thomas v. Watkins*, 16 Wis. 550.

So, a non-negotiable note which had been discounted may be defended against by one of the signers on the ground that the note was not executed for the purpose of discount, but was executed by him with the distinct agreement that two other designated persons were also to execute it, and it was then to be delivered to the bank in part renewal of a debt due it, and that another of the signers was to pay the balance, and that he was in fact the surety of such other person and received no part of the proceeds. *Rogge v. Cassidy*, 12 Ky. L. Rep. 54.

And the fact that one who signs a note upon condition that there shall be another signer to make it valid had an agency or was active in procuring the indorsement of a payment made upon the note, does not constitute a waiver of his right to insist that the agreement for another signer should have been fulfilled. *Miller v. Gamble*, 4 Barb. 146.

And it has been held that a promissory note and a mortgage securing it, placed in the hands of a custodian with the express understanding

that they were not to be delivered to the payee except on the happening of a certain event, which never occurred, but which were delivered without authority are void though they came to the hands of a purchaser in good faith for value before maturity, where nothing appears to charge the maker with negligence in allowing the instruments to be put into circulation. *Chipman v. Tucker*, 38 Wis. 43, 20 Am. Rep. 1.

This rule has been extended to a conditional delivery to the payee himself, and it has been held that the maker of a note sued by the payee may prove by parol that the instrument was delivered even to the payee, to take effect only on the happening of some future event. *Julliard v. Chaffee*, 92 N. Y. 530; *Alexander v. Wilkes*, 11 Lea, 221.

And that parol evidence of an understanding or agreement between the parties to a note that the makers were not to be bound by their signatures unless the note was signed by other designated persons, and that the note was placed in the hands of the payee to obtain such signatures, but that they were not obtained, is admissible in evidence as a defense in an action on the note. *Robertson v. Evans*, 3 S. C. N. S. 330.

And that the delivery of a note to the agent of the payee with an agreement that he should hold it until a designated time, and then return it if the maker should not decide to effect a designated purchase from the payee, and that in the mean time the note should not be considered as delivered, is of no effect where at the specified time the maker notified the agent that he had decided not to make the purchase and demanded a return of the note; and an allegation of such facts constitutes a good defense in an action thereon. *Hillisdale College v. Thomas*, 40 Wis. 661.

Upon the other hand, however, it has been held that parol evidence of an undertaking between the parties to a note is not admissible in an action thereon to show that the note was given to the payee himself as an escrow to take effect upon a condition, or to show delivery upon the condition that it was not to have any binding force at all. *Guilce v. Thornton*, 76 Ala. 406; *Massmann v. Holscher*, 49 Mo. 87. And see *Johnson v. Branch*, 11 Humph. 521; *Radcock v. Steadman*, 1 Root, 87; *Henshaw v. Dutton*, 59 Mo. 139; *Jones v. Shaw*, 67 Mo. 667.

And that parol evidence that a note was given and received by the payee upon the condition that it was not to be used and the maker was not to be bound unless the signature of another designated person was obtained, and that such signature was never procured or asked for, is not admissible in an action on the note. *Cianin v. Esterly Harvesting Mach. Co.* 118 Ind. 372, 3 L. R. A. 863.

So, in *Sherwin v. Brigham*, 39 Ohio St. 137, it was held that where a letter of credit provides that negotiable paper drawn under its authority shall be used only for the purpose of being discounted at a particular bank, persons taking it with notice that it had been offered to the bank for discount and refused cannot recover thereon.

But an agreement between the maker and payee of a note that it was to be negotiated in a designated bank, which was violated by the payee by procuring the money thereon from an individual, is no defense in an action on the note, though the holder discounting it had notice of such agreement. *Parker v. Sutton*, 103 N. C. 191; *Parker v. McDowell*, 95 N. C. 219, 59 Am. Rep. 235.

And where a note is made or indorsed as accommodation paper with the understanding that

It is to be discounted at a certain bank or that money is to be obtained upon it in a particular manner, discounting it at another bank or obtaining money on it in a different way from that intended is not a fraudulent misappropriation of the note which will defeat an action upon it. *Duncan v. Gilbert*, 29 N. J. L. 521.

And the failure on the part of a payee of a note made for his general accommodation, where no restrictions have been placed upon him as to its use, to appropriate the proceeds according to a prior agreement, is no defense thereon in an action by the holder against the maker. *Brooks v. Hey*, 23 Hun, 372.

A note made for accommodation to the order of the cashier of a bank under an agreement that it should be discounted at that bank, which is not carried out, however, the bank refusing to discount it, whereupon it is discounted by a third person having no notice of any understanding or agreement that the note should be discounted by the bank other than what appears on the face of the note, is void, although the cashier indorsed it without recourse. *Parker v. McDowell*, 95 N. C. 219, 59 Am. Rep. 235.

And the rule would be different if the notes were not made for the purpose of raising money. *Ibid.*

And an agreement between the indorser and the maker of a negotiable promissory note that it was not to be delivered as an indorsed note until a bill of sale of a certain steamer was executed and delivered by her owners to the maker, and until a first lien was given thereon by the latter to the indorser, is not *per se* evidence in an action on the note by the holder against the indorser, but is admissible in evidence in connection with proof that the holder received the note from the maker with express notice and actual knowledge of the agreement; and the jury might infer from such evidence that the holder acquiesced in the agreement and accepted the note subject to it. *Ricketts v. Pendleton*, 14 Md. 320.

So, in *Smalley v. Bristol*, 1 Mich. 153, it was held, in an action on a promissory note, that a separate writing to the effect that the note was to be operative as such on a contingency or unless a certain event should happen, contained in a separate paper, is matter of defense only, and need not be noticed by the plaintiff in declaring on the note.

And in *Massmann v. Holscher*, 49 Mo. 87, it was held that an oral agreement between the maker and payee of a note that the note should be signed by another designated person, and if not so signed it should then become inoperative and void from the time of such failure and proof that such third person executed the notes and that it was mere accommodation paper, is inadmissible in evidence in an action on the note.

The law with relation to delivery in escrow is not intended to be covered, but is merely touched upon incidentally so far as the cases on that subject apply to the matter in hand.

VIII. Agreements constituting satisfaction or discharge.

A verbal agreement entered into by the parties at the making of a note, that it should be delivered up to the maker on his performing certain conditions, is admissible in evidence in an action by the payee thereon as the performance of the conditions amounts to payment of the note. *Hagood v. Swords*, 2 Ball. L. 305.

And such an agreement that a designated claim should be allowed as a credit thereon and entered as such on the note, which was not done, is not subject to the objection that it was 43 L. R. A.

a contemporaneous verbal understanding that would vary the terms of the written instrument, as the transaction amounted to an equitable payment. *Nalle v. Gates*, 20 Tex. 315.

And an agreement to apply on the notes whatever should be received from the debtors may be shown in defense of an action thereon to establish payment where, after the giving of the note, the creditor did receive and accept property from the debtor. *Rugland v. Thompson*, 48 Minn. 539.

So, it is competent to show by parol a collateral agreement that notes should be held for nothing if the makers compromised with all their creditors, as the rule that verbal evidence is not admissible to contradict or alter a written instrument does not exclude such evidence adduced to prove that the written instrument is totally discharged. *Bissenger v. Gulteman*, 6 Helsk. 277.

And an agreement between the parties to a note given in consideration of a sale of certain letter boxes, drawers, and other furniture in a postoffice, that each one should have and receive his proportionate share of the rent of boxes and drawers for a designated quarter, and proof that the payee had collected various sums for the entire quarter, the amount of which he agreed to apply as soon as definitely ascertained in liquidation and payment of the note, does not fall within the rule prohibiting a change of the terms of a written instrument by parol, as the effect of the agreement would merely be to show that at the time the note was given it was understood that a portion was to be paid in a particular manner, and that it had been so paid. *Jones v. Keyes*, 16 Wis. 563.

Proof of a parol agreement between the maker and payee of a note that it was to be surrendered to the maker at the death of the payee in satisfaction for services rendered to the payee by the maker merely constitutes proof of an agreement showing how the note had been in fact paid, and how upon the death of the holder it was to be surrendered, and is admissible in defense in an action on the note. *Jilson v. Gilbert*, 26 Wis. 637, 7 Am. Rep. 100.

So, where notes and accounts are transferred upon an agreement that if they could not be used in a specified manner they should be returned and the contract rescinded, the arrangement does not have the effect in any manner of contradicting the note, and as soon as the notes and account are offered to be returned after it is ascertained that they cannot be used for the purpose agreed upon the contract is discharged or rescinded and the note ought to be given up and canceled; and such facts constitute a good defense in an action on the note. *Blminton v. Steele*, 1 Ala. 357. But see *McClintic v. Cory*, 22 Ind. 170, and *Ely v. Kilborn*, 5 Denio, 514, *supra*, II. c.

And where a note is made upon the understanding and agreement between the parties that when it falls due it shall go as a credit on a note given by the payee, and when it becomes due the payee applies to the maker to have such credit made according to the agreement, which she refuses to do, she becomes liable for the whole amount. *Smith v. Lawrence*, 73 N. C. 98.

An agreement between the parties to a note to renew it when it becomes due does not amount to a defeasance or release, however, and cannot be set up as a defense in an action on the note; it is only available as a basis of a separate suit. *Bond v. Worley*, 26 Mo. 253.

And an agreement under seal between the parties to a note given for the purchase price of a tract of land, that if there should be any suit concerning the land, the note should not be

paid until the same had been entirely got rid of and cleared away, and that the expenses of the suit were to be deducted from the notes, cannot be set up in bar of a suit on the notes, as it does not amount to a defeasance or release, and the party aggrieved can only resort to his separate action on the covenant. *Bircher v. Payne*, 7 Mo. 462.

So, where the payee of a note agrees with the maker that upon the conveyance to him of certain land a designated sum should be allowed him upon the note, and if any sum should be paid in cash or otherwise double that amount should be indorsed upon the note, and that upon receiving a conveyance of the land and the maker's note for \$500 payable in one year with interest the first note should be given up, the agreement to be carried into effect in three months, after which the land was conveyed and the designated amount indorsed as paid on the note in accordance with the agreement within the three months, but no other payment and no note for \$500 was made or tendered within that time, the note is to be regarded, not as a penalty, but as evidence of a subsisting debt to the amount of it, and the agreement is to be regarded as in the nature of a composition the conditions of which must be strictly complied with, and the maker, not having complied with such conditions, is liable for the balance of the note after deducting the amount paid. *Makepeace v. Harvard College*, 10 Pick. 298.

But evidence that a mother delivered to her son a sum of money to relieve him from financial distress as an advancement, but took a note therefor to satisfy her other children, which was intended simply as evidence of such advancement, promising that the mortgage given to secure it should never be recorded, and that the instruments were delivered to him immediately after execution and had remained in his possession ever since until the mortgage was surreptitiously taken from him and recorded so that the note and mortgage were mere evidence of an advancement, constitutes a good defense to an action on the note. *Peabody v. Peabody*, 59 Ind. 556. See also *Sherman v. Sherman*, 3 Ind. 337, *supra*, II. b.

The foregoing subdivision should be read in connection with the subdivisions on "Parol agreements: As to medium of payment, and As to mode of payment," *supra*, II. f and g. It will be at once seen that agreements constituting satisfaction or discharge of a note, and agreements as to medium or mode of payments, are very similar, if not the same thing, and the conflict between some of the cases on the question of parol proof of such agreements seems to be irreconcilable. It is thought, however, that the line of division between the cases rests upon the distinction between executed and executory agreements, and that on principle such agreements by parol are not admissible as a defense when they are wholly executory, and become so only when they are executed or when there is an attempt or offer to execute them.

IX. Executed agreements.

When an agreement contemporaneous with a promissory note is executed, it satisfies the note.

While an executory oral agreement made contemporaneous with the execution of a promissory note is not available as a defense in an action on the note, if it is agreed that if the maker do a certain thing it should operate as a payment and discharge of the note, and he thereupon does such thing, it will constitute a sufficient defense. *Thompson v. Rawles*, 33 Ala. 29.

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And where an oral agreement for payment in something besides money, contemporaneous with a promissory note, has been performed, it becomes a complete cancellation and discharge of the written obligation, and a defense to an action brought upon it. *Patrick v. Petty*, 83 Ala. 420; *Hammond v. Cadmus*, 10 N. J. L. J. 245.

Where there is a parol executory agreement made at the time of the execution of a note, if the collateral contract be not executed, it cannot be given in evidence to defeat an action on the note because that would be to contradict by parol the written agreement of the parties, but if the collateral agreement be executed it will be a good defense to an action on the note, not because such proof would show a different contract, but because it would show its discharge in the nature of an accord and satisfaction. *McNair v. Cooper*, 4 Ala. 660.

And it may be shown that a promissory note has been discharged by a parol agreement. *Julliard v. Chaffee*, 92 N. Y. 529.

In the above case *Hoare v. Graham*, 8 Campb. 57, *Moseley v. Hanford*, 10 Barn. & C. 729, and *Woodbridge v. Spooner*, 3 Barn. & Ald. 233, 1 Chitty, 661, *supra*, II. d, were distinguished and explained, the court saying that they are in harmony with those which recognize a distinction between an agreement for the legal discharge of a contract and one which destroys its legal effect either by contradicting its terms or substituting a distinct and independent agreement.

So, parol evidence of an agreement between the parties to a note, made contemporaneously with the note, that merchandise should be taken in satisfaction of the amount to become due, coupled with proof that the merchandise was delivered according to agreement, is admissible as showing satisfaction, and does not infringe the rule that parol evidence of contemporaneous declarations is inadmissible to vary the terms of the written contract. *Buchanan v. Adams*, 49 N. J. L. 636, 60 Am. Rep. 666.

And such evidence of an agreement contemporaneous with a promissory note given for three clocks, that the vendor would take back one of the clocks if the purchaser's father did not like it, and that, the clock being disapproved of, an offer was made to return it, which was refused, is admissible in defense in an action on the note, as the evidence does not go to alter the terms of the note, but to show a return of the clock as authorized by the contract, and therefore a right of set-off against the note. *Barnes v. Shelton*, Harp. L. 33, 18 Am. Dec. 642.

So, where notes are given to secure the execution by the maker of a promise to support and take care of a designated person for life, and the promise is fulfilled, the notes are discharged, and parol evidence is admissible to prove such agreement. *Howard v. Stratton*, 64 Cal. 487. And see *Kirkpatrick v. Taylor*, 43 Ill. 207, *supra*, VII. c.

And an oral agreement entered into between the payee and maker of a promissory note at the time the note was made, which has been fully performed, that if the maker would pay interest on the note and support a relative of the payee for life the note should be considered paid, is a good defense in an action by the personal representatives of the payee against the maker of the note. *McQuarrie v. Brand*, 28 Ont. Rep. 69.

And parol evidence is admissible in an action on a note made payable upon the death of a widow to prove that the note was given for the estimated value of one third of the land of which the widow was dowable, on the agreement that if the maker should expend the

amount of the note in her support the note should be void and that she had lived eighteen years after the note was given, and that the amount expended exceeded the amount of the note. *Crosman v. Fuller*, 17 Pick. 171.

So, a promissory note and a written agreement between the parties made at the same time, by which the maker was to furnish the payee his house at a stipulated rent and the payee was to satisfy the note with the accruing rent, should be considered as one agreement, and where it appears that the maker furnished the house as agreed, and was still ready to furnish it, performance or readiness to perform on the part of the maker is shown which will constitute a good defense in an action on the note. *Bradley v. Marshall*, 54 Ill. 173.

And parol evidence of an agreement between the parties to a note in satisfaction of an injury done to the payee by the circulation of false reports injurious to the character of his wife, that in case the maker would make it appear to the satisfaction of the payee that he did not originate the injurious reports the payee would give up the note, and proof that such evidence was furnished to the satisfaction of the payee, is admissible in evidence as a defense in an action on the note. *Sanders v. Howe*, 1 D. Chip. (Vt.) 365.

And that a note given for the purchase price of property purchased by an agent for his principal, given by the agent in his own name, was made under an agreement that when the principal returned the vendor would obtain his signature to the note, releases the agent and presents a good defense to an action on the note as against the original payee or an indorsee after maturity, where the vendor procured the principal's signature, but failed to release the agent. *McNitt v. Helm*, 33 Iowa, 342.

So, it is a good defense to a note in the hands of one not a bona fide holder that at the time of its execution there was a verbal agreement between the maker and the payee that the payee should transfer to the maker certain property for which the maker was to execute the note, and in case the payee was successful in settling the affairs of a person who had failed and for whom he was surety, who had assigned to him, then the said payee was to receive back such property from the maker and surrender the note, where evidence was produced that such property was surrendered to the payee from the maker in accordance with the agreement. *Van Valkenburgh v. Stupplebeen*, 49 Barb. 99.

And when it is charged, in an action on a note in which it is alleged that it was made and delivered for the purpose of securing credit to the payee upon an agreement that the first moneys paid by the maker to the payee should be applied on the note, that if such defense was believed the jury should find for the defendant whether or not such moneys were specially denoted to be applied on the note, a subsequent instruction that if the money paid had not been applied on the note it was not paid is erroneous as contravening the previous instruction. *Merrick v. Rogers* (Tex. Civ. App.) 47 S. W. 801.

So, proof that a note represented a sum of money placed by the payee in the hands of the maker to be by him used in purchasing a controlling interest in a certain newspaper, so as to procure the support of the newspaper for the candidacy of the payee for office, and that the purchase failed and that thereupon the payee directed that the money be distributed in legitimate campaign expenses in a designated county, with evidence of a disbursement of considerable sums for livery teams to carry persons to political meetings, writing up proceedings of political

meetings and other expenses, a verdict for the defendant based on the ground of payment will be upheld. *Hitchcock v. Hassler*, 16 Neb. 467.

And where a promissory note was given in settlement of a breach of promise suit and other proceedings, proof that on the day of the execution of the note it was mutually agreed between the parties that in consideration of the dismissal of the suit the maker would marry the payee, and that the note was executed as security that the defendant would faithfully keep and perform his agreement, and that thereafter he complied with his agreement and married her, would be a complete defense to an action on a note, as it would constitute an executed agreement; but where it appears that the agreement was that he should marry her and take care of her and treat her as a husband should treat his wife, and that although he had married her he had nevertheless treated her in a manner so cruel and inhuman as to drive her from his house so that she was compelled to obtain a divorce, his liability on the note would remain. *Tucker v. Tucker*, 113 Ind. 272.

So, an agreement contemporaneous with the giving of notes, that they should be void on the happening of certain contingencies, will invalidate the notes though the contingencies did not happen, where the act of the payee of the notes prevented them from happening. *Stockwell v. Gidney*, 73 Me. 84.

And where an oral agreement for the payment in something besides money contemporaneous with a promissory note is performed in part, and full performance is prevented only by the death of a party, it will operate as payment or accord and satisfaction *pro tanto*, but *pro tanto* only. *Patrick v. Petty*, 83 Ala. 420.

And a note given by a person indicted for a crime to a lawyer to defend him cannot be defended against on the ground that the lawyer did not perform the particular service for which the note was executed, where before the trial the maker of the note committed suicide. *Mitcherson v. Dosler*, 7 J. J. Marsh. 53, 22 Am. Dec. 116.

And that a note was given to pay an attorney to defend the maker on an indictment for murder, but that the defendant died before a trial was had, and that the only service rendered consisted of advice and counsel which were not worth the amount of the note, constitute no defense against the liability on the note. *Headley v. Good*, 24 Tex. 232.

An executory agreement between the parties to a note, however, constitutes no bar to an action brought upon the note. *Cushing v. Wyman*, 44 Me. 121.

And an agreement signed by the payee of a note in which he acknowledges the receipt of the note on account of a claim held by him, and agrees to stop proceedings on a certain judgment then in the hands of the sheriff pending against the maker, and to enter satisfaction when notes to be agreed upon are given, constitutes no defense in an action on the note in the absence of proof of the giving of such notes. *Klett v. Claridge*, 31 Pa. 106.

Nothing short of the fulfillment of an agreement made contemporaneous with a promissory note for its compromise under certain conditions will discharge the original demand. *Brown v. Spofford*, 95 U. S. 474, 24 L. ed. 508.

And a collateral compromise agreement by the terms of which the original contract consisting of promissory notes is to be delivered up upon certain specified payments being made, can only be availed of to defeat a remedy on the notes when the party seeking to do so shows that he fulfilled it on his part. *Spofford v. Brown*, 1 MacArth. 223.

And an executory agreement by a payee of a note to accept a smaller sum in satisfaction of a larger cannot avail the maker as a defense where the undertaking is conditional and the condition has not been complied with. *Makepeace v. Harvard College*, 10 Pick. 298; *Blake v. Blake*, 110 Mass. 202.

And where the maker of a promissory note relies in an action thereon on a verbal promise by the payee to release him from the payment of the principal on the condition of the payment by him of a designated rate of interest during the life of the payee, it is incumbent upon him to show full performance of the condition. *Harmon v. Adams*, 120 U. S. 363, 30 L. ed. 683.

So, a contemporaneous oral agreement that a promissory note is to be discharged by the doing of something other than the payment of money so long as it remains executory is wholly inoperative, and no defense whatever to a suit on the note. *Patrick v. Petty*, 83 Ala. 420; *Tuskaloosa Cotton-Seed Oil Co. v. Perry*, 85 Ala. 158.

It is neither payment nor accord and satisfaction until performed, and on failure to perform such agreement the only advantage that can be taken of the failure is by action for damages for its breach. *Tuskaloosa Cotton-Seed Oil Co. v. Perry*, 85 Ala. 158.

And an agreement between the parties to a note that a note held by the maker against the payee should be set off against the new note so that the smaller would pay the larger, is executory and does not work an extinguishment of the smaller note. *Cary v. Bancroft*, 14 Pick. 315.

And such an agreement by which the maker had the liberty of substituting as collateral a certain contemplated issue of bonds, does not become operative so as to constitute a defense in an action upon the note, where no new mortgage was made and no new bonds issued. *Coffin v. Grand Rapids Hydraulic Co.* 46 N. Y. S. R. 851.

And that a note was given in part payment for the patent of a sewing machine for a designated state, and that at the time of the purchase and as part of the same transaction the vendors verbally agreed with the purchasers to furnish the machines to them from time to time as fast as they were wanted and as they might order them, at a designated price, and that numerous orders were sent which were never filled, by reason of which their sales were stopped and business spoiled, are no defense in an action upon the note in the absence of anything to show that they paid for the machines ordered, or that they were ready and offered to pay for them on delivery. *Merrill v. Stanwood*, 52 Me. 65.

And where the maker and payee of a note agreed under seal that the maker should make quarterly payments for ten years, the payee promising that, if such payments amounted in all to less than the amount of the note, the note should be canceled, and the quarterly payments were made up to the maker's death but not afterwards, the note is a valid claim against the estate of the maker for its full amount less the payment actually made. *Blake v. Blake*, 110 Mass. 202.

So, a purchaser of land for which he gives his note is liable on such note though he had an option to give up the land in payment of the note, and he afterwards tendered a deed thereof, which was refused, where such tender was not made within a reasonable time and he had placed it beyond his power to make an effectual reconveyance of such land by making a voluntary conveyance of it to a trustee to secure a debt: and an action will not lie to enjoin the enforcement of a judgment on the note. *Bailey v. Boydstun* (Tex. Civ. App.) 33 S. W. 281. 43 L. R. A.

Where a note was given in consideration of the postponement of the sale of mortgaged premises for a designated time, and as collateral security for a mortgage debt, under an agreement that if the debt should be paid before that time, or if the premises should sell for an amount sufficient to pay the debt and costs, the note should be void, and in the event of a sale for a less sum, only so much of the note should be collected as would make up the difference, if by reason of the sale no part or only a portion of the note ought to be collected, it is the duty of the defendant in an action thereon to show it by way of defense, otherwise a full recovery can be had. *Hancock v. Hodgson*, 4 Ill. 330.

X. Effect on transferee of note.

A purchaser of a promissory note for full value before maturity is not affected by a contemporaneous agreement between the maker and payee unless he had knowledge thereof at the time of the purchase. *Brown v. Spofford*, 95 U. S. 474, 24 L. ed. 508; *Spofford v. Brown*, 1 MacArth. 223.

And an answer in an action on a note setting up a contemporaneous agreement by which the maker was not to be held liable furnishes no defense in an action by an innocent holder in the absence of an allegation of notice. *Mitchell v. Noell*, 39 Ind. 399.

And see also *Stewart v. Anderson*, 59 Ind. 375. *supra*, III. a; *Nebraska Nat. Bank v. Pennock* (Neb.) 75 N. W. 554, *supra*, III. b; *Ricketts v. Pendleton*, 14 Md. 320, *supra*, VII.

And evidence of the breach of contemporaneous agreement cannot be given to defeat a note as against a transferee where it is not accompanied with an offer to prove that the transferee knew the facts when he took the note. *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246.

One who takes a negotiable instrument for a valuable consideration before the same is due and without notice of any equities existing between the original parties has good title, and an agreement between such original parties that the payee shall either return or pay the obligation cannot operate to defeat his recovery; in order to affect him by such a defense, it must be shown that he had notice or knowledge of the facts. *Spofford v. Brown*, 1 MacArth. 223.

But it has been held that failure of consideration of a note consisting in part of an agreement to convey a valid and clear title to certain lands to the maker thereof, which had not been complied with, may be set up against an assignee of the note without reference to any question of notice at the time of the assignment. *Holman v. Creagmiles*, 14 Ind. 177.

And that a promissory note placed in the hands of a custodian not to be delivered to the payee except on the happening of a certain event, which never occurred, is void, not only in the hands of the payee, but also of a purchaser in good faith for value before maturity, where nothing appears to charge the maker with negligence in allowing the note to be put into circulation. *Chipman v. Tucker*, 88 Wis. 43, 20 Am. Rep. 1.

But an agreement between the parties, made contemporaneously with a note, providing that the goods for which the note was given might be returned, and proof that they were returned in accordance therewith, is not a defense to an action on the note brought by an innocent holder without notice. *Mase v. Heinze*, 53 Ill. App. 503.

Nor is a writing given by the payee of a note contemporaneously with it and as a part of the consideration, providing that the maker was not to pay the note until he could realize from the

sale of a certain patented article sufficient money to pay it, admissible in evidence in an action on the note, brought by a bona fide purchaser for value. *Walt v. Chandler*, 63 Me. 257.

And a plea in an action on a promissory note payable on demand, that it was agreed by the parties at the time the note was made that it should be held by the payee as a security for the settlement of their future accounts, but that the payee had transferred it to the plaintiff, does not constitute a good defense in the absence of allegation or proof of a demand before the note was assigned and of notice to the indorsee. *Harvey v. Geary*, 1 U. C. Q. B. 483.

A note given for a premium on an insurance policy subject to a contemporaneous agreement between the parties made by the insurance company's local agent, which is violated, however, is subject to the same agreement in the hands of the insurance company, and its violation would be a defense in an action on the note brought by the company, though if the company should indorse it before maturity to a third person for value and without notice he would hold it discharged of the equity. *Breese v. Crumpton*, 121 N. C. 122.

But a note is presumed to have been indorsed before due, and an agreement in writing between the parties to a note payable in meats when called for, in which the payee agreed to pay the maker for one half the meat which he should purchase and apply the other half on the note until satisfied, after which the note was indorsed to a third party without recourse, in the absence of anything to show that it was negotiated after due, will constitute no defense in an action on the note, and is not admissible in evidence therein. *Patterson v. Hartsock*, 1 G. Greene, 252.

And the violation of an agreement between the maker and payee of a note for money loaned, that the payees should procure insurance for the amount of the note on the adventure or charter of a certain brig of the maker for his benefit, and in case the vessel should be lost should collect the amount due on the policy for the benefit of the defendant in payment of the note, or should assign the policy to the maker and in case of the arrival of the vessel at any time before the expiration of ninety days the defendant should pay the note on her arrival, the brig having been lost on the voyage, cannot be set up as a defense in an action on the note by an indorsee for a good consideration, who took the note before any valid defense existed and before its maturity, though they knew that an oral agreement between the maker and payee accompanied the note. *Patten v. Gleason*, 106 Mass. 439.

And the rule that when by agreement of the parties the consideration of a promissory note is to be defeated if certain bills of exchange shall not be paid, the nonpayment of the bills cannot be set up as a defense against an assignee without notice, is not affected by the Indiana statute providing that the maker of a note may set up any defense against the assignee which he could make against the payee. *Thomas v. Page*, 3 McLean, 369.

And a collateral contemporaneous agreement providing that a note should not be paid in the event that an executory contract which was the consideration thereof should not be performed will not defeat the negotiability of a note in the hands of an indorsee though he had notice thereof, and affords no defense to the note where he purchased it before a breach occurred. *Jennings v. Todd*, 118 Mo. 296.

So, the fact that a note recites the consideration for which it was given, consisting of goods purchased, and that the goods had been received, 43 L. R. A.

does not afford notice to the transferee of a contemporaneous agreement that the goods might be returned. *Mase v. Helmse*, 53 Ill. App. 503.

And a mere conception on the part of a holder of a note at the time he took it that an executory contract which was the consideration thereof would not be carried out, and that therefore the note would not be paid under a collateral contemporaneous agreement providing that it should not be paid in the event that such contract should not be performed, is not sufficient to stamp his purchase with bad faith. *Jennings v. Todd*, 118 Mo. 296.

And knowledge by a transferee of a negotiable note that the consideration therefor was future and contingent does not affect his right to recover thereon. *State Nat. Bank v. Cason*, 39 La. Ann. 865.

And an indorsee for value before maturity of a negotiable promissory note may recover thereon in an action against the maker, though when taking it he knew that there was a written stipulation between the maker and the payee that upon a specified contingency the note was not to be paid, and though before maturity such contingency actually happened. *Adams v. Smith*, 35 Me. 324.

So, the words "secured by mortgage," written upon a promissory note, form no part of the note, and do not operate to limit or impair its value, and do not constitute notice to third persons of the contents of the mortgage or that it contains clauses inconsistent with the note, and are not sufficient to put them on inquiry. *Howry v. Eppinger*, 34 Mich. 29.

And where an agreement was written upon the same paper with a note and signed by the parties, to the effect that the maker should do certain acts by a designated time, in which case the payee should release all claims upon the note, and the paper containing the note and agreement was placed in the hands of a third person who was to deliver the note if the maker failed to do the acts by the time stipulated, and who upon his failure to do such acts separated the note from the agreement and delivered it to the payee who transferred it to an indorsee, an action may be maintained thereon by such indorsee. *Moody v. Leavitt*, 2 N. H. 171.

But the maker of a note which was accompanied by a collateral contemporaneous agreement providing that it should not be paid in the event that an executory contract which was the consideration of the note should not be performed, does not estop himself from disputing the validity of the note in the hands of a purchaser to whom the payee has transferred it contrary to his agreement, by stating to such purchaser that as it was traded off already he would as soon he would have it as anybody else. *Jennings v. Todd*, 118 Mo. 296.

And the transferee of a note after-due acquires no interest in addition to that of the payee, where it was accompanied by a contemporaneous written agreement with relation to the manner of payment, which agreement had from time to time been modified by parol. *Hill v. Huntress*, 43 N. H. 480.

And the transfer of an overdue note which was given only as an acknowledgment of the maker's liability to the payee on account of a surety debt he had paid for him and with the understanding that it was to be a credit in the settlement between them in respect to his legacy or portion in his mother's estate, and not as an absolute obligation, is a fraud on the maker, contrary to the intent and understanding with which it was made, and, having been made after maturity, confers no greater rights upon the holder than the payee had, so that he can recover nothing except what might be found due

on the settlement of the estate. *Williamson v. Doby*, 36 Ark. 639.

An oral agreement contemporaneous with a promissory note, that if on looking over and settling the account for which the note was given it was not found to be right, the purchaser would make it so, which is proved without objection, is as fully operative as though it had been reduced to writing as a part of the note itself, and takes away the prima facie effect of the note as evidence of consideration, and compels the holder suing upon it to show consideration, and in case of failure so to do he cannot recover. *Hathaway v. Hagan*, 59 Vt. 75.

As to the rule under the Georgia statute with relation to attorneys, see *Weed v. Bond*, 21 Ga. 195, *supra*, VI. d.

F. H. B.

Annie E. McLANE, Admrx., etc., of Martin H. Russell, Deceased,
v.

Frank G. PERKINS *et al.*

(.....Me.....)

1. Freedom from contributory negligence must affirmatively appear in evidence, or, at least, by some legitimate inference from the evidence, and is not to be presumed.
2. Failure to prove freedom from contributory negligence precludes recovery for the drowning of an employee who, with others, was going to his work in an old punt, with a crack in one side calked with waste, and a part of one end split off, when all were drowned and there is no evidence as to the cause or manner of the accident.

(August 10, 1898.)

EXCEPTIONS by plaintiff to rulings of the Supreme Judicial Court for Penobscot County granting a nonsuit in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Overruled.*

The facts are stated in the opinion.

Messrs. P. H. GILLIN and E. C. DONWORTH for plaintiff.

Mr. C. F. WOODARD, for defendants:

It is necessary for the plaintiff to establish three propositions: First, that there was negligence on the part of the defendants; second, that this negligence was the cause of the death of the plaintiff's intestate; third, that there was no negligence on the part of the plaintiff's intestate contributing to his death.

Wormell v. Maine C. R. Co. 79 Me. 397.

It is not enough to establish negligence and an accident. It must also be shown that the negligence was the cause of the accident.

State v. Maine C. R. Co. 76 Me. 357, 49 Am. Rep. 622; *Nason v. West*, 78 Me. 253; *Buzzell v. Laconia Mfg. Co.* 48 Me. 113, 77 Am. Dec. 212.

In the absence of all testimony as to the boat after it was last seen lying at the

wharf, and the men in it, everything is left to conjecture and to conjecture alone.

Nason v. West, 78 Me. 253; *Maguire v. Fitchburg R. Co.* 146 Mass. 379; *Chase v. Maine C. R. Co.* 77 Me. 62, 52 Am. Rep. 744.

Mr. O. F. FELLOWS also for defendants.

Emery, J., delivered the opinion of the court:

The plaintiff's evidence goes only to the following extent: The defendants were operating in Bucksport, on the Penobscot river, a mill for the manufacture of barrel staves and heads from wood. They had occasion, in the course of their business, in September, 1897, to send some eight of their employees, including the plaintiff's intestate, up the river some 2 or 3 miles to raft and drive some logs down the river to the mill. The party detailed for this purpose assembled at the wharf near the mill a little before 4 o'clock on the morning of September 21, when it was quite dark. One of the defendants (Perkins) was in charge of the party, and accompanied it. They launched into the water two small boats of the defendants, known as "punts," put into them the pick poles and other implements necessary for rafting and driving the logs, and then embarked. In one boat was Mr. Perkins with four men. In the other boat were the other four men, including the plaintiff's intestate. In this boat also was a lighted lantern. The first boat—that of Perkins—started off about 4 o'clock, while the second boat, on which was the plaintiff's intestate, was still at the wharf. The first boat went safely up the river to its destination. The second boat did not arrive, and was not seen for some days afterwards, when it was found on the shore. Its crew were never afterwards seen alive, and their drowned bodies were found at intervals afterwards at different places up and down the river; that of the plaintiff's intestate among the rest.

After the first boat started, its crew did not see the second boat on account of the darkness, but they saw a light as of a lantern moving after them for some fifteen minutes, or half a mile, when it disappeared. They heard no cries, and saw and heard nothing else indicating any disaster. At this time the river was comparatively smooth, with little wind; but later, towards 7 o'clock it became rough from a rising gale of wind. The plaintiff's intestate was a young man nearly 22 years of age, and unacquainted with boats, as the defendants knew.

The boat itself was an old punt, made of inch pine boards, with bottom and sides almost flat and straight, and with ends nearly square. It was about 14 feet long, 3½ feet wide, and 19 inches deep in the center. Along one of its sides was an old crack, which had been calked with waste. The top part of one end had been split off, so that only about 7 inches of height of that end remained, while the other end was 14 inches high. It did not appear which, or whether

NOTE.—As to the presumption with respect to the negligence of a person who is found dead as a result of the alleged negligence of another party, see *note* to *Hendrickson v. Great North-* 43 L. R. A.

ern R. Co. (Minn.) 16 L. R. A. 261; also *Suburban Electric Co. v. Nugent* (N. J.) 32 L. R. A. 700.

either, of the crew was in charge of the boat more than the others.

The four men in the boat were undoubtedly drowned in the river some time that morning, but where, how, and when that morning they were drowned is utterly unknown. Whether they fell overboard, or the boat capsized or foundered, is left completely to conjecture.

The plaintiff insists that it can be logically inferred from this evidence that the drowning was the direct result of the unseaworthiness of the boat furnished by the defendants, and hence was the direct result of their fault. The defendants insist that it cannot be reasonably inferred from the evidence that the plaintiff's intestate at the time of the accident did not, by his own want of care, contribute to produce the accident.

The plaintiff admits that contributory negligence on the part of her intestate would bar her action, but she argues that such contributory negligence should not be presumed, and that, if her evidence does not indicate its existence, she is entitled to recover, unless the defendants adduce evidence that it did exist. Her counsel have argued the proposition ably and vigorously with many citations, especially from other states. The law of this state, however, is unmistakably and inexorably against her. More than a generation ago, in *Gleason v. Bremen*, 50 Me. 222, this court declared through the able, learned, and liberal-minded Mr. Justice Kent that "the law is clear and unquestioned that the plaintiff must satisfy the jury as an affirmative fact, to be established by him as a necessary part of his case, that at the time of the accident [he] . . . was in the exercise of ordinary care." This clear and unqualified statement has been often affirmed since. In *State v. Maine C. R. Co.* 76 Me. 357, 49 Am. Rep. 622, the court again said more tersely, but not less unmistakably: "The burden is upon the party prosecuting to show that the person injured or killed did not, by his own want of ordinary care, contribute to produce the accident." It also said that sometimes the plaintiff's own evidence shows that he, by his own carelessness, did thus contribute; but that it is equally fatal to him if his evidence fails to show that he did not thus contribute. The court has not made this repeated declaration by way of dicta, but has made it the foundation of its judgment in several cases. *Buzzell v. Lacomia Mfg. Co.* 48 Me. 113, 77 Am. Dec. 212; *Lesan v. Maine C. R. Co.* 77 Me. 87; *Chase v. Maine C. R. Co.* 77 Me. 62, 52 Am. Rep. 744; *State v. Maine C. R. Co.* 81 Me. 84; *Giberson v. Bangor & A. R. Co.* 89 Me. 337. It is useless to try to move the court from this ground so long and firmly maintained.

The plaintiff's counsel further urge that in dealing with moving railroad trains persons should be apprehensive of danger, and hence in case of accident should be held to adduce affirmative evidence of their own care, and that the rule in question has grown out of such cases, and should not be extended to cases like this, where the plaintiff's intestate had no acquaintance with

boats, and could not apprehend danger. The rule, however, will be found to have been applied to all cases of negligence in this state. The inquiry has always been whether the plaintiff's evidence showed affirmatively, either directly or by inference, that he did not, by his own fault, contribute to the accident.

Counsel again urge that the rule has been too broadly stated, and that the true rule, even in this state, as to the burden of proof upon the issue of contributory negligence, may be stated thus: If the circumstances disclosed and left unexplained indicate any contributory negligence, then the burden is on the plaintiff to explain the circumstances, and to show that after all he was free from fault; but that, if the circumstances disclosed do not indicate any contributory negligence, there can be no presumption of any such negligence, and there is nothing for the plaintiff to rebut or explain.

It is true that the plaintiff's freedom from contributory negligence can sometimes be reasonably inferred from the circumstances without direct evidence of what he did or left undone. When a plaintiff is injured while merely passive in the care of the defendant, without any active agency of his own in the matter, it is fairly inferable that he did not contribute to the injury. In the case of an injury to a passenger in his seat in a railroad train, caused by the train leaving the track, or by a collision, he is merely passive in the care of the railroad company, and his freedom from fault affirmatively appears from the shown circumstances. In his seat, in the place assigned to him by the railroad company, he evidently could do nothing to bring about or prevent such an accident. In the case of the engineer or conductor of the train, or in the case of any person who might be exercising any active agency in the matter, such freedom from fault would not be apparent. So, in a disaster to an unseaworthy ship, a person on board, shown by the evidence to be merely passive in the place assigned to him, would affirmatively appear to be without fault, while other persons on board, not shown by the evidence to be merely passive in their proper places, would need to show by other evidence their freedom from fault.

But in all cases the plaintiff's freedom from contributory negligence in the particular case must affirmatively appear in evidence, or at least by some legitimate inference from the evidence. It is not to be presumed. If sought to be established by inference, it must be by inference from facts in evidence in the case. It cannot be inferred from general conduct, nor from the habits or instincts of mankind, nor from the argument that men are likely to be careful in danger. It is as true that men are careless as that they are careful. It is as true that men negligently contribute to their own injury as that they do not. We maintain the statutory rule stated in *Chase v. Maine C. R. Co.* 77 Me. 62, 52 Am. Rep. 744, that the plaintiff must affirmatively show by evidence that in his case he was free from contributory negligence.

The plaintiff in this case cites *Guthrie v. Maine C. R. Co.* 81 Me. 572, as such a departure from the rule as to authorize her to proceed with this action. That case, however, was decided strictly in accordance with the rule. Guthrie, a brakeman, was injured by the coming together of two box freight cars, the bumpers and drawbar upon one of them having been broken off, so that the cars came much nearer together than usual, and sufficiently near to injure a person between them. The defective car was stationary, and the plaintiff was on top of a moving train of freight cars backing up to couple on the defective car. He was directed by the conductor to run to the rear car and "make the hitch,"—meaning for him to go down between the cars and couple them. In compliance with this order, he ran along over the top of the train, and was seen to begin the descent of the ladder on the end of the car first approaching the defective car. In descending, his back was to the defective car, and he would not know of its defective condition. While no one saw him at the moment of the injury, and he instantly became unconscious, and had no memory of it himself, it was apparent that he was injured by the absence of the drawbar and bumpers from the defective car, which permitted the cars to come so close together as to crush him while between them in the performance of his duty. He was in his proper place,—the place assigned to him. As to the condition and movement of the cars he was passive. He could not see the defect. He did nothing to bring the cars so close together. He could do nothing to prevent it. The collision was too sudden to give him any chance to extricate himself by any amount of care, after he had begun to descend the ladder. The evidence for the plaintiff tending to show all these facts affirmatively, the court properly decided that the case should go to the jury.

In several cases decided by this court the application of the rule led to a different result. In *Chase v. Maine C. R. Co.* 77 Me. 62, 52 Am. Rep. 744, the plaintiff's intestate, while driving in a sleigh over a railroad crossing, was hit and killed by a passing train. No one saw him at the time. No evidence was given as to how the accident happened. It did not appear from the evidence that in approaching the railroad track he had taken any precautions to ascertain whether a train was coming. It did not affirmatively appear from the evidence that he could not have avoided the collision by the exercise of due care on his part. In *State v. Maine C. R. Co.* 81 Me. 84, the plaintiff's intestate, a passenger, was last seen alive as he was passing through the train towards the rear, while the train was in motion. He was found next morning, dead, upon the track, with severe wounds and fractures. The plaintiff claimed that he fell off the train solely by reason of a defective platform on one car in the rear, but there was no evidence as to what he was doing, or attempting to

do, at the time of the accident, nor how the accident happened. He was not shown to be in his seat, nor to be merely passive in the matter. As in the *Case of Chase*, it did not appear from the evidence that he could not have avoided the accident by the exercise of due care. In *Giberson v. Bangor & A. R. Co.* 89 Me. 337, it could not be inferred from the evidence that the plaintiff's intestate took the proper precautions in crossing the railroad track.

Recurring now to the plaintiff's evidence in this case, it is painfully wanting upon the affirmative of the proposition that the plaintiff's intestate, at the time of the accident, did not by his own negligence, contribute to produce the catastrophe. He was alive in the boat at the wharf at 4 o'clock on the morning of September 21, and days afterwards was found dead on the shore. All between is a blank. Perhaps it sufficiently appears that he came to his death by drowning within a few hours after the preceding boat left the wharf, but that is all. If the following light, observed by the crew of the first boat, was the lantern in the second boat, its disappearance is no evidence of disaster at that time. The lantern may then have been placed in the bottom of the boat, as would be usual. No sounds indicating trouble were heard at that time or ever. There is nothing indicating where or how the drowning took place, nor what the plaintiff's intestate was doing or attempting to do at the time, nor that he was passive. He may have fallen out of the boat, and the others swamped the boat in trying to rescue him. He may himself have swamped the boat by his own acts. The boat may have come in contact with a floating log, or run upon a ledge, or may have been capsized by the rough water, or by the swell of a passing steamer, or may have sunk for want of bailing, or, as contended by the plaintiff, may have foundered solely by being overloaded in its defective condition. All is conjecture, however. The evidence does not indicate any one course of events more than another. The sad result is all that is shown. The evidence does not show that the plaintiff's intestate did in any way contribute to the drowning, but it does not show affirmatively that he did not; and this latter lack in the evidence is fatal to the plaintiff's action. *State v. Maine C. R. Co.* 76 Me. 357, 49 Am. Rep. 622.

The rule herein affirmed may seem to work a hardship in such a case as this, where the plaintiff is prevented from compliance with the rule by the suddenness and magnitude of the disaster itself sweeping away all possible evidence; but, if the rule were otherwise, it would work equal hardship to a defendant. It is not a peculiar hardship, however. Many meritorious claims and defenses often fail for want of legal evidence to establish them. Judgments of courts, however, should never be based upon conjecture, but always and only upon evidence.

Exceptions overruled.

CONNECTICUT SUPREME COURT OF ERRORS.

YALE UNIVERSITY, *Appt.*,
v.

Town of NEW HAVEN.

(71 Conn. 316.)

1. Buildings used by a college exclusively as dormitories and dining halls for its students are exclusively occupied as a college, within the meaning of Gen. Stat. § 3820, providing for the exemption of such buildings from taxation.
2. A statute exempting college property from taxation in accordance with a well-settled and long-established public policy is to be construed reasonably so as to give full effect to the policy declared, as well as to avoid abuse and frustrate evasion, and is not within the rule of strict construction.
3. Students' fees, whether apportioned to room rent or tuition, cannot be treated as income of real estate, and land occupied and reasonably necessary for the plant of a college is not productive real estate, within the meaning of a statute providing that a college shall not hold real estate exempt from taxation which shall afford more than a specified annual income.
4. Real property substantially owned and enjoyed by a private person, although the title remains in a college, is not within the exemption of college property from taxation.

(January 4, 1899.)

RESERVATION by the Superior Court for New Haven County of an appeal by Yale University from a proceeding of the taxing officers assessing certain of its property for taxes which was alleged to be exempt. *Judgment for appellant advised.*

The facts are stated in the opinion.

Messrs. Charles R. Ingersoll, Louis H. Bristol, and Henry Stoddard, for appellant:

The court will so construe the statute as to promote the policy of the state and the manifest purpose and intent of the legislature.

People, American Geographical Soc., v. New York Tax Comrs. 11 Hun, 505; *New York Infant Asylum v. Westchester County Supers.* 31 Hun, 116; *Re Miller*, 45 Hun, 244; *Brown University v. Granger*, 19 R. I. 704, 36 L. R. A. 847; *People, Seminary of Our Lady of Angels, v. Barber*, 42 Hun, 27; *Griswold College v. State*, 46 Iowa, 275, 26 Am. Rep. 138; *State v. Ross*, 24 N. J. L. 497; *Detroit Home & Day School v. Detroit*, 76 Mich. 521, 6 L. R. A. 97.

A municipality often derives great advantages from the presence of an institution ex-

empted from taxation,—advantages which much more than offset any losses that are real.

The appellant's buildings are within the exemption.

The practical construction of the statutes has been such that prior to the list of October, 1896, returned by the appellant to the assessors of the town of New Haven, none of the college dormitories were ever in fact taxed or set in the list of New Haven or elsewhere for that purpose.

The controlling force of such long continued and universal practice is a matter of elementary law.

Yudkin v. Gates, 60 Conn. 429; *Flynn v. Morgan*, 55 Conn. 130; *Hawley v. Parrott*, 10 Conn. 486; *Whittlesey v. Fuller*, 11 Conn. 337; *Sage v. Wilcox*, 6 Conn. 83; *People, Academy of Sacred Heart, v. New York Tax & A. Comrs.* 6 Hun, 109, Affirmed in 64 N. Y. 656; *Easton v. Pickersgill*, 55 N. Y. 311.

The buildings are exclusively occupied as colleges.

Webster's International Dict.; 6 Encyclopædia Britannica, 9th ed. p. 142; *First Unitarian Soc. v. Hartford*, 66 Conn. 368.

The test whether a given building is exclusively occupied as a college is whether it is used and occupied exclusively by the college corporation for college purposes,—that is, the purposes expressed in its act of incorporation. And the true inquiry should be, not what is actually necessary, but what is proper and appropriate to effectuate the objects of the institution.

Griswold College v. State, 46 Iowa, 277, 26 Am. Rep. 138.

The following decisions in analogous cases form a body of authority which puts an end to any further discussion or argument.

State v. Ross, 24 N. J. L. 497; *Northampton County v. Lafayette College*, 128 Pa. 132; *House of Refuge v. Smith*, 140 Pa. 387; *Ramsey County v. Macalester College*, 51 Minn. 437, 18 L. R. A. 278; *Griswold College v. State*, 46 Iowa, 275, 26 Am. Rep. 138; *Detroit Home & Day School v. Detroit*, 76 Mich. 521, 6 L. R. A. 97; *Davis v. Cincinnati Camp Meeting Asso.* 57 Ohio St. 257; *Wesleyan Academy v. Wilbraham*, 99 Mass. 599; *Massachusetts General Hospital v. Somerville*, 101 Mass. 319; *Mount Hermon Boys' School v. Gill*, 145 Mass. 139; *People, Academy of Sacred Heart, v. New York Tax & A. Comrs.* 6 Hun, 109, Approved in 64 N. Y. 656; *People, Seminary of Our Lady of Angels, v. Barber*, 42 Hun, 27.

The buildings are also exempt from taxation, as belonging to and used exclusively for a scientific and literary society, within the meaning of the statute.

Detroit Home & Day School v. Detroit, 76 Mich. 521, 6 L. R. A. 97.

The amount received by the appellant for the use and occupation by its students of living, study, and sleeping room is not income within the meaning of the act of 1834 and the Revised Statutes of the state, § 3822.

NOTE.—As to exemption of property of colleges or schools from taxation, see brief note to Auditor General v. University of Michigan (Mich.) 10 L. R. A. 376; also Philadelphia v. Overseers of Public Schools (Pa.) 29 L. R. A. 600; and Kentucky Female Orphan School v. Louisville (Ky.) 40 L. R. A. 119.

As to the exemption of property used by such institutions for revenue, see also note to Book Agents of M. E. Church, South, v. Hinton (Tenn.) 19 L. R. A. 289.
43 L. R. A.

The limitation applies only to productive capital invested in land.

The buildings are non-income producing.

West Hartford v. Hartford Water Comrs. 44 Conn. 360; *State v. Ross*, 24 N. J. L. 497; *Ramsey County v. Macalester College*, 51 Minn. 437, 18 L. R. A. 278; *First Unitarian Soc. v. Hartford*, 66 Conn. 368.

The amounts received by the appellant for the use and occupation of said rooms are not a means of profit to the funds of the institution.

Episcopal Academy v. Philadelphia, 150 Pa. 565; *Gooch v. Association for Relief of Aged Indigent Females*, 109 Mass. 558; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529.

Messrs. W. H. Ely, J. W. Alling, and Stoddard & Goodhart, for respondent:

The charter provides a rule for taxation as follows: That all the lands and ratable estate belonging to said college not exceeding the yearly value of 500 pounds sterling, lying in this government, etc., shall be free and exempt from all rates, taxes, military service, working at highways, and other such like duties and services.

As the university accepted this charter, it is bound by its provisions relating to taxation.

1 Dill. Mun. Corp. § 88; *Cooley, Taxn.* 2d ed. p. 71; *Hartford v. Hartford Theological Seminary*, 66 Conn. 482.

The amendment to the charter in 1834 (*Private Acts*, vol. 1, p. 481), which is now contained in our statute, § 3822, simply increases the exemption from the yearly value of £500 sterling, to the right to hold real estate affording an annual income of not more than \$6,000. It also exempts from taxation other funds absolutely.

The charter and the statute laws should be strictly construed.

Gillette v. Hartford, 31 Conn. 357; *Hartford v. Hartford Theological Seminary*, 66 Conn. 482; *Brainard v. Colchester*, 31 Conn. 410.

The finding is not that the buildings are used for college purposes, but that the income is applied for college purposes.

A building rented for living and sleeping purposes is not such occupation of buildings as is intended by the statute, § 3820.

Cincinnati College v. State, 19 Ohio, 110; *New Haven v. Sheffield Scientific School*, 59 Conn. 166; *Manresa Institute v. Norwalk*, 61 Conn. 228; *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387; *Hartford v. Hartford Theological Seminary*, 66 Conn. 475; *Gibbons v. District of Columbia*, 116 U. S. 404, 29 L. ed. 680; *Williams College v. Williamstown Assessors*, 167 Mass. 505; *Philips Exeter Academy v. Exeter*, 58 N. H. 306; *St. Joseph's Church v. Providence Tax Assessors*, 12 R. I. 19; *Griswold College v. State*, 46 Iowa, 275, 26 Am. Rep. 138; *Gillette v. Hartford*, 31 Conn. 351; *Connecticut Spiritualist Camp-Meeting Asso. v. East Lyme*, 54 Conn. 152; *Chapel of Good Shepherd v. Boston*, 120 Mass. 212.

Before any construction of the statutes in question can be claimed by force of alleged acquiescence, it must be shown that the as-

sessors knew of the facts which exposed the property of the appellant to taxation.

King v. Hogg, 1 T. R. 721; *Dwight v. Boston*, 12 Allen, 316; *Landon v. Litchfield*, 11 Conn. 263.

Hamersley, J., delivered the opinion of the court:

In 1887 the corporation of the President and Fellows of Yale College in New Haven was authorized to use the title "Yale University," and gifts received and contracts made under either of said names were declared to be valid. The powers of the corporation were not otherwise changed. 10 Spec. Laws, p. 467. In October, 1895, the university filed with the assessors of the town of New Haven a list of the property owned by it subject to taxation for the year 1896. The list contained seven pieces of land, valued at \$57,680. To this list the assessors added certain buildings used for dormitories and dining hall, with the land on which they stood, valued at \$214,990, and also added certain vacant building lots, dwelling houses, and factories, valued at \$167,112. The plaintiff appealed to the board of relief, which confirmed the action of the assessors. This appeal is an application to the superior court, alleging that the board of relief acted illegally in confirming the action of the assessors, and praying for appropriate relief. The alleged illegality depends on the meaning given to two statutes, viz., § 3820 of the General Statutes, and the act of 1834, amending the charter of the college, which appears also in § 3822 of the General Statutes.

1. Section 3820 of the General Statutes provides that "buildings or portions of buildings exclusively occupied as colleges, academies, churches or public schoolhouses, or infirmaries" shall be exempt from taxation. If buildings used by the college exclusively as dormitories and dining halls for its students are buildings exclusively occupied as a college, then the action complained of, in adding to the list dormitories and dining hall, was illegal; if such use is not a college occupation, then said action was legal. The word "college," used to denote a constituent of or the equivalent of "university," has acquired a definite meaning. As first used, "college" indicated a place of residence for students, and occasionally a "universitas," or "studium generale." The expressions "universitas studii" and "universitatis collegium" occur in early official documents. A suggestion of the modern university appears in the College and Library of Alexandria, founded and endowed by Ptolemy Soter. Here the Museum provided from the first lodgings and refectory for the professors, and later similar provisions were made for the students. A writer of the twelfth century speaks of the "handsome pile of buildings, which has twenty colleges, whither students betake themselves from all parts of the world." The university in Europe developed about the year 1200. It was a community organized for the study of all the branches of knowledge, and authorized by pope, king, or emperor to confer degrees upon those found competent to instruct others. At Bologna—perhaps the

earliest organized university—we find colleges almost from the beginning. Such college was a separate house, with a fund for the maintenance of a specified number of poor students. Similar colleges existed in Paris, Oxford, and other universities. At first little more than lodging rooms and refectory, they grew, especially in England, to be the home of the students for all purposes. The instruction and discipline of the university were through the colleges. The conditions of the early universities were peculiar. Vast throngs of students were gathered at one place. They were divided into "nations," each—as at Paris—with its own proctor or procurator. They were further divided among faculties, each with its dean. The divisions into nations and faculties were cross divisions; and another cross division was that into colleges and halls (hall sometimes meaning an unorganized college, and sometimes used as synonymous with college). With changes in conditions, the college was largely eliminated from the continental universities, while in England the university became practically the associated colleges. Merton College, Oxford, founded in 1264, was the prototype of the English college. That college consisted of the chapel, refectory, and dormitories. Here the scholars, called "fellows," in token of the spirit of equality and companionship, lived under one government, educational and moral, and prepared to take the degree granted by the university. As the colleges increased, all noncollegiate students were driven away. The vagabonds or chamberdekyns,—i. e., camera degens,—living in lodgings, as opposed to those who lived in a college, disappeared. Each student in a college must belong to the university, and each student of the university must be attached to a college; and the heads of the colleges administered the university. Thus was developed the English theory of the university, where the honors and influence of the *studium generale* are gained and enjoyed by students living and working under the government of their respective colleges. As Newman says, the university, to enforce discipline, developed itself into colleges, and so the term "college" "was taken to mean a place of residence for the university student, who would there find himself under the guidance and instructions of superiors and tutors, bound to attend to his personal interest, moral and intellectual." See, *passim*, 3 Newman, Hist. Sketches; Lyte's History of University of Oxford; 1 and 2 Huber's English Universities; Enc. Brit. *Universities*. The College and university, however, were sometimes united in one corporation. Newman says, "The University of Toulouse was founded in a college; so was Orleans." Trinity College, Dublin, styled in its charter (1591) "The College of the Holy Undivided Trinity of Queen Elizabeth, near Dublin," is both university and college. It was founded by the Queen as a "*mater universitatis*"; but the hope was not realized, and the university and college have ever since remained one, called in common speech indiscriminately "Trinity College, Dublin," "Dublin University," "The Univer-

sity of Trinity College, Dublin." Marischal College, Aberdeen, was founded in 1593 as a college and a university, with power of conferring degrees. And so at the beginning of the seventeenth century the students of an English university lived in colleges; were instructed and governed through colleges, whether the university included a number of colleges or a single college; and among the buildings indispensable for every college were the great hall, or dining room, and the living rooms, or dormitories.

In establishing universities in the new world the limitations of the people compelled the founders to follow the example of Trinity College, Dublin, and Marischal College, Aberdeen, and not that of Oxford and Cambridge. Upon the same corporation was conferred the power of the university in granting degrees and of the college in government, and such community and the buildings required for its use were known as "the college." The first appropriation to endow a university in Virginia was made in 1607. In 1660 an act of the colonial legislature endowed "The College," and in 1693 William III. established the university, described in the charter as "a certain place of universal study, or perpetual college of divinity, philosophy, languages, and other good arts and sciences," and named it "The College of William and Mary in Virginia." The settlers of New England early felt the need of a local university, and the first step was the erection of a college; i. e., a building where the students were to be lodged, fed, and instructed while pursuing the university studies and qualifying for its degrees. In 1630 the general court of Boston advanced £400 for this purpose, and subsequently appointed Newtown as the seat of the university, and for this reason changed the name of the town to Cambridge. 2 Mather's *Magnalia*, pp. 7-9, 19, 20; Quincy's History of Harvard. In 1642, the court established overseers of "a college founded in Cambridge," and in 1650 the charter was granted. The statutes immediately adopted provided that all students admitted to the college "must board at the commons," and also provided for conferring the first and second degrees in arts. While the college exercised some of the privileges of a university, doubt was felt as to the power of the general court to confer such privileges. The colonial charter of 1692 was construed as authorizing the court to erect a university, and immediately, as Mather says, the general assembly granted "a charter to this university," authorizing it to grant degrees "as in the universities in England." This charter expired within three years, from failure to receive the royal approval, and the college was subsequently reorganized under the charter of 1650. The degree of D. D. was conferred by the college in 1693 on Increase Mather, its president, who, in conferring the degrees at the first commencement after the new charter, maintained that "the right of establishing universities (*academias*) is reserved to all those, and to those only, who hold the sovereignty in the state," and that the general court, under the charter of 1692, possessed such sov-

ereignty. No other degree of doctorate was conferred until 1771, when Nathaniel Appleton was made doctor of divinity; and a few years later George Washington was made doctor of laws. The Massachusetts Constitution of 1779 recognized "the University at Cambridge," and ratified and confirmed all the rights and privileges it had been accustomed to exercise.

The colonies of Connecticut and New Haven were at first unable to erect a college by themselves, and for some years contributed to that of Cambridge. The plan of the college at New Haven was early mooted, and in 1654 steps were taken towards its consummation. Davenport wished to direct the benefaction of Gov. Hopkins to the founding of a college, and the court of that colony acceded to that plan. The difficulties attending the union of the colonies of New Haven and Connecticut obstructed the execution of the plan, and eventually the funds were appropriated to the Hopkins Grammar School. In 1698 the plan was revived, and ten of the principal ministers agreed to stand as trustees to found, erect, and govern a college. They formed themselves into a society at New Haven in 1700, and the same year, at a meeting at Branford, they (in the language of Trumbull) "founded the University of Yale College." 1 Trumbull, Hist. Conn. 402. In 1701 the general court of Connecticut granted to said trustees the privilege of founding, endowing, and ordering a "collegiate school," and authorized them to acquire and hold real estate, not exceeding the value of £500 per annum, and personal property to any amount, for the use of said school, and for erecting and endowing the same. 4 Col. Rec. 363. The act did not purport to establish a college and university, unless by indirection; but the trustees, following the example of Harvard, proceeded at once to grant degrees in arts. Until 1716 the school was migratory. The trustees then decided that it should be established at New Haven, and this decision was confirmed by the legislature the following year. 6 Col. Rec. 30. In pursuance of this authority, aided by appropriations by the colonial government, as well as by gifts from Gov. Yale and other benefactors, a college house "for the entertainment of the scholars" was so far finished, in 1718 as "to be fit for the reception and accommodation of all the students." It contained nearly fifty studies, and was furnished with a convenient hall, library, and kitchen. At the commencement for that year, in the presence of the authorities of the colony, the trustees did, "with one consent, agree, determine, and ordain that our college house shall be called by the name of its munificent patron, and shall be named Yale College." 2 Trumbull, Hist. Conn. 11. In 1745, under the energetic rule of President Clapp, a body of statutes was drawn up, derived partly from the laws and customs of the college, partly from the laws of Harvard, and partly from the University of Oxford; and the same year the general court, assuming the right of exercising within its jurisdiction the powers of sovereignty belonging to an independent government, not incon-

sistent with express statutes of England, which it always claimed, though with much fear and trembling, and with great caution, granted a charter somewhat like in form to a royal patent, erecting a corporate university and college under the name of "The President and Fellows of Yale College in New Haven," endowing it as university and college, with the power of self-government, and of making all reasonable laws and ordinances for that purpose, and with the power of conferring all such degrees as are usually given in colleges or universities, and with the power to appoint a scribe or register, a treasurer, tutors, professors, steward, and all such other officers and servants usually appointed in colleges or universities for the promotion of good literature, and for the well ordering and managing the affairs of said college. It is plain that the college thus erected involved as an essential feature the education and government of university students in college houses under college officers. The "colleges or universities" referred to in the charter were the universities in England administered by associated colleges, or the single colleges endowed with the privileges of a university. In both the "college" involved necessarily buildings for the residence and entertainment of the officers and students. The general court again and again contributed to the erection of such buildings. When, in 1753, the trustees of the College of New Jersey (now Princeton University) applied to the general assembly of Connecticut for leave to set up a lottery to raise money "to build a public house for entertaining the students, and better answering the good ends designed in founding and erecting said college," the assembly granted the liberty, "on consideration of the matters in said petition, and for the encouragement of religion and learning." 10 Col. Rec. 217. The "college" and the buildings for entertaining the students under college government were inseparable. In 1818, Yale College consisted of three college buildings for housing the officers and students, a lyceum, a chapel, a kitchen, and large dining room; and it was this college whose charter was confirmed by our Constitution of 1818.

The settled meaning of "college" as a building or group of buildings in which scholars are housed, fed, instructed, and governed under college discipline, while qualifying for their university degree, whether the university includes a number of colleges or a single college, is now attacked. We have deemed it proper to trace this meaning with sufficient detail to demonstrate the utter unreason of the attack. This peculiar function of a college is inherent in the best conception of the university. This meaning has been attached to the English word for 800 years; it was the only meaning known at the time our first American colleges were founded; it was recognized and distinctly affirmed in the charter of Yale College; it has since been affirmed by repeated acts of legislation, and has received the sanction of constitutional confirmation. It was impossible for the legislature to express its meaning more clearly

than in the language of § 3820, "buildings occupied as colleges." If it had said, "dormitories, dining halls, and other buildings occupied as colleges," the meaning would have been the same, and the amplification would have added nothing to the precise certainty of the language used. *State v. Ross*, 24 N. J. L. 497; *Northampton County v. Lafayette College*, 128 Pa. 132; *Ramsey County v. Macalester College*, 51 Minn. 437, 18 L. R. A. 278; *Griswold College v. State*, 46 Iowa, 275, 26 Am. Rep. 138.

The fact that certain sums are paid for use of the rooms occupied does not alter the character of the occupation. A church is none the less a church because the worshippers contribute to the support of services by way of pew rent. A hospital is none the less a hospital because the beneficiaries contribute something towards its maintenance. And a college is none the less a college because its beneficiaries share the cost of maintenance; and it is immaterial whether such contribution is lumped in one sum, or apportioned to sources of expense, as tuition, room rent, lecture fee, dining hall, etc.

The defendant further claims that, even if some dormitories may be occupied as a college, yet § 3820 must be construed strictly, because it is a statute exempting property from taxation; and that, so construed, the finding of the committee requires the court to hold that the dormitories assessed are not in fact buildings erected for the use of students, but in substance constitute an investment in the business of furnishing apartments for rich men of highly remunerative rates; and that the student, as student, is in fact, and by the very necessity of the case, excluded from any occupation of the buildings; and therefore, upon the principle laid down in *American Sunday School Union v. Philadelphia*, 161 Pa. 307, 315, 316, 23 L. R. A. 693, "if such institution sees fit to engage in trade for the purpose of increasing its revenue, or making any part of its business 'self-supporting,' the trade part of its business can be taxed, and ought to be." *Cincinnati College v. State*, 19 Ohio, 110. Neither contention is correct. The rule that laws exempting property from taxation should be strictly construed is well settled, and is based on solid reason. But it is often referred to—and several times in our own reports—in cases where it has no application, and is not, in fact, applied. *Gillette v. Hartford*, 31 Conn. 351, 357; *Bruinard v. Colchester*, 31 Conn. 407, 410; *First Unitarian Soc. v. Hartford*, 66 Conn. 368, 374; *Hartford v. Hartford Theological Seminary*, 66 Conn. 475, 482. The last two cases mark the distinction in treating a mere charter exemption and a statute declaring public buildings nontaxable. The rule is limited by the reasons which brought it about. These are two: exceptions to a general rule should be distinctly stated: private privileges are obnoxious to the law, and must be clearly expressed. The rule, in truth, is based on a presumption of intention. The legislature ordinarily intends its laws to apply to all equally. It does not intend to grant privileges to

select individuals. So, when exceptions or special privileges are claimed under a statute, this ordinary or presumptive intention is entitled to weight according to the circumstances in ascertaining the actual intention expressed by the language used.

These reasons do not fully apply to the law under discussion. The nontaxation of public buildings is not the exception, but the rule. The corporations, whether municipal or private, which own and are by law charged with the maintenance of such untaxed buildings, are not the recipients of special privileges in any sense obnoxious to the law. This clause of § 3820 does not exempt any individuals from the burden of taxation that is common to all. It does not grant to one particular privileges denied to all others. It declares that lands and buildings sequestered to certain public uses—i. e., taken out of the body of private property, and devoted exclusively to the common good, from which no individual can derive any profit—are not taxable property. And this has been, not the exception, but the rule, from the foundation of our government. The seats of government, state or municipal, highways, parks, churches, public schoolhouses, colleges, have never been within the range of taxation. They cannot be exceptions from a rule in which they were never included. Our theory of taxation was laid down in the Code of 1650, and has not been changed, except so far as the *corpus*, rather than the revenue, of the estate may have become the basis of assessment. "Every inhabitant shall contribute to all charges both in church and commonwealth whereof he doth or may receive benefit proportionably to his ability;" his ability to be determined by his occupation and the amount of his ratable or taxable estate. It is the person enjoying the benefits of government who is taxed according to his ability. The mere stuff of land and buildings is not the subject of taxation, except as it may be the source of profit, present or prospective, to some person bound to contribute to the charges of government. And this same Code compelled each town to tax itself for the support of schools, that youths might "be fitted for the university," and appointed commonwealth collectors to demand of every family gifts for the maintenance of scholars at Cambridge. 1 Col. Rec. pp. 547, 555. Buildings erected by means of such taxes and gifts were not a source of profit to any person. Towns and trustees charged with the maintenance of such buildings were contributors to the public benefit, rather than recipients. So these public buildings were not taxed. They were not exempted, because they had not been within the range of taxation. They were simply not mentioned in our tax laws. It was different with exemptions in the more strict sense. The polls and estates of individuals were from time to time exempted. In 1667 those of commissioners or magistrates in the plantations were so exempted, and a like exemption was tendered Winthrop to induce him to accept the appointment of governor. 2 Col. Rec. 59, 64. In 1699 the estates of settled

ministers were exempted from paying rates, and in 1703 the polls of students at the Collegiate School were exempted. 4 Col. Rec. 287, 440. And many like exemptions occur. When the legislature, in 1702, adopted our statute of charitable uses, it not only secured the perpetuation of gifts for pious uses according to the intent of donors, but also declared that estates so given shall be "free from payment of rates." This was an exemption of a very wide range and somewhat uncertain description. The language is, perhaps, broad enough to cover some public buildings which previously had been and afterwards remained untaxed because of the nature of the property, and not by reason of special legislative exception; but the main purpose of this declaration of exemption related to productive funds, lands, or personal estate, given for charitable uses, possibly with special reference to the gifts of Hopkins, Gibbons, and Talcott, which had recently come into use for the support of grammar schools, to anticipated gifts for the support of the Collegiate School, and to appropriations made for payment of ministers' salaries. 4 Col. Rec. 31; *Attwater v. Woodbridge*, 6 Conn. 223, 227, 16 Am. Dec. 46. And so we find that subsequent laws of taxation except or exempt from payment of rates not only prior personal exemptions, but "in like manner" "all lands in this colony sequestered to or improved for schools and other pious uses" (8 Col. Rec. 133), and that this special exemption, in the same words, continued until 1821, when the act of 1702 was changed by the omission of the tax exemption. Since then the only exemption from taxation of funds given for "pious uses" is to be found in special charters or in general acts passed from time to time. But public buildings, whether belonging to the state or to some trustee appointed by the state, occupied as colleges, schoolhouses, and churches, were not specially named in the tax laws as exempted, because they were not included in "ratable estate" as taxable property. When the legislature, in 1822, saw fit to formally declare that property of the United States, of the state, and of municipal governments, and "the buildings occupied as colleges," etc., should be exempt from taxation (Pub. Acts 1822, p. 25), it did not alter the character of the property, or the reason of its not being taxed. The declaration was not an exemption, in the strict sense of the word, as to buildings occupied as colleges and schools, any more than as to property of the United States. They were untaxed, as they had been for nearly 200 years without any legislative declaration, because they are not "ratable estate," because they had been placed in that class of property which ought not to be taxed by virtue of a public policy too clear to be questioned, and which had been followed without any specific legislation by our government from its very beginning.

The reason of such a public policy is apparent. The principle that property necessary for the operation of state and municipal governments, and buildings occupied for

those essential supports of government,—public education, and public worship,—ought not to be the subject of taxation, has been with us accepted as axiomatic. It has been incorporated into the Constitution of several states. It has been inseparably interwoven with the structure of our government and the habits and convictions of our people since 1638. It is not based merely on the theory of the general benefit resulting from an increase of pious uses. All exemptions imply some public benefit; otherwise they are invalid. It is not merely an act of grace on the part of the state. It stands squarely on state interest. To subject all such property to taxation would tend rather to diminish than increase the amount of taxable property. Other conditions being equal, the happiness, prosperity, and wealth of a community may well be measured by the amount of property wisely devoted to the common good in public buildings, parks, highways, and buildings occupied as colleges, schoolhouses, and churches. To tax such property would tend to destroy the life which produces a constant increase of taxable property, as well as some benefits more valuable. It is a misnomer to call the nontaxation of such property an exemption in favor of the governmental agency in which the legal title is vested. When sequestered to such public use, the whole property, by that act,—equivalent to a single taxation to the extent of confiscation,—passed out of the domain of private property, lost all value as ratable estate, and became incapable of measuring the ability of any person to contribute to the charges of the commonwealth whereof he receives the benefit. These are, in brief, the positions which the history of Connecticut shows to have been the foundation of our taxation laws. This clause of § 3820 is not strictly so much an exemption from taxation as the declaration of a public policy well settled and long established. It must, therefore, be construed reasonably, so as to give full effect to the policy declared, as well as to avoid abuse and frustrate evasion.

The argument urged by the defendant in support of its claim that the dormitories assessed are practically used for the purposes of trade is substantially this: The college is intended primarily for scholars who are poor, and the great majority of foundations express this purpose more or less clearly. No one shall be prevented by limitations of birth or means from the full development of his capacities for the service of the state. An essential feature of the college is equality. No special privileges nor honors can be secured, except through personal worth. When, therefore, in the apportionment of rooms, the students are practically divided on the right hand and left according to the marks of wealth, and, as the finding shows, the poor student is relegated to the unsightly discomfort represented by 75 cents a week and the rich student promoted to the comparative luxury represented by \$10 a week, a rule of apportionment is adopted, which violates the essential condi-

tions of college life, and the buildings or portions of buildings appropriated to the rich students cease to be college buildings, because the average student is excluded from their occupation. There would be force in this argument, so far as it is supported by facts, if addressed to the college authorities. We do not care to minimize its force for that purpose. It goes without saying that the most costly gifts cannot compensate for any loss of that spirit of independent equality which is the life of the university, and which has heretofore especially characterized this plaintiff. But the argument does not touch the essential condition that the dormitories are used for trade, and not as college buildings. The committee finds that these buildings "are occupied by students of the college as study and living rooms under the supervision and management of college officers resident therein for that purpose"; and that they "are unfitted for any other use or purpose"; and such is admittedly the fact. This is conclusive. The criticism of the defendant goes deeper, and claims that the rules for ordering the occupation of college buildings tend to the perversion of the purpose of the college. But the power to make these rules is vested in the trustees by the charter. Wise or unwise, they are an exercise of charter power. As to their effect thus far, the committee finds that the corporation administers a college within the true intent and meaning of its charter, "wherein all such persons of good moral character as desire to avail themselves of its advantages, irrespective of nationality, domicile, color, creed, or religious belief, are, at a moderate cost, to the number of about 2,500 annually, instructed in the arts and sciences." There are no special facts found necessarily inconsistent with this conclusion. We are not now, therefore, called upon to decide whether a complete perversion of college purpose involves a forfeiture of college rights. All the dormitories occupied by students, the building used as a dining hall, the observatory buildings, the two houses furnished by the college for the officers of the observatory, the adjoining land found to be reasonably necessary for the purposes of the observatory, and No. 121 Elm street, used as a college yard in connection with the college buildings, are nontaxable property, under § 3820. Some suggestion was made in argument that this section might include buildings occupied, but not owned, by the college. We do not admit this interpretation, but express no opinion, as the question is not involved in this case.

2. The act of 1834 amending the charter of Yale College is as follows: "That the funds which have been or may hereafter be granted, provided by the state of Connecticut, or given by any person or persons to the corporation of the President and Fellows of Yale College in New Haven, and by them invested and held for the use of that institution, shall, with the interest thereof, be and remain exempt from taxation: provided, however, that the said corporation shall never hold in this state real estate free from

taxation affording an annual income of more than \$6,000, and provided also that the private property of the officers of the institution shall not be exempt from taxation, and that the said corporation shall on or before the first day of September, A. D. 1834, give its assent to this act, and transmit the evidence thereof to the secretary of the state, to be by him recorded." 1 Private Laws, p. 481. The same language in respect to taxation is repeated in § 3822, which was passed in 1882 (Pub. Acts 1882, chap. 98), to exclude the charters of the colleges, which were claimed to be in the nature of contracts, from the operation of acts affecting taxation.

Some of the considerations suggested in discussing the clause of § 3820 apply to the construction of this charter. In granting such a charter the state constitutes the corporation its agent for a purely public purpose, and intrusts it with the authority, which can only be derived from the state, to confer degrees in scholarship and learning upon those found worthy. The legislative intent is indicated in the charter of Wesleyan College, which provides that the act "shall be liberally construed for every beneficial purpose hereby intended." 1 Private Laws, 472. The state has been very careful to treat its colleges precisely alike in the matter of taxation, and it is hardly possible that one rule of construction was intended for Wesleyan and another for Yale and Trinity. But it is unnecessary, in treating the question now before us, to invoke any special rule of construction. The charter, in the broadest terms, exempts all the property of the college from taxation. This possibly may cover the buildings occupied as colleges, which are nontaxable by virtue of our settled public policy as declared in § 3820; but its main purpose was to exempt all estate and funds invested and held lawfully,—i. e., "for the use of the college,"—including both principal and income. The only limitation on this absolute exemption is contained in the proviso: "Provided, however, that said corporation shall never hold in this state, real estate, free from taxation, affording an annual income of more than \$6,000." The contention of the defendant is that, whenever the income from real estate exceeds the sum of \$6,000, not only the real estate producing such excess of income, but also all the unproductive real estate the college may hold, becomes at once liable to taxation. We think this requires us to interpolate into the charter a limitation it does not contain. By the original charter "all the lands and ratable estate belonging to the said college, not exceeding the yearly value of £500 sterling," as well as the estates of the president and professors were freed from rates, etc. It is not easy to determine the precise meaning of this language without a detailed examination of the conditions of 1745, in reference to which it was used. This is unnecessary. It is certain that by this provision it was intended to exempt all the property the college was likely to own for an indefinite period, and that the provision served that purpose

for nigh a hundred years. The precise restriction the legislature of 1745 had in mind is now immaterial. It was abandoned in 1834. A new provision in respect to taxation different in form and substance, was then adopted in reference to a new future. This new provision was intended to be broader than the old, as shown, not only by the language used, and by the wider field of public usefulness opening to the college, but also by the controlling fact that, in view of the full exemption of the college property,—*i. e.*, the funds devoted to public use,—the college surrendered the existing exemption of the private estates of its president and professors. The act of 1834 plainly exempts all the property of the college from taxation, and the proviso qualifies this exemption only for the purpose of imposing a limited restraint on the mode of investment. It is not an absolute limitation to the holding of real estate, but it is a provision which makes it the interest of the college to itself limit its holding. It is not presumed that the college will, to any considerable extent, invest its funds in unproductive property, so there is no direct limit to its holding of such land; but the college might well be tempted to put all its funds into productive real estate, and the proviso directly restrains this tendency by limiting its right to hold real estate producing more than \$6,000 a year, unless it pays taxes on the excess. If the college finds in any year that its revenues from land exceed \$6,000, it must choose between its unlimited exemption from taxation and its unlimited right to hold real estate. If it chooses the former, it must sell so much of its productive land as will reduce its income within the limit; if it chooses the latter, it must pay taxes on the land, instead of selling it. In this way the state sought to exempt all the funds of the college from taxation, and, through the potent operation of self-interest, to keep the investment of those funds in real estate within reasonable bounds. Counsel for the plaintiff urged with great force, in further support of this view, the fact that here the enacting clause is a total exemption, and a proviso can withdraw from the enacting clause nothing that is not fairly within its terms. In speaking of this rule, Justice Story said: "We are led to the general rule of law, which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reasons thereof." *United States v. Dickson*, 15 Pet. 141, 165, 10 L. ed. 689, 698.

For reasons before given, we think that students' fees, whether apportioned to room rent or tuition, cannot be treated as income of real estate, and that land occupied and

reasonably necessary for the plant of the college is not productive real estate, within the meaning of the proviso in the act of 1834. The vacant lots added by the assessors are exempt from taxation. The dwelling houses and factories added by the assessors are also exempt, unless some one or more of these must be added to the list returned by the plaintiff in order to reduce its net income from all its other real estate within the prescribed limit.

Certain questions as to a few items of property were submitted without argument. The nature of these questions is not quite clear. It appears that a lot on Cannon street was sold to one Robert Brown, a professor in the university, by parol, and the money needed to build a dwelling house advanced to him; that he has built and occupied the house, and has repaid a portion of the loan, but has paid nothing on the purchase price. This presents a case of property substantially owned and enjoyed by a private person, while the title remains in the college. The lot and house should be added to the plaintiff's list. Its charter does not exempt from taxation property held for private use. It appears also that a number of lots have been leased to private parties on long leases, the tenants agreeing to pay the taxes. So far as the town is concerned, such agreements by the tenants are inoperative. If the revenue from these leases is in excess of the \$6,000 derived from the other real estate, the lots should be added to the plaintiff's list. It will be necessary for the superior court to proceed to a further hearing for the purpose of ascertaining these facts, unless the parties shall agree.

The record does not show any impropriety on the part of the plaintiff in dealing with its exemption, unless, possibly, in the case of the Brown house; but, in order to exclude any false implication, we deem it proper to add that the charter does not authorize the college to hold any property exempt from taxation for any private use, and does not authorize any commercial dealings with its exemptions, whether by way of mere speculation in vacant land, or selling land on long leases at nominal rents, or otherwise. This statute was intended to serve a great public use in pursuance of a most beneficial public policy, and the construction to be given such a statute requires that the intent shall not be defeated either by clear evasion or undue restriction.

The Superior Court is advised to render judgment ordering the board of relief to strike from the plaintiff's tax list all the items added by the assessors except the Brown house, and except such items, if any, of productive real estate, as it may find to be necessary to retain in order to bring the net income from all other real estate within the sum of \$6,000; and to take further proceedings for the purpose of ascertaining this fact, unless it shall be settled by agreement of the parties.

The other Judges concur.

PENNSYLVANIA SUPREME COURT.

T. L. WHITE *et al.*, Trustees of St. Peter's Roman Catholic Church, *Appts.*,

v.

William H. SMITH, Collector of Delinquent Taxes, *et al.*

(189 Pa. 222.)

1. A school building erected and maintained entirely by voluntary contributions and the school in which is open to all free of charge, without regard to creed, color, race, or condition, is a purely public charity which may be exempt from taxation under Const. art. 9, § 1.
2. A convent building used solely as a residence for the teachers in a school maintained as a charity, and which is a part of the school property and is necessary for the efficient operation and management of the school, is included in the exemption of the school property from taxation as a purely public charity.
3. The fact that the legal title to school property is in a bishop, with no declared trust in the grantee for a charitable use, so that the charity may be terminated at any time by a sale of the property, does not prevent the exemption of the property from taxation while used as a charity.
4. The fact that all the trustees of property used for a school maintained as a charity are Catholics does not prevent the exemption of the property as a purely public charity, when there is no evidence to show the exclusion of any children because of their belief.

(January 2, 1899.)

A PPEAL by plaintiffs from a decree of the Superior Court reversing a decree of the Court of Common Pleas, No. 1, for Allegheny County in plaintiff's favor in a suit brought to enjoin the enforcement of taxes against property alleged to be exempt from taxation. *Reversed.*

The facts are stated in the opinion.

Messrs. John Marron, F. C. McGirr, Johns McCleave, and D. T. Watson, for appellants:

The free public school which has been founded and maintained by the trustees of St. Peter's congregation, is a purely public charity, and exempt from taxation.

Jackson v. Phillips, 14 Allen, 556; *Fire Insurance Patrol v. Boyd*, 120 Pa. 624, 1 L. R. A. 417; *Episcopal Academy v. Philadelphia*, 150 Pa. 565.

Many charities whose benefits have been more restricted and hampered with conditions, pecuniary, sexual, racial, or confined to a class, have been held by this court to be purely public charities.

Donohugh's Appeal, 86 Pa. 306; *Philadelphia v. Women's Christian Asso.* 125 Pa. 572; *Philadelphia v. Pennsylvania Hospital for Insane*, 154 Pa. 9; *Burd Orphan Asylum v. Upper Darby School Dist.* 90 Pa. 21; *Episco-*

pal Academy v. Philadelphia, 150 Pa. 565; *Philadelphia v. Masonic Home*, 160 Pa. 572, 23 L. R. A. 545.

It is the purely public use of the property which secures the exemption from taxation, not the mode of dedication, or the title by which it is held, nor the character of the instrument by which it is controlled.

Gerke v. Purcell, 25 Ohio St. 229; *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201; *Hennepin County v. Grace*, 27 Minn. 503; *Philadelphia v. Church of St. James*, 134 Pa. 207; *Mullen v. Erie County Comrs.* 85 Pa. 291, 27 Am. Rep. 650; *Willard v. Pike*, 59 Vt. 203; *Episcopal Academy v. Philadelphia*, 150 Pa. 575; *Burd Orphan Asylum v. Upper Darby School Dist.* 90 Pa. 21.

The title to this land being in the bishop in trust for the congregation of St. Peter's the property is as fully devoted to a charitable use as if the congregation were incorporated, although no definite charitable use is expressed in the deed.

Phipps v. Jones, 20 Pa. 260, 59 Am. Dec. 708; *Charitable Soc. of Evangelical Asso.'s Appeal*, 35 Pa. 320; *Yard's Appeal*, 64 Pa. 95; *Domestic & F. Missionary Soc.'s Appeal*, 30 Pa. 425; *Thomas v. Ellmaker*, 1 Pars. Sel. Eq. Cas. 98.

The objection that the property may at any time be diverted from the public charitable use for which it was contributed, and lawfully so, is not well considered. This property could not be appropriated to any other uses than those for which it has been donated, and it must be applied in furtherance of the charitable work of St. Peter's Church.

Story, Eq. Jur. §§ 1187-1191; *Bethlehem v. Perseverance F. Ins. Co.* 81 Pa. 445; *Henry v. Deitrich*, 84 Pa. 292; *Thomas v. Ellmaker*, 1 Pars. Sel. Eq. Cas. 98; *Humane Fire Co.'s Appeal*, 88 Pa. 389; *Donohugh's Appeal*, 86 Pa. 314.

The objection that the property in question is not permanently devoted to purposes of public charity is not tenable.

The establishment of schools of learning has always been held a charitable and benevolent use.

Vidal v. Girard, 2 How. 127, 11 L. ed. 205; *Price v. Maxwell*, 28 Pa. 23; *Miller v. Porter*, 53 Pa. 292.

If it is the public use which secures the exemption, so long as the public secures the benefit of the property without any gain or profit resulting to the church, it is and should be exempt.

Northampton County v. Lafayette College, 128 Pa. 132; *Pennsylvania Hospital v. Delaware County*, 169 Pa. 305; *House of Refuge v. Smith*, 140 Pa. 387; *Woman's Home Missionary Soc. v. Taylor*, 173 Pa. 456; *Episcopal Academy v. Philadelphia*, 150 Pa. 565.

In the event of a lease or sale the property would at once become taxable.

Boyd v. Insurance Patrol, 113 Pa. 279.

If the property in question should cease to be devoted to the purely public charity for

NOTE.—As to exemption of property of educational institutions, see also preceding case of *Yale University v. New Haven (Conn.) ante*, 490.

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which it is now used, and become a source of revenue, it would then become taxable, but so long as it serves its present use it is exempt.

Moore v. Taylor, 147 Pa. 481; *Philadelphia v. Jewish Hospital Asso.* 148 Pa. 454; *American Sunday School Union v. Philadelphia*, 161 Pa. 307, 23 L. R. A. 695; *Philadelphia v. Barber*, 160 Pa. 123; *Episcopal Academy v. Philadelphia*, 150 Pa. 575; *Greenl. Ev. § 41*; *Miller v. Henry*, 84 Pa. 33.

The public school being exempt from taxation because a purely public charity, it follows that the building contiguous and annexed thereto and necessary for the efficient maintenance thereof, used as a residence for the teachers therein, is also exempt.

Northampton County v. Lafayette College, 128 Pa. 132; *Ramsey County v. Macalester College*, 51 Minn. 437, 18 L. R. A. 278; *Woman's Home Missionary Soc. v. Taylor*, 173 Pa. 456; *Pennsylvania Hospital v. Delaware County*, 169 Pa. 305; *House of Refuge v. Smith*, 140 Pa. 387; *Wesleyan Academy v. Wilbraham*, 99 Mass. 599; *Hennepin County v. Brotherhood of Church of Gethsemane*, 27 Minn. 460, 38 Am. Rep. 298; *Hennepin County v. Grace*, 27 Minn. 503; *State v. Ross*, 24 N. J. L. 497; *Griswold College v. State*, 46 Iowa, 275, 26 Am. Rep. 138.

Messrs. E. P. Douglass and T. C. Jones, for appellees:

There is not a case in the state of Pennsylvania that holds that property belonging to a congregation or church and used for other than religious purposes, even although it may apparently be used for that which would seem to be a charitable use, has been exempt from taxation, on the grounds that it is a purely public charity.

Miller's Appeals, 10 W. N. C. 168; *Philadelphia v. Women's Christian Asso.* 125 Pa. 572.

No corporation or institution is a purely public charity which is not under the control or supervision of the public authorities, or at least subject to public visitation, or is founded and endowed so as to give the general public, under reasonable restrictions, an absolute right to receive its benefits, and in case of a failure of its managers to carry out the founders' will to compel a compliance therewith by an application to the courts. In case of a dissolution of such a charity its property must vest in the public authorities for charitable purposes.

Delaware County Inst. of Science v. Delaware County, 94 Pa. 163.

The parochial school of St. Peter's Roman Catholic congregation is not a purely public charity within the meaning of the Constitution and the act of assembly.

Donohugh's Appeal, 86 Pa. 306; *Mullen v. Juenet*, 6 Pa. Super. Ct. 1; *Philadelphia v. Women's Christian Asso.* 125 Pa. 572; *Thiel College v. Mercer County*, 101 Pa. 530; *Philadelphia v. Masonic Home*, 160 Pa. 572, 23 L. R. A. 545.

Dean, J., delivered the opinion of the court:

St. Peter's Roman Catholic Church of McKeesport owns ground fronting 280 feet 43 L. R. A.

on Market street, and extending back 140 feet to an alley, all inclosed as one property. The legal title is in the bishop of the diocese, in trust for the congregation. The church fronts 60 feet on the street; then, 22 feet distant, the convent fronts on the same street 40 feet; then, 22 feet distant from that, is the school building, having a frontage of 100 feet. The school building was erected in 1887, wholly by the voluntary contributions of the members of the congregation, and has since been maintained by such contributions. It is open to all, free of charge, without regard to creed, color, race, or condition. At the commencement of this proceeding there were in attendance about 750 children. No revenue whatever is derived from it. The teachers of the school live in the convent building, which is occupied exclusively by them, and no others. They are paid for their services a small salary, in addition to the privilege of residence in the convent building. They are not lessees, and have no right or interest in it, except that of residence while teaching. Both buildings, when projected, designed, and erected, were intended for the use to which they have since been put. The city conceded that the church and school buildings were exempt from taxation under the act of 1874, but assessed and levied a tax on the convent building. The collector, this defendant, was about to seize and sell the personal property on the premises in payment, when the trustees filed this bill for an injunction to restrain him. After full hearing of evidence in the court below, the facts were found as we have narrated them, and the collector was restrained. From this decree the city appealed to the superior court, where the decree was reversed and the injunction dissolved. The reasons given for the reversal by the superior court are that the title is in an individual; that it is under the control of one denomination, and there is no perpetual dedication of the property to public charity. Was the decree a correct legal conclusion from the facts found, and not controverted, in the court of common pleas?

We concede that, under our cases arising since the act of 1874, the exact line dividing taxable from nontaxable property is not at once discernible. We may even go further, and admit that taking all that was said, instead of just what was decided, in some of the cases, that line is not exactly a straight one; nor could it well be so, under the circumstances. Previous to the Constitution and act of 1874, the legislature, by special act, relieved from taxation just what property it saw fit, whether the property was charitable, religious, or even devoted solely to purposes of corporate or private gain. The legislative habit had grown into a great abuse. Then came the new Constitution, which at once put a stop to the abuse of power by the legislature. Whether, in its sweeping provisions, it did go somewhat further, and prevent good as well as evil, is a question with which we have nothing to do. Section 1, art. 9, provides that "all taxes shall be uniform upon the same class of subjects,

within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the general assembly may by general laws exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity." As is said in *Donohugh's Appeal*, 86 Pa. 306, a case decided by our Brother Mitchell, when sitting in the common pleas, within four years after the adoption of the Constitution, that instrument exempted nothing from taxation; it only withheld from the legislature power to exempt property of any kind, except that mentioned in this section, and exemption of such property must be by general laws. It is evident, by the use of the words "general laws" the Constitution intended that exemptions should be as uniform on the same class of subjects as the uniformity enjoined in the preceding sentence of the same section, as to taxation. The legislature being powerless to particularize, by bill, exemption for any one institution, necessarily, if it intended to exempt any property under this power, it must adopt such general designation or words of description as would include all of that class of property, and thus promote uniformity. And palpably, on this view, the act of May 14, 1874, was framed as follows: "All hospitals, universities, colleges, seminaries, academies, associations and institutions of learning, benevolence, or charity, with the grounds thereto annexed, and necessary for the occupancy and enjoyment of the same, founded, endowed, and maintained by public or private charity, . . . be and the same are hereby exempted from all and every county, city, borough, bounty, road, school, and poor tax." This at once imposed upon the courts a most difficult and often perplexing duty of interpretation from the facts in the cases as they arose. No hard and fast rule adapted to the varying facts of the different cases could at once be confidently laid down. The natural scientist depends for the soundness of his deductions on the copiousness of his facts. The value of a rule of law often depends on the experience and observation of courts derived from many cases raising the same question, but not involving the same facts. One thing was clear at the start, no matter what was the legislative language; the exemption could not extend to any property not a "purely public charity." This was not so clear to taxpayers, for it is seldom anyone, whether individual or association, displays any great alacrity in rendering "unto Cæsar the things that are Cæsar's." Hence there were many attempts by parties clearly not within the act to escape taxation, and by others where the question was doubtful; and while it was easy to say the institution making claim was not exempt, unless purely a public charity, the varying facts presented by the different cases resulted in apparently conflicting legal conclusions as to the application of the designation. The first case raising fairly the question as to what was a

purely public charity is *Donohugh's Appeal*, 86 Pa. 306. In that case the institution claiming exemption was the Philadelphia Library Company, having a library of over 100,000 volumes. It was an ancient institution, and had been founded and endowed by voluntary gifts. The use of the books was absolutely free to all persons who chose to use them in the library building, but, as with all public libraries, many persons desired to take books away, and read them at their homes or lodgings. To such persons a small fee was charged, and they were further required to make a deposit as security for the return of the book. Another class of readers who took the books away were called "commuters." These were allowed to make a lump deposit annually as security for and hire of the books, the number so taken in one year being limited. The amount deposited, however, in the latter case, was less than if each book used had been taken out singly, and the charge then deposited. The entire sum thus realized was a comparatively small one, and was used in replacing wornout books and purchasing others. Not one of the twelve managers of the company received any compensation. The library, except from the small sum for book hire, was maintained, and from year to year enlarged, by voluntary contributions. The opinion on what constitutes a public charity, although the subject is more elaborately discussed, is compressed in these few words: "The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character. The smallest street in the smallest village is a public highway of the commonwealth, and none the less so because a vast majority of the citizens will certainly never derive any benefit from its use. It is enough that they may do so if they choose." Further, as to what constituted a "purely public charity," he says: "In this connection, and in its ordinary sense, the word 'purely' means completely, entirely, unqualifiedly, and this is the meaning we must presume the people to have intended in adopting it in their Constitution." Then, as to the charge for a special use of the books taken away from the building, it is held to be but a regulation necessary to the proper management of such an institution, and does not destroy its character as a purely public charity; and, further, if it had such effect, a regulation in violation of its fundamental character would be void. It will be noticed that the small fee charged is held to be merely an administrative regulation for the preservation of the library, and not a provision whereby, by hire to the public, the library is to be maintained. And this seems to us to be clearly sustained by the facts. When the book is taken from the custody of the librarian and other employees, carried to another building, and probably used by others, it is subject to rougher usage than when in the library, and will become worn and useless sooner. The primary object is the preservation of the book to the

public. Incidentally, the fee may net a profit. That will depend on the wear and tear of the book. But it is in no real sense a hiring to support the alleged charity, or a charge which excludes from the privileges of the library those unable to pay it, for they have free access to the books in the building. The conclusion was that the charity was a purely public one. While it is not so said, yet it is clearly implied from this opinion that if any part of the public had been excluded from the use of the library because of inability or refusal to pay for books, or if its support had been derived from hiring of its books to the public, the conclusion would have been the opposite one to that adopted.

In the many cases that have come before us in the more than twenty years since *Donohugh's Appeal*, our effort has been to adhere to it. We have noticed no case in which it has not been cited either by counsel or the court. In *Miller's Appeals*, 10 W. N. C. 168, the school was supported largely by tuition fees. It was held not exempt. In *Thiel College v. Mercer County*, 101 Pa. 530, the college was incorporated to furnish an education to the youth of both sexes at as reasonable rates as possible. No profit was derived by the corporation, although the students paid for their board and tuition. It was held that as the school was maintained by those who attended it, and not by voluntary contributions, it was not exempt. In *Hunter's Appeal*, 22 W. N. C. 361, some income was derived by the academy from property which had been donated, but a considerable part of its revenues was from tuition fees at low rates. It was held not exempt. All these cases were based on the principles announced in *Donohugh's Appeal*. Three cases (*Philadelphia v. Women's Christian Asso.* 125 Pa. 572; *Episcopal Academy v. Philadelphia*, 150 Pa. 565; and *Philadelphia v. Pennsylvania Hospital for Insane*, 154 Pa. 9), professedly follow *Donohugh's Appeal*; but it is difficult to bring them, on their facts, within the rules of that case. The facts are much alike in the three, and really the last two merely follow the first; but it seems to me,—and as to these cases I speak only for myself, and not for the court,—on their facts, they have but slight resemblance to *Donohugh's Appeal*. They can be sustained only by a very liberal construction of the act of 1874, and they go in the direction of exemption to the uttermost limit of such construction. In the *Women's Christian Asso. Case*, the expressed object of the charter was the temporal, moral, religious welfare of women; by its organized methods, it furnished regular board for young women, restaurant meals, employment bureau, lectures, and library. The cost of the building was \$70,000,—one half furnished by charitable contributions, the other half borrowed. The privileges of the institution were granted only to those who earned less than \$6 per week in wages. These paid \$3.50 per week for board and washing. Those out of employment and unable to pay were taken in free, if there was

any vacancy, until the employment bureau secured places for them. In the year preceding the trial of the cause, out of 2,100 young women who enjoyed the privileges of the institution, but 100 did not pay. About one seventh of the gross expenses were charitable contributions, and six sevenths were paid by those who had meals, board, or lodging. Not one of the officers or managers received any compensation. It was held to be a purely public charity, and exempt, mainly on the ground that it was free from any taint of corporate or private gain. I doubt if the decision can be sustained on this ground alone; but the facts that board and lodging were furnished by the corporation at less than actual cost to a worthy class, and to some of them free, and that the deficiency was made up by voluntary contributions, would perhaps warrant the conclusion that the association was purely a charity. But it will be noticed how narrow was the margin between gross expenses and gross receipts from boarders. If they had been equal, or if the receipts from that source had exceeded the expenditures, it would have been difficult to discern the element of charity in the association, for there would have been no place for voluntary contributions. In that case it seems to me, it would have been purely a co-operative boarding and lodging house, managed by benevolent women, who gave their services without charge. Paxson, Ch. J., who delivered the opinion of the court, says at the close of it: "It may be these views conflict slightly with what has been said in some of the cases referred to [meaning *Thiel College*, *Miller's Appeals*, *Hunter's Appeal*, and other cases which strictly followed *Donohugh's Appeal*]: It does not conflict, however, with the points decided in either of them, while they are believed to be in entire harmony with *Donohugh's Appeal*." I think the distinction between a public charity supported almost wholly by voluntary contributions, but which, by a reasonable regulation necessary for the preservation and care of its property, incidentally realizes a small income, and a charity which collects from its beneficiaries six sevenths of its whole income, is quite obvious. We have no desire to disturb the judgments in the three cases cited. They stand on the facts peculiar to them, and are outside the line of cases which follow *Donohugh's Appeal*. After this lapse of time, and our observation of the litigation which has had its source in the act of 1874, and the Constitution which suggested the act, we are adverse to any departure from the law of that case. We therefore adhere to it now as the settled rule of interpretation of that act. It is a safer guide than the *Women's Christian Asso. Case*, which gives such prominence to the one fact,—the absence of corporate or private gain. Carry that a little further, and it would exempt a carrying corporation from taxation, whose receipts are less than its expenditures, whose stockholders received no dividends, and yet the road is operated for the benefit of the whole public on exactly the same terms. We will not op-

en the road further in that direction, because both the Constitution and the statute obstruct it; and it is immaterial whether the courts break through or go around this obstruction, the end is the same; the very thing which the Constitution sought to cure as a legislative abuse will become a judicial one. These remarks are prompted by the fact that appellants here have cited and relied on these cases, while we desire it to be understood we rest our decision on *Donohugh's Appeal*, and cases following it. Under them, the law is clearly with appellants. This school is a purely public charity, and is embraced by the general words of the act. While it is not specifically designated by the word "school," yet it is clear, from the juxtaposition of the words in the sentence, and the character of the institution, that it is included in "associations and institutions of learning." The preceding part of the sentence is an attempt to specify institutions of learning by the words "universities, colleges, seminaries, academies;" then, as if mindful of the constitutional mandate that exemption must be by general law, and therefore, impliedly uniform, it uses the all-embracing words "associations and institutions of learning." That a school for children preliminary to the academy or college is an institution of learning, in fact, no one can doubt. Its purpose and methods place it within the general term.

It is further argued that, even if the school building proper be exempt, the teachers' residence is not, because it is not part of the school building. This argument assumes the fact to be in direct contradiction of that found by the court,—that is, that it is used solely as a residence for the school teachers; that it is a part of the school property, and is necessary for the efficient operation and management of the schools; that it was constructed solely from voluntary contributions, and no revenue whatever is derived from it. Assuming, as we must, this finding of the court to be the fact, the property is exempt; for it is part of the school building, and exclusively used for school purposes.

It is argued further that the legal title to the property is in an individual, the bishop, with no declared trust in the grantee for a charitable use; that, therefore, the charity may be terminated at any time by a sale of the property. There is nothing in the act of assembly which requires that the grant of property to a purely public charity shall be stamped by perpetuity. The only requirement is that, when the institution seeks exemption, its character, whether created by charter, conveyance, articles of association, or voluntary rules and regulations, shall be that of a purely public charity. If it violates its implied duty towards its contributors, equity will afford relief. If it ceases to be that on which it depends for exemption, the property at once becomes subject to taxation.

Nor, in view of the other facts in the case, is it important that the trustees are all Catholics, and, therefore, the institution is controlled and managed by Catholics. If there was evidence tending to show exclusion

of non-Catholic children because their belief did not accord with that of the trustees, the fact would have some weight; but, standing as it does by itself, it is of but little consequence. There is nothing either express or implied, in the law, which disqualifies a board of trustees composed of members of a single church from managing and supervising a public charity. A Presbyterian, Jewish, or other charity may have boards of managers composed exclusively of persons of the faith indicated by the name; but if the benefits are open to all, without regard to creed, it does not affect the public character of the charity. Purely public charities are neither so abundant nor so effective that we can afford to discriminate against them because of the creed of the managers. Our discrimination must rest solely on the fact as to whether they discriminate in favor of or against any part of the public.

We are of opinion the superior court erred in its decree reversing the court of common pleas. Therefore *the decrees of the Superior Court is reversed*, the decree of the common pleas affirmed, and the injunction reinstated; costs of appeal to be paid by appellees.

David P. REIGHARD *et al.*

v.

Phillip S. FLINN, *Appt.*

(189 Pa. 355.)

1. Citizens and taxpayers who will be deprived of free access to a public landing and river, and of the free enjoyment of light and air from the landing, by the unlawful erection of a building thereon by a lessee, can maintain a suit for an injunction against the structure.
2. A lease of part of a public landing to a private person is not within the lawful power of a city council,—especially when the city charter conferring rights of property on the corporation provides that it shall not be construed to authorize the sale, lease, or alienation of such landings.

(January 3, 1899.)

APPEAL by defendant from a decree of the Court of Common Pleas, No. 1, for Allegheny County in favor of complainants in a suit brought to enjoin defendant from erecting a structure on a portion of a public landing on the Allegheny river. *Affirmed.*

The facts are stated in the opinion.

Messrs. Clarence Burleigh and Watson & McCleave for appellant.

Mr. George W. Guthrie, for appellees: The ordinance and lease under which appellant claims are illegal and void.

The town of Pittsburgh was not incorporated until many years after the dedication of this space; no legislative action was taken

NOTE.—As to the trust for the public in a wharf or landing, see also *Roberts v. Louisville (Ky.)* 13 L. R. A. 844; and *St. Paul v. Chicago, M. & St. P. R. Co. (Minn.)* 34 L. R. A. 184; and *Louisiana Constr. & Improv. Co. v. Illinois C. R. Co. (La.)* 37 L. R. A. 661.

in regard to it, and no attempt was made to grant to the borough or to the city subsequently created any right in or control over it, either in the acts of incorporation or any other acts, until the act of March 31, 1836.

It was enacted that "the space so graded and lying between said way and low-water mark of the Allegheny river shall forever thereafter be occupied, used, and employed as a public landing.

The act of April 6, 1867, which consolidated into one city the old city of Pittsburgh, the borough of Lawrenceville, and various townships adjoining, provided that "nothing herein contained shall be construed to empower said corporation to sell, mortgage, lease, or in any manner alienate any lands which are held by any of the said former corporations as public squares, common grounds, or river-shore landings."

Public lands are held by the state "in trust for the public uses of navigation."

Stockton v. Baltimore & N. Y. R. Co. 32 Fed. Rep. 9; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018.

The lease and ordinance being null and void, appellant's possession and the structure erected by him, having no other authority, are also illegal.

A public landing is one which is held under public control for public use in water commerce, subject only to such rules, regulations, and charges as may be enacted by public authority.

Subordination to public control, and freedom from the will of a private owner, are essential to the existence of a public use as distinguished from a public interest.

Re New York, 135 N. Y. 253; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42.

However important the business of a common carrier by land may be, it is not "navigation," and a public landing cannot be appropriated to it without a perversion of its use.

Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224; *Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co.* 10 Mo. App. 401, 82 Mo. 122, 101 Mo. 192, 8 L. R. A. 801; *Lord v. Oconto*, 47 Wis. 386; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80.

When the proprietors laid out the plan of the town of Pittsburgh, they—by leaving an open space along the rivers—dedicated this space to the lotowners "as a means of public access to and along the rivers."

Schenley v. Pittsburgh, 104 Pa. 472.

If the plan and deeds carry title to the river's edge, then the appellees, without any specific grant, are the owners of a riparian right which "is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired."

Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; Gould, Waters, § 48.

Such rights are entitled to protection from any illegal obstruction, and the fact that the obstruction is also a public nuisance does not impair the power of a court of equity to remove it by injunction.

Hacke's Appeal, 101 Pa. 245.

Appellees as owners of property to which

the use is appurtenant, and in front of which the illegal obstruction is placed, may maintain an action for its removal.

Miller v. Lynch, 149 Pa. 460; *Fereday v. Mankedick*, 172 Pa. 535; *Clad v. Paist*, 181 Pa. 148; *Pennsylvania R. Co.'s Appeal*, 115 Pa. 514; *Groff's Appeal*, 128 Pa. 621; 5 L. R. A. 661; *Pennsylvania R. Co. v. Reading Paper Mills*, 149 Pa. 18; *Westhoffer v. Lebanon & A. Street R. Co.* 163 Pa. 54; *Potts v. Quaker City Elev. R. Co.* 161 Pa. 396; *McDonald v. Newark*, 42 N. J. Eq. 136; *Callanan v. Gilman*, 107 N. Y. 360; *Flynn v. Taylor*, 127 N. Y. 596, 14 L. R. A. 556.

Green, J., delivered the opinion of the court:

The authority of the city to make the lease in question to the defendant is derived from the 3d section of the act of March 31, 1836 (Pub. Laws, 318). By that act the councils of the city of Pittsburgh were authorized to define, locate, and cause to be opened a public street, to be known as "Duquesne Way," of at least 40 feet in width, and at least 420 feet north of Penn street. By the 3d section it was provided that, after Duquesne Way was located and opened, the councils were authorized to grade and improve the space lying northwardly from the line of the way, "and the space so graded and lying between the said way and low-water mark of the Allegheny river, shall forever thereafter be occupied, used, and employed as a public landing, and the said councils shall have full power to make such rules, regulations, and by-laws regulating the use of such public landing as they may think proper, and shall not be inconsistent with the existing laws of this commonwealth; . . . and to exercise in every respect over the said public street and public landing, when the same shall be opened, the same powers and authority which they may or can exercise by law over the other public streets and landings within the said city." The answer of the defendant avers that, in pursuance of the authority thus conferred, an ordinance was passed by the councils on the 25th of January, 1897, authorizing the department of public works to lease to the defendant, for the term of five years, the part of the public landing now in question. Other averments are made in the same connection, which are not necessary to be considered. The contention turns upon the question whether the city councils had the lawful power to make a lease of such a piece of public property to a private person. The learned court below decided that they did not have such power, and therefore granted a restraining injunction against the defendant. The propriety of this ruling is the question before us.

The plaintiffs are citizens and taxpayers of the city, and are the owners of property fronting on Duquesne Way immediately opposite the proposed structure which the defendant is about to erect. The plaintiffs allege that they have held and owned their lots, with buildings on them, from a time before the lease to the defendant was made, and have always been accustomed to have a

free and unobstructed passage to and over the public landing in front of their lots, and that the erection by the defendant of any buildings or structures on said leased premises will prevent their free access to and use of the public landing at that place, and will also deprive them of free access to the river, and of the free enjoyment of light and air over said space. We do not think there is any doubt of the right of the plaintiffs to maintain the present bill, if they incur a liability to the injuries complained of, and we do not think it necessary to expend time in the discussion of that question. They are injuries which are personal to themselves, and they are direct and positive in character. As it seems to us, the fate of the contention depends upon the question of the right of the defendant to occupy the public landing and to erect structures thereon, as is averred in the bill and admitted in the answer. But that question depends exclusively upon the lawful right of the city to make such a lease and to authorize such structures. On this question, it seems to us, the weight of authority is against the defendant. Passing by the very important consideration that, if the right now claimed for the city be sustained, the entire public landing system of the city on its river fronts would soon be destroyed and become vested in private persons for their own emolument, it is enough to know that, in the fundamental grant to the city by the legislature of power over the landings, there is a most serious restriction upon any disposition of the control over the landings which will interfere with the free, perpetual, public, and unrestrained use of them by the whole community. The specific and positive language of the act of 1836 is that "the space so graded and lying between said way and low-water mark of the Allegheny river shall forever thereafter be occupied, used, and employed as a public landing." Now, if a system be inaugurated of leasing out to private persons portions of the space thus formally dedicated to a perpetual public use, we are unable to see how the public character of the landing is to be preserved, as is required by the act; because it is of no consequence, as it seems to us, that the people generally may have the right to make use of the landing by purchasing the consent of the lessees with a price for such use,—it is no longer the free, unrestrained use by all the people, as of a public and undisputed right thereto. The privilege would be something that belongs to private persons who are lessees of the city, and, in order to be enjoyed by the general public, it must be purchased from those persons, and a private gain must therefore be subserved in order that a clear public and free right of enjoyment can be exercised.

The authorities which are directly pertinent seem to be conclusive on this subject. In *Illinois C. R. Co. v. Illinois*, 146 U. S. 453, 36 L. ed. 1042, Mr. Justice Field, delivering the opinion, said: "The trust devolving upon the state for the public, and which can only be discharged by the management and

control of property in which the public has an interest, cannot be relinquished by a transfer of the property. . . . The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." This ruling appears to be quite applicable to the present case, because the act of 1836, while it does confer the power to make rules and regulations concerning the space between the way and the river, does not confer any power upon the city to divest itself of its authority or control over the space which it designates as "public landing." Rules and regulations concerning the use of the whole of this space called "public landing," are radically different from an absolute conveyance of the right of use, whether by lease or deed. The intention of the legislature, moreover, is made still more manifest upon this subject in the consolidation act of April 6, 1867, in which it is specially provided (§ 35) that "all rights of property of every kind and description, excepting schoolhouses and lots, which were vested in any of said former corporations or townships, shall thereafter be deemed and held to be vested in the corporation created by this act, . . . provided that nothing hereinafter contained shall be construed to empower said corporation to sell, mortgage, lease, or in any manner alienate any lands which were held by any of said former corporations, as public squares, common grounds, or river shore landings, but such lands shall be held for general public use in the same manner as before the passage of this act." Besides being specially restrictive as to the classes of property described, this act is confirmatory of the policy established by the act of 1836, particularly enjoining that the new municipal corporation shall not sell, mortgage, or lease, or in any manner alienate, any lands which were held by any of the former corporations, as public squares, common grounds, or river-shore landings, "but such lands shall be held for general public use in the same manner as before the passage of this act." It is plainly manifest, therefore, that the contest here is not to be affected by decisions which are predicated of municipalities which do have the whole power of disposition of water fronts, wharves, docks, and landings, such as on tide water and lake ports, or ports of great cities on the large rivers of the country, but only of such where the municipal control is limited by specific restrictions, within which alone the municipal authority must be exercised. Judged by this test, the solution of the present controversy seems to be quite simple, and it appears to us that the learned court below arrived at the correct result in granting the injunction prayed for.

Decree affirmed and appeal dismissed, at the cost of the appellant.

MISSOURI SUPREME COURT (In Banc).

Annie GANNON, *Respt.*,
v.

LACLEDE GAS LIGHT COMPANY, *Appt.*

(145 Mo. 502.)

1. Unproved allegations of knowledge and want of care on the part of an electric-light company will not prevent recovery for death of a fireman killed while in the discharge of his duty by stepping on a live grounded wire in a public alley, if sufficient is proved to establish the fact and manner of death, defendant's negligence, and due care on the part of deceased.
2. An electric company maintaining overhead wires along a public alley is prima facie liable for injuries caused to persons rightfully in the alley by live grounded wires.
3. An allegation in a suit for damages for injuries caused by a live grounded electric wire in a public alley, that its owner permitted it to become broken and to remain down a long time when it knew or ought to have known its condition, does not shift the burden of proof as to care of the wire from defendant to plaintiff.
4. A verdict cannot be directed for defendant in an action to recover damages for negligent injuries, although his evidence is uncontradicted and sufficient, if true, to overcome the prima facie case made by plaintiff.

(*Sherwood, Brace, and Marshall, JJ., dissent.*)

(June 7, 1898.)

APPEAL by defendant from a judgment of the Circuit Court for the City of St. Louis in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's husband. *Affirmed.*

The facts are stated in the opinions.

Mr. Henry Hitchcock, for appellant:

In such an action the negligence proved must conform to that charged in the petition; and *a fortiori* if the plaintiff fails to prove the negligence alleged against the defendant, a demurrer to the evidence should be sustained.

Gurley v. Missouri P. R. Co. 93 Mo. 445; *Haynes v. Trenton*, 108 Mo. 123; *Buffington v. Atlantic & P. R. Co.* 64 Mo. 246; *Price v. St. Louis, K. C. & N. R. Co.* 72 Mo. 414; *Waldhiser v. Hannibal & St. J. R. Co.* 71 Mo. 514; *Leslie v. Wabash, St. L. & P. R. Co.* 88 Mo. 50.

While the court will not weigh conflicting evidence to ascertain whether a verdict can be supported if there be any evidence upon which it can rest, on the other hand, a verdict which has no substantial evidence to support it ought to be set aside.

Reichenbach v. Ellerbe, 115 Mo. 588; *Long v. Moon*, 107 Mo. 334; *Carroll v. Interstate*

NOTE.—As to liability for electric wires in streets, see *note* to *Denver Consol. Electric Co. v. Simpson* (Colo.) 31 L. R. A. 566; also *Snyder v. Wheeling Electrical Co.* (W. Va.) 39 L. R. A. 499, and other cases cited in *footnote*. 43 L. R. A.

Rapid Transit Co. 107 Mo. 653; *Hunt v. Mis-souri R. Co.* 89 Mo. 607; *Spohn v. Missouri P. R. Co.* 87 Mo. 74; *Powell v. Missouri P. R. Co.* 76 Mo. 83; *Marion County Comrs. v. Clark*, 94 U. S. 284, 24 L. ed. 61; *Hearne v. Keuth*, 63 Mo. 84; *Schmeiding v. Ewing*, 57 Mo. 78; *Doering v. Saum*, 56 Mo. 479; *Routson v. Pacific R. Co.* 45 Mo. 236; *Nelson v. Boland*, 37 Mo. 432; *Morris v. Barnes*, 35 Mo. 412.

On rehearing.

What proof will make a prima facie case of negligence depends upon what, in a legal sense, constitutes actionable negligence. Unless the proof offered conforms to that in each essential particular, a prima facie case is not made out.

Actionable negligence is the inadvertent failure of a legally responsible person to use ordinary care under the circumstances in observing or performing a non-contractual duty implied by law, which failure is the proximate cause of injury to a person to whom the duty is due.

16 Am. & Eng. Enc. Law, p. 389; *Shearm. & Redf. Neg. § 3*; *Ray, Negligence of Imposed Duties (Passenger Carriers)*, § 183a.

Defendant must owe plaintiff a legal duty of care.

Brown v. Wabash, St. L. & P. R. Co. 20 Mo. App. 222.

The proof must affirmatively show a breach of such duty by defendant.

Holman v. Chicago, R. I. & P. R. Co. 62 Mo. 564; *Harlan v. St. Louis, K. C. & N. R. Co.* 65 Mo. 22; *Dowell v. Guthrie*, 99 Mo. 663, 116 Mo. 654; *Baker v. Kansas City, Ft. S. & M. R. Co.* 122 Mo. 593; *Rutledge v. Missouri P. R. Co.* 123 Mo. 121; *Hite v. Metropolitan Street R. Co.* 130 Mo. 138; *Thompson v. Metropolitan Street R. Co.* 140 Mo. 141.

Such breach of duty must result in damage to plaintiff.

Harlan v. St. Louis, K. C. & N. R. Co. 65 Mo. 22; *Powell v. Missouri P. R. Co.* 76 Mo. 83; *Stapp v. Chicago, R. I. & P. R. Co.* 85 Mo. 233; *Mathiason v. Mayer*, 90 Mo. 585; *Hite v. Metropolitan Street R. Co.* 130 Mo. 132.

Such breach of duty must be the proximate cause of the injury complained of.

Stoneman v. Atlantic & P. R. Co. 58 Mo. 503; *Harlan v. St. Louis, K. C. & N. R. Co.* 65 Mo. 22; *Stapp v. Chicago, R. I. & P. R. Co.* 85 Mo. 229; *Stanley v. Union Depot R. Co.* 114 Mo. 606; *Thompson v. Metropolitan Street R. Co.* 140 Mo. 125; *Nolan v. Shickle*, 3 Mo. App. 305, 69 Mo. 336; *Banks v. Wabash Western R. Co.* 40 Mo. App. 464; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256.

The proof offered by plaintiff in this case completely failed to show breach of duty or proximate cause.

Nolan v. Shickle, 3 Mo. App. 305; *Thompson v. Metropolitan Street R. Co.* 140 Mo. 141.

There is no absolute rule as to negligence; that which is negligence in one case will become by change of circumstances ordinary care in another, or gross negligence in a third.

Brown v. Hannibal & St. J. R. Co. 50 Mo. 467, 11 Am. Rep. 420; *Wilkins v. St. Louis, I. M. & S. R. Co.* 101 Mo. 93.

Common carriers, though bound to exercise toward passengers the highest degree of care of a very prudent person, are not insurers of their safety, nor responsible for injuries occurring when all reasonable skill and diligence had been used, and *a fortiori* are not liable for mere accident or misadventure or for an unknowable insufficiency of some part of their road.

Sawyer v. Hannibal & St. J. R. Co. 37 Mo. 240, 90 Am. Dec. 382; *Huelsenkamp v. Citizens' R. Co.* 37 Mo. 537, 90 Am. Dec. 399; *Morrissey v. Wiggins Ferry Co.* 43 Mo. 380, 97 Am. Dec. 402; *Leslie v. Wabash, St. L. & P. R. Co.* 88 Mo. 50; *O'Connell v. St. Louis Cable & Western R. Co.* 106 Mo. 482; *Willmott v. Corrigan Consol. Street R. Co.* 106 Mo. 535; *Smith v. Chicago & A. R. Co.* 108 Mo. 243; *Jackson v. Grand Ave. R. Co.* 118 Mo. 199; *Clark v. Chicago & A. R. Co.* 127 Mo. 197; *Hite v. Metropolitan Street R. Co.* 130 Mo. 132; *Sullivan v. Jefferson Ave. R. Co.* 133 Mo. 1, 33 L. R. A. 167.

If at the trial defendant offers testimony after a demurrer to plaintiff's evidence is overruled, he takes the chance of aiding the plaintiff's case, but is not thereby deprived of the right to ask the court to direct a verdict for defendant on all the evidence.

Guenther v. St. Louis, I. M. & S. R. Co. 95 Mo. 286; *Eswin v. St. Louis, I. M. & S. R. Co.* 96 Mo. 290; *McPherson v. St. Louis, I. M. & S. R. Co.* 97 Mo. 253; *Weber v. Kansas City Cable R. Co.* 100 Mo. 194, 7 L. R. A. 819; *Jennings v. St. Louis, I. M. & S. R. Co.* 112 Mo. 274; *Hite v. Metropolitan Street R. Co.* 130 Mo. 141; *Stanley v. Union Depot R. Co.* 114 Mo. 606; *Kelsay v. Missouri P. R. Co.* 129 Mo. 362; *Payne v. Chicago & A. R. Co.* 136 Mo. 562; *Vogg v. Missouri P. R. Co.* 138 Mo. 172; *Thompson v. Metropolitan Street R. Co.* 140 Mo. 125; *Powell v. Missouri P. R. Co.* 76 Mo. 80.

Mr. T. J. Rowe, for respondent:

In passing upon a demurrer to the evidence, the court is required to make every inference of fact in favor of the party offering the evidence, which a jury might, with any degree of propriety, have inferred in his favor, and if, when received in this light, it is insufficient to support a verdict in his favor the demurrer should be sustained.

Wilson v. Lee's Summit Bd. of Edu. 63 Mo. 137.

A case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish.

Beatty v. Mutual Reserve Fund Life Asso. 44 U. S. App. 527, 75 Fed. Rep. 65, 21 C. C. A. 231.

The jury and the trial judge found that the plaintiff made a *prima facie* case when 43 L. R. A.

she proved that her husband met his death on a public highway, by coming in contact with a deadly fluid placed on the highway by defendant, and it was their exclusive province to decide what facts were proved.

Haynes v. Raleigh Gas Co. 114 N. C. 208, 26 L. R. A. 810; *Ray, Negligence of Imposed Duties, Personal*, p. 145; *Mullen v. St. John*, 57 N. Y. 570, 15 Am. Rep. 530; *Kearney v. London, B. & S. O. R. Co.* L. R. 5 Q. B. 411; *Suburban Electric Co. v. Nugent*, 58 N. J. L. 658, 32 L. R. A. 700; *Loveland v. Gardner*, 79 Cal. 317, 4 L. R. A. 395; *Sisk v. Crump*, 112 Ind. 504; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154.

The maxim *Res ipsa loquitur* is directly applicable.

Clarke v. Nassau Electric R. Co. 9 App. Div. 51; *Jones v. Union R. Co.* 18 App. Div. 267; *Gilmore v. Brooklyn Heights R. Co.* 6 App. Div. 117.

Robinson, J., delivered the opinion of the court:

This action was begun by the respondent, Annie Gannon, against appellant, to recover \$5,000 for the death of her husband, William Gannon, alleged to have been caused by the fault of the defendant company as set out in her petition, containing the following substantial averments: "That the Laclede Gas-light Company, defendant, is a corporation under the laws of Missouri, engaged in the business of furnishing and selling electric light throughout the city of St. Louis, Missouri. That in conducting said business the defendant had erected and strung upon poles along the streets and alleys of said city wires charged with a certain dangerous and life-destroying fluid and current known as electricity; and that on the 18th day of April, 1894, on a certain public highway of said city, to wit, in an alley running east and west through the block bounded on the north by Sheridan avenue, on the south by Thomas street, on the east by Elliot, and on the west by Leffingwell avenue, through and along which alley it then and there had erected and maintained as aforesaid its said wires, so as aforesaid charged with electricity, in the conduct of its said business, and at a point in said alley in the rear of residence No. 2737 Thomas street, the defendant negligently and carelessly permitted its said wires, to the number of six or seven, then and there charged as aforesaid, to become broken in two, and to fall to the pavement of said alley, and to remain broken in two and down for a long time then and there, while full charged with electricity as aforesaid, when it knew, or ought by the exercise of any care and caution to have known, that the said wires were so as aforesaid broken and down, and liable, if touched by any human being while so broken down and charged as aforesaid, to destroy human life. And plaintiff states that, while the said wires were then and there in said alley broken in two and down and charged as aforesaid, her said husband, while walking along in the said alley at said point, struck with his foot against one of said defendant's said wires,

and was thereby instantly killed, by the fault and recklessness and carelessness of the said defendant then and there in the premises as aforesaid, to her damage in the sum of \$5,000, for which sum plaintiff prays judgment."

Defendant's answer was a general denial, coupled with a plea of contributory negligence on part of plaintiff, to which plaintiff replied, denying the allegation of new matter contained in defendant's answer.

At the close of plaintiff's testimony in chief the defendant asked the following instructions: "The court instructs the jury that, on the pleading and evidence, the plaintiff cannot recover, and the verdict will be for defendant;" which being refused, the defendant offered testimony on its part to the effect that the wires belonging to defendant, that killed plaintiff, were melted or burned in two by reason of a fire originating in a stable that was fronting on the alley in which its wires were strung; that said fire was not caused by the wires, and that its origin was unknown; that the defendant was not notified of the existence of the fire, or that its wires were broken down in the alley where the fire occurred, until after plaintiff's husband had been killed, and that said wires were down upon the ground in the alley only a short while before plaintiff's husband was killed; that there was no appliance at defendant's power house at the time to indicate when one of its wires was grounded; and that defendant had at the time of the fire a contract with the city for lighting certain streets and alleys with electricity, and also certain public and private institutions, which required it to keep in operation during the day a constant current of electricity passing over its wires. At the close of all the testimony in the case, defendant again prayed the court to instruct the jury "that, upon the pleading and all the evidence, the plaintiff cannot recover;" which being refused, the jury, under proper instructions submitted by the court, found a verdict for plaintiff for \$3,000, on which in due time judgment was entered, and to reverse which, on account of error alleged in refusing defendant's two peremptory instructions, this case is here. No objection is made now to the proposition of law announced in the instructions given by the court, if the refusal of defendant's instruction at the close of the case is held good. The sole controversy has grown out of the application of the law to the facts, under the peculiar averments of the petition.

The plaintiff, to sustain her case, offered testimony tending to show that William Gannon, in respect to whose death this action was begun, was the husband of plaintiff; that he came to his death by stepping upon an electric wire belonging to the defendant company that was broken in two and lying upon the ground in one of the public alleys of the city of St. Louis, charged with an electric current of more than double the voltage necessary to kill a human being; that plaintiff's husband was at the time in the discharge of his duty as one of the city firemen, trying to extinguish a fire that had

originated in a stable fronting on the alley where he was killed, and along which defendant, by permission of the city, had strung its electric wires, for the purpose of enabling it to furnish light to the city and for various private consumers along the course of the line; that two of a series of seven of defendant's wires strung overhead in said alley were down when plaintiff's husband arrived at the fire, and two other of the firemen engaged with him were also stunned and knocked to the ground at and near the same time and place.

The defendant's contention here is that no testimony was offered which tended to prove that the death of plaintiff's husband was caused by negligence on part of defendant, after the manner as alleged in her petition; that no substantial evidence, nor any evidence whatever, was offered by plaintiff tending to show, either that the wires in question became broken in two or fell to the ground in consequence of any negligence on part of defendant or its agent; or that said defendant knew, or ought by the exercise of ordinary care or caution to have known, that said wires were so broken and down at or before the time when plaintiff's husband was killed; or that defendant or its agents, with knowledge or notice, actual or constructive, that said wires were broken and down in the alley where plaintiff's husband was killed, did negligently permit said wires to remain so broken and down for a long time after notice thereof. And in the second place it is contended by defendant that, if it be conceded that a prima facie case was made by plaintiff in the first instance, it was entirely overcome by the positive and uncontradicted testimony of defendant's witnesses, and for that reason a finding should have been directed for defendant by the court at the close of the case.

While there is no doubt of the general proposition, so vigorously and repeatedly asserted by the counsel for appellant in his elaborate and able brief filed herein, "that a party cannot declare upon one cause of action, upon one negligent act, and recover upon an entirely different act of negligence, without a disregard of all rules of pleading and practice," it must be borne in mind that it has likewise been a rule of long practice, and frequently asserted in this court, based upon the plainest principles of propriety and fairness, that a party will not be driven out of court merely from the fact that he or she has alleged more than has been proved, when the unproved allegations are shown to be unnecessary averments to authorize a recovery; nor will plaintiff's action be denied merely because the testimony offered does not support certain averments in his or her petition when it does support other averments which are sufficient to authorize a recovery. *Know County v. Goggin*, 105 Mo. 182, and cases cited. Here the plaintiff in her petition not only alleged the act from which defendant's negligence might be inferred when shown, but went further, to say that the act of negligence was committed or suffered under circumstances that admit of no excuse, that is, after notice, etc.

Plaintiff's petition was complete when the charges had been made that her husband had met his death upon one of the public alleys of the city, when in the discharge of his duty as fireman, and without fault upon his part, by stepping upon an electric wire of the defendant charged with electricity, that defendant had negligently suffered to become broken in two and fall to the pavement of the alley. The other averments of carelessness on part of defendant, that it knew, or ought by the exercise of care and caution to have known, that said wire was broken and down, and liable, if touched by a human being, while so broken and down, and charged with electricity, to destroy human life, were not necessary allegations, and the fact that the act of negligence as alleged to have occurred after the particular manner detailed in the petition was not shown in all its fullness, is not fatal to a recovery, if sufficient was shown to have made a prima facie case of negligence under any of the charges made, and this announcement is no disregard of the rule of pleading and practice that prohibits variance between allegations made and proof shown. Surely, no harm could be said to have come to defendant because of plaintiff's failure to establish all that was alleged, if what was proved under the allegations disclosed, showed defendant liable; nor can defendant be said to be surprised at the variance between the proof and the allegations of the petition, if that shortage or variance was in the failure to establish facts that were alleged which defendant must have affirmatively asserted, and shown not to have existed, in order to relieve itself from the prima facie case made by the facts proved. It is scarcely necessary to assert that it was the duty of the defendant company to so keep at all times its electric wires, over which was continuously being transmitted that most dangerous energy, force, or fluid known to man called "electricity," out of the way of the citizen, that contact with them would not occur as he went to and fro in the prosecution of his business. It was a matter of the plainest duty for the defendant to see that the streets and alleys of the city, along which, by permission, it was suffered to place its overhead wires for its own private gain, were at all times maintained in the same condition, as to safety from the danger of electricity, as they were before its overhead use thereof was begun; and a most imperative duty was placed upon defendant, in assuming the overhead use of the public alley with its wires, to see that persons passing along and using the alley were not injured thereby; and when proof, under the allegations of plaintiff's petition, was made showing that one or more of defendant's wires charged with its death-dealing force was down upon one of the public alleys of the city, and that plaintiff's husband met his death in the discharge of his duty, a prima facie case of negligence was made out against defendant, and the burden was then put upon it to show that its wires were down in the alley through no fault of its agents and servants, notwithstanding the plaintiff had alleged, further,

that said wires were permitted to become broken in two and to remain down and broken in said alley for a long time, when it knew, or ought to have known, by the exercise of care and caution, the broken condition thereof. The unnecessary or additional allegations made on part of plaintiff cannot have the effect of changing the presumption that the law raises from the proof of a given state of facts, and, when that presumption attaches from proof made of facts alleged, the after allegation will not stay the course of procedure resulting therefrom.

Plaintiff by her testimony made out a prima facie case of negligence against defendant, although her proof was not in full after the manner the negligence was charged in her petition. The proof of facts that were alleged was adequate to cast the burden upon defendant of showing the nonexistence of negligence on its part, notwithstanding plaintiff went further in her petition, and charged that the negligent act complained of was done under circumstances that could not be defended against. In the case of *Gurley v. Missouri P. R. Co.* 93 Mo. 445, so often quoted, and so much relied on by appellant, the proof was of an entirely different act of negligence from that alleged in the petition. It was not mere variance, resulting from incomplete proof of unnecessary averments, as in the case at bar. There the proof was that defendant negligently left certain of its cars on its track without securing them, by reason of which a collision occurred, causing an injury to plaintiff, while the allegation of the petition was that defendant's agents negligently drove a loose car against certain other cars standing on its track, whereby plaintiff was injured. There the negligence shown was no part of the negligence charged, and had no tendency to establish, either presumptively or conclusively, the existence thereof. In fact the proof on part of plaintiff, in the *Gurley Case*, showed the nonexistence of the allegations of negligence made in the petition, and the court properly held there was a fatal variance between allegations made and proof shown, or a want of proof to support the allegation of the petition.

If, then, it is determined that a prima facie case of negligence on part of defendant was made out by the testimony offered in behalf of plaintiff in the first instance, and that the plaintiff is not to be defeated on the grounds of variance between the facts alleged and the proof made, we are brought to the consideration of the other questions raised by the presentation and refusal of defendant's second peremptory instruction asked at the conclusion of all the testimony offered in the case; that is, had the court the right to determine upon the conclusiveness of defendant's uncontradicted testimony offered to sustain its burden of proof (made by plaintiff's prima facie case), by an instruction to find for the defendant? It must be said that in our Reports quite a contrariety of opinion has been expressed on the proposition, and that, to some extent, the bar is left in doubt as to the absolute rule of practice; one line of decisions, prominent

among which the case of *Reichenbach v. Elzerbe*, 115 Mo. 588, so much relied upon by appellant in his brief, holding that when the uncontradicted and unimpeached testimony in the case shows a complete defense to plaintiff's prima facie case, it was the plain duty of the trial judge to have directed a verdict for defendant, and not have submitted the case to the jury, and that for having refused to so direct at the time, or afterwards, when its attention was called to the fact by the motion for a new trial, this court would reverse the case. The converse of that proposition, which was assumed by the trial judge in this as in the *Reichenbach Case*, that, when either party to a controversy submits testimony (other than written instruments that call for the court's construction of their meaning and import) to sustain his or her burden of proof, the other party, though offering nothing to contradict it, is entitled to have the jury pass upon the whole case, and to determine the credibility of the witnesses and the weight to be given to their testimony, has from our earliest reported cases been often asserted with much positiveness. This court, as far back as the 4th Mo. report, at page 106, in the case of *Bryan v. Wear*, when the plaintiff had offered uncontradicted evidence of his title, in an action of ejectment, announced as a rule that it was error to instruct the jury as to the weight of evidence by telling them that plaintiff had shown a good title, because it was practically telling the jury that they must believe the evidence. Also, in the early case of *McAfee v. Ryan*, 11 Mo. 365, this court refused to disturb a verdict rendered against the undisputed testimony of a witness when nothing appeared in the record to impeach his veracity or to indicate why it should not have been believed. If this court can now set aside the finding of the jury on the matters of fact involved in the issue raised by defendant's answer, we must assume to ourselves the prerogative which the writer has always thought, under our Constitution and laws, rested exclusively with the jury. If we can set aside this finding on the ground that the defendant's proof was undisputed, and sufficient as a defense, we ought to reverse the case, and in that we have made the finding of facts and passed our judgment thereon contrary to the finding of the jury, with the apparent sanction of the trial court, as indicated by its refusal to set aside the finding so made by them.

Upon the broad simple proposition that the juries are the triors of facts in all cases of this character, certainly no question can be made. Here, by the well-established facts a prima facie case was made out by plaintiff, and the onus was cast upon the defendant of relieving itself from responsibility by showing that plaintiff's husband met his death as the result of an accident, not occasioned by that want of care and caution which the law made obligatory upon defendant to bestow, in using its highly dangerous agency, electricity, through overhanging wires upon the public streets and alleys of the city. That issue of fact was addressed to the consideration of the jury, for their determina-

tion, and the trial court in the first instance had no right to say to them, by an instruction, when they should become satisfied with the facts of the defense, and to have done so would have substituted the judgment of that court for that of the jury. The plaintiff was entitled to have the jury determine the credibility of the testimony offered, even though she offered nothing to contradict that offered in behalf of defendant, and it is not to be assumed by the court, as a matter of law, that evidence is true, satisfactory, or convincing to the body called upon to hear it, from the mere fact that no one by words contradicts what has been uttered. The right to judge the weight of evidence and the credibility of witnesses implies, of necessity, the right to resist the influence of any part of what the witnesses may have testified to,—of saying that it wants in the power to convince. If the mere presentation of evidence of a fact is to be called its proof, because undisputed by any other witness or witnesses, then the right to judge the weight of evidence and the credibility of witnesses in such cases means nothing. There must not only be the presentation of the evidence of a fact by a witness or witnesses, but its acceptance by the jury, before proof can be said to have been made complete upon any given point; and, if what has been uttered or said by a witness or witnesses fails to convince the mind or intelligence addressed,—has not been accepted by them,—then no sufficient proof has been made, however positive or unqualified the utterance of the witnesses upon which a finding can be predicated. The office of the court in the trial of a case by the jury is not to say when proof has been made sufficient for a verdict, but is limited to instructing when testimony offered tends, or does not tend, to establish a given fact or facts in issue. Testimony may tend in many instances to prove a given issue that falls far short of convincing proof. Suppose that a suit has been brought upon an open account for goods forwarded by plaintiff to defendant at his request, upon which issue has been joined by answer. A jury is called to try the cause, and the most positive testimony is offered as to the existence of every averment of plaintiff's petition, and defendant offers no proof whatever. Surely, no one would say that the court had the right to direct a finding for plaintiff upon the uncontradicted testimony; and why? Because defendant asked to have the facts of the case determined by a jury, and not by the court, as would be done if the court could direct a given finding. Because the right of trial, as heretofore enjoyed, shall remain inviolate, etc. Mo. Const. art. 2, § 28. See § 2131, Rev. Stat. 1889. Again, suppose that suit has been instituted on a note of hand, and issue joined by a plea of payment on part of defendant. A jury is called to try the case. The burden is then upon defendant, and he swears positively that, at a given time and place, he paid plaintiff the amount of the note in full, principal and interest. No witness is called to contradict his statement. The payee in the note may have been absent from the state, and unable

to be present at the trial, or we may suppose that the suit had been brought by an administrator, and some witness had been called to the stand, who swears positively that he either saw the defendant pay the deceased payee of the note the full sum due thereon, or that the deceased had told him that the notes had been paid in full. The administrator cannot dispute the statement thus sworn to by any known witness; neither is he able to impeach the character of the witness who thus testified, by any other witness, on the ground that his past reputation for truth and veracity was bad, or to effect, by the most rigid cross-examination, a self-impeachment. Would the trial court, under either of the circumstances above named, be compelled to instruct the jury to find for defendant on the uncontradicted and unimpeached testimony? We think not. The jury, in the exercise of its prerogative of judging the weight of evidence and the credibility of witnesses, might say, "It fails to convince us," "It fails to satisfy our mind;" "We do not believe it." Something in the action, in the manner, in the bearing, of the witness upon the stand (which finds no place in the transcript that reaches this court), might have repelled belief in the minds of the jurors of the facts; and, without belief in the existence of the truthfulness of a given statement or statements made, no verdict predicated thereon can be reached, and, when not reached or believed, a verdict cannot be ordered by a mandatory instruction from the court. If the jury in this as in all cases have the right to judge of the credibility of witnesses and the weight of their testimony, how could the trial court have dictated its verdict, contrary to that afterwards made, without an abridgment of the exercise of that right,—without substituting its beliefs and finding for that of the jury? The occurrence of undisputed testimony during the progress of the trial should furnish no occasion for a change in the rule of practice of asking the opinion of the jury on questions of fact, unless we are willing to announce, for the future guidance of the bench and bar, that uncontradicted and undisputed testimony is to be held and treated as facts agreed (and if this is done, to make proof and pleading consistent in this case, plaintiff should have been required to withdraw her replication denying the allegation of new matter set up in defendant's answer, and thus new complications would arise). To be logical and consistent, under our Constitution and laws, we think the only course that can properly be pursued and maintained is that all questions of fact, in suits at law, must finally and conclusively be determined by the jury, subject only to the corrective action of the trial court; to set aside the finding of facts, which, in the opinion of that court, is not warranted by the testimony, but never to coerce an opinion by a mandatory instruction directing a finding of fact in favor of one or the other of the parties litigant, according to its judgment of the facts. To the question of facts the jury alone, and not the court, must respond.

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The judgment of the Trial Court will be affirmed.

Gantt, Ch. J., and Burgess and Williams, JJ., concur.

Sherwood, Brace, and Marshall, JJ., dissent.

Rehearing denied.

Marshall, J., dissenting (Filed November 16, 1898):

The importance of the legal principles involved in this case, and the fact that in some respects it is the first case of its kind that has reached this court, demands that I shall give my reasons for my dissent from the opinion of the majority of the court. To understand the points involved, and to appreciate the force of my dissent, it is necessary to state the case more fully than is done in the opinion of the majority.

The suit is an action for damages for the death of plaintiff's husband. The petition avers that the defendant is a duly-incorporated Missouri corporation, organized for the purpose and engaged in the business of furnishing electric light in the city of St. Louis; that it had wires strung on poles set up on the public streets, conveying and charged with "a certain dangerous and life-destroying fluid and current, known as 'electricity,'" that on April 18, 1894, it had such wires, so strung and charged, in a public alley in the rear of house No. 2737 Thomas street, and that "the defendant negligently and carelessly permitted its said wires, to the number of six or seven, then and there charged as aforesaid, to become broken in two and to fall to the pavement of said alley, and to remain broken in two and down for a long time, then and there, while full charged with electricity as aforesaid, when it knew, or ought by the exercise of any care and caution to have known, that the said wires were so as aforesaid broken and down, and charged as aforesaid to destroy human life;" that, while the wires were so down, plaintiff's husband, while walking along the alley, struck his foot against the wires, and was instantly killed. The answer is a general denial and a plea of contributory negligence on the part of plaintiff's husband. The reply denied contributory negligence.

The evidence for plaintiff was substantially as follows:

Annie Gannon testified that she is the widow of William Gannon, who was killed on April 18, 1894; that he was thirty-eight years old, employed in the fire department, and was a strong, healthy man.

Ernst Hilgendorf testified that he is the city telegraph operator; that it was his duty to receive alarms of fire, and distribute them to the engine houses and other city departments; that on April 18, 1894, at 10:56 A. M., he received an alarm from box No. 129, in the neighborhood of Leffingwell avenue and Thomas street; that the Laclede Gas Light Company have connection with his office, but he could not say whether they were given the alarm on that occasion.

Peter J. Dolan testified that he was standing on Glasgow avenue, between Sheridan and Cass (three blocks from the fire), when he heard the alarm; that he ran to the fire, saw smoke coming from the shed, went into the alley about 10 feet, to a point 30 or 40 feet from the burning shed, and saw two wires down, and there may have been more; that the fire department got there two or three minutes later, and within two minutes after that he was put out of the alley by a policeman; saw a man (not identified as the deceased) lying in the alley when the policeman was putting him out of the alley; that at that time the flames had not burst out of the top of the shed.

Frank J. Hildebrand testified that he was at work in his barber shop, 2601 Sheridan avenue, cutting witness Sullivan's hair; that when the fire alarm sounded he and Sullivan ran to the fire, which was a block and a half west of his barber shop; that the smoke was dense, and it was "pretty hot;" that he went into the alley, and saw an electric wire lying north and south across the alley; that from two to four minutes later the fire department arrived; that Gannon came into the alley from the south, and was killed very soon after he got there; that he (witness) assisted in pulling the hose into the alley, and got a pair of nippers and gloves to cut the wire; that he was excited on account of seeing Gannon lying on the wires, and he got the nippers after the man was hurt.

John Sullivan, a police officer, whose hair Hildebrand was cutting, testified: That he heard the alarm at half-past 11 o'clock in the morning, or between 11 and 12. That he ran to the fire. Noticed a lot of smoke, and the adjoining shed, across from it, was smoking, too. That he went into the alley, but as it was getting "pretty hot" he went into the yard. That "three or four minutes after that the fire department came, and when the fire was over—pretty near over—I seen Mr. Gannon, a fireman, coming out from the hallway; and I noticed a black wire about 2 feet from where he stepped out, and I noticed him having a nozzle in his hand. As he came out, I saw him step on this wire. I think it was the right foot. And I noticed him give a groan, and halloo 'Oh!' That is all I noticed." Witness further testified that the wire was down when the fire department arrived, and that when he saw the wire the flames had burst out on top of the shed.

James Cain testified that on April 18, 1894, he was pipeman in No. 17 company, which was stationed on Easton avenue, between Leonard and Compton, five blocks west of the fire; that his company was among the first to reach the fire; that they started down the alley, when somebody hallooed that the wires were down, and to look out for the horses, just in time for them to stop; that the alarm came in about 11 A. M.; that Gannon belonged to chemical No. 4 company, and got there after he (witness) did; that Gannon came into the alley, from Thomas street, through the yard, out of a hallway or door in the alley, with a pipe in his hand; that he

saw him fall; was 10 or 12 feet from him; that a man threw a rope around him and pulled him away from the wire as soon as possible; that the fire was nearly under control when Gannon was killed, which was twenty minutes after witness reached the fire, and he reached the fire two or three minutes after the alarm came in; that the wire which killed Gannon was a large wire, and hung down along the pole; that Hester, assistant chief, tried to cut it with an ax, striking it against the pole; that Gannon's engine was stationed on Washington avenue and Twentieth street, about ten blocks south and five blocks east of the fire; that the defendant's power house or plant was located at the foot of Mound street, which was about twice as far from the fire as Gannon's engine house was from it; that everybody knows that when wires are down they are dangerous; that firemen carry wire cutters; that he could see from the west end of the alley that the wires were down; that his company played on the fire quite a while before Gannon's company arrived; that No. 5 company came in from Sheridan avenue on the north side of the alley, and that Dolan and then Shivley were knocked down by the wires, and a few minutes afterwards Gannon fell; that he did not see any one attempting to cut the wires before Gannon or Dolan fell.

Luke McConn testified that he is a member of hook and ladder company No. 8, which was stationed at the same engine house with Gannon's company; that they went to the fire together; that he, Gannon, and Cronin worked on the Thomas street side of the shed ten or twelve minutes before going into the alley, and then someone called to bring the chemical line into the alley, and witness and Gannon pulled the pipe into the yard, on the Thomas street side; that he and Gannon stepped into the alley, when he got a shock, jumped to another part of the alley, and shouted, "Look out, Billy!" that Gannon was right behind him, and, as he looked around, Gannon stepped out into the alley, reeled, and fell over; that there was from 4 to 6 inches of water in the alley, from the hose and the rain, it being just after a thunder-storm; that the wires came down in a looped shape, and looked pretty big to him when he stepped into the alley; that all those wires were insulated, "if they don't get burned or torn off"; that he did not know how the insulation got off of these wires.

Robert E. Cronin testified that he belonged to the same chemical company with Billy Gannon; that he was at the fire; that they took the hose through the yard to the shed; that he did not see the accident to Gannon; that it was a pretty fierce fire for a shed fire; that it was a two-story shed, with a hallway through it; that all firemen know that electric wires are dangerous if they are down or disarranged.

Charles Swingley testified: That he is chief of the fire department. Knew Gannon, as a fireman, about four years. That he was at the fire. That, on arriving there, found a fire raging. "It was a pretty fierce blaze when they commenced playing on it.

Q. by the Court: When did you first notice those wires that were down there?

A. On entering the alley.

Q. And then, you say, the fire was raging?

A. Yes, sir.

Q. It had been for some time?

A. It appeared to me so.

Q. by counsel for defendant: It was raging pretty fierce, with the flames away up in the air?

A. Yes, sir."

Andrew J. O'Reilly testified that he has been a professional electrician for twelve or fifteen years, and is supervisor of city lighting in St. Louis; that he is acquainted with the electric-light wires in the city; that he arrived at the fire about twenty minutes after it started, when it had burned out; that he found seven wires down,—one telephone wire belonging to the city fire department, and six copper wires belonging to defendant; that the wires were strung on poles, east and west, in a public alley. Witness produced six wires which were cut on the day of the fire from the wires in the alley, and testified that the five copper wires were used by the defendant to furnish electricity for light and power purposes under contract with the city, and for private lights and power north of Washington avenue; that the large wire produced by him was part of the Brush incandescent light system, being the main wire supplied with electricity from defendant's power house on the Levee and Mound street, and carried a charge of 2,200 to 2,300 volts; that the power circuit carried about 500 volts, which would shake one up seriously and burn him; that 1,100 volts will kill a man; that there was no current at that time on the small wires of the alley-lighting circuit, except at night; that when he arrived at the fire he found the big wire burnt in two; that, if a wire breaks, the defendant has no automatic method of knowing where the break is; that the only way it finds out that the wire is broken is that the lights beyond the break go out, and the customer reports the fact to defendant, who then sends out a man to repair it; that defendant uses the multiple system; that there is less danger in using the multiple system than the series system, because the latter requires more voltage; that the voltage used in these wires was no more than was required by defendant's contract with the city; that all the electric companies in St. Louis have a system of receiving fire alarms; that the defendant, under contract with the city, furnishes electric light to the various engine houses and other public institutions along the line, and is required by that contract to keep the circuit of electricity in operation all the time,—day as well as night; that the pieces of wire exhibited by him were cut off for him by an inspector of the lighting department while he was at the fire, and that in his opinion these wires were broken by reason of heat underneath; that when he saw the wires, the day of the fire, quite a length of the insulation was burned off; that before the fire the wires were strung in accordance with the city ordinances, without any unusual sagging between the poles, and were 25 feet above the ground; that he knew Gannon, and had talked with him about his work; that all firemen know the dangers of electric wires, and he thought Gannon had spoken to him about it; that Gannon was a lineman before he was a fireman; that the defendant's contract with the city required it to keep the lights burning on this circuit all the time, to furnish light to the engine houses Nos. 28 and 29 and the mounted police station; that in his opinion those wires could not have set fire to the shed; that the large wire belonged to defendant's incandescent Brush system, which was a metallic circuit, having no ground connection, and was supplied with electricity generated at defendant's station at the foot of Mound street; that defendant has appliances which show when both wires of the circuit are down, but that in this case only one of the wires was down, and that defendant had no way of knowing the fact in such cases; that defendant's contract required it to keep a constant current of 2,000 volts for that part of the city, which was a proper current for that purpose; that the large wire was strung almost over the shed, and that the burning of the shed would have produced heat enough to affect the wire; that in his opinion the breaking of these wires was caused by "the wires becoming overheated at this particular point, lost their strength, and there was a reduction of cross section, due to the tension in the wires, and a consequent break"; that in his opinion the break in the wires was caused by the fire; that he examined the wires at the time of the fire, and there was no sagging; that if the wires between these poles had sagged enough to cause the wires to touch the shed, the wires on the other spans would have sagged, too, but they were all taut, and there was nothing to indicate that the wire had sagged and set fire to the shed; that engine house No. 28 is west of where the fire occurred, and that a telephone message was received that day at about ten minutes past 11 o'clock, from engine house No. 28, that its lights went out at 11 o'clock, which was a short time after the fire alarm was given, which occurred at about five minutes before 11 o'clock; that it was impossible for these lights to have continued burning after the break in those wires; that at fifteen or twenty minutes past 11 the defendant was notified from witness's office that the lights were out at No. 28 engine house; that the firemen had gone to the fire before the notice was given to defendant.

This was all of plaintiff's evidence. Thereupon defendant demurred to the evidence, the court overruled the demurrer, and defendant duly excepted. The defendant then introduced evidence as follows:

S. A. Keightley testified that he was present at the fire; was filling an ice box right north and a little northwest of the fire when his attention was first attracted to the fire; that he ran to the fire, and at the request of a lady he ran to the alarm box on the northeast corner of Leffingwell avenue and Dickson street, a block and a half from the fire,

and turned on an alarm, and then came back to the fire; that the firemen arrived in three or four minutes; that before he turned on the alarm there was considerable fire,—“the whole back part of the stable was blazing”; that he noticed the electric wires on the poles before he turned on the alarm; that none of the wires were down, or he would have noticed it; that on coming back, after turning on the alarm, he noticed three or four wires down.

J. W. Beyer testified that his attention was called to the fire when Keightley was fixing the ice box; that he ran to the alley, walked into it 10 or 15 feet and watched the fire; that when he arrived the whole back of the shed was ablaze; that the wires were then up on the poles; that about a minute after he went into the alley, and before the firemen came he saw the wires fall, and because of the wires being down and because of the heat he got out of the alley; that he saw Gannon when he reached the fire, when he went into the alley, and when he fell.

E. M. Wordsworth testified that he lived at 2733 Thomas street, the second house from the fire; that he heard the commotion, and went to the alley and saw the fire; that the wires were all up when he arrived at the fire; that he saw the wires burn in two and fall, and thinks some of the firemen were there when they fell.

August Keil testified that he lived on Leffingwell avenue, on the corner of the alley that runs midway between Thomas street and Sheridan avenue (which is the alley in question, and would make his house about 75 feet from the fire); that he was in the second story of his house when he noticed the smoke coming out of the shed; that he ran into the stable, and saw it was on fire downstairs; there was some wash strung up in the stable, which he took down and laid it on the steps, and by this time a man got a garden hose and began squirting it on the stable, but it got so hot that he could not go back through the alley; that when he went through the alley the wires were all up on the poles, and when he got out of the stable the blaze was shooting up, and he saw the wires curl up and drop down into the alley; that this was two or three minutes before the firemen arrived.

Miss Josie Keil testified that she is a sister of August Keil, and lived with him; that she smelt the smoke, and her brother called “Fire,” and ran out of the house; that she looked out of the window; could only see smoke at first; then someone burst open the door, and the flames shot out; that the electric wires were all up on the poles; that when the flames shot up, the covering of the wires caught fire, and the wires burned in two and fell.

John Fitzgerald testified that he reached the fire before the firemen came; that he stood at the entrance of the alley on Leffingwell avenue, and saw the smoke burst out around the windows and doors; that the electric wires were all up; that he helped a lady to get her surrey out of a stable on the opposite side of the alley from the fire, and pulled it out through the alley; that the wires

were up then; that he saw the wires fall, and he got out of the alley as soon as he could.

Thomas J. Foster testified that he went to the fire with Fitzgerald; that he saw wires burn in two a few minutes after he arrived at the fire; that he warned the driver of No. 17 reel that the wires were down, and he just had time to stop; that the rubber around the wires caught fire and burned, and the wires fell close to him, and he halloed to Mr. Sweeney that the wires were coming down, and Sweeney got his pants burned in getting out of the alley.

William Gallagher testified that he is the general foreman of the electric-light department of the defendant company, and remembered the fire; that the alarm was given about 11 o'clock; that defendant's lines and circuits in that vicinity were at that time in first-class condition; that defendant has an instrument known as a “circuit breaker,” when both of the wires are down, but that it would not indicate the falling of only one wire, if the other was up, and that he knows of no device which would do so; that the first notice defendant had that the wires were down was about seven minutes past 12 o'clock, which was received by telephone from the city lighting department, and up to that time there had been no indication of any disturbance on that circuit; that he immediately went out to repair it; that, if one wire of a circuit is down, it is not necessarily dangerous, but if both are down, and you touch one of them, it is very dangerous; that if both wires are down, and resting in a pool of water, the circuit would be continuous, and the circuit breaker would give no indication of the break; that there was no indication at the company's works that morning that there was any grounding of the circuit; that defendant furnishes light for the city institutions, and is required by contract to keep the lights burning all day; that defendant got the fire alarms at the same time the fire department did, and that on this occasion the alarm came from the box at Leffingwell avenue and Dickson street; and that defendant had no live wires in that neighborhood, and knew nothing about any disturbance until the report came that the lights were out in No. 28 engine house.

Robert Quain testified that he is general foreman of the city fire and police department; that he was familiar with the wire in question; and that it was in good condition when put up, and was a well-constructed line, erected in compliance with the city ordinances.

M. B. Fittsworth testified that he is a city inspector of fire and police telegraph; that he was at the fire at 11:30, and cut the wires off the poles; found the line in good condition, except some of the wires were down.

This was all the evidence in the case. The plaintiff introduced no evidence in rebuttal. Thereupon defendant asked, and the court refused to give, the following instruction,—defendant duly saving its exception: “The court instructs the jury that, upon the pleadings and all the evidence, the plaintiff cannot recover.” The court then

instructed the jury in various respects, but as no point is urged here as to the correctness of the rulings in this respect, it is unnecessary to refer to that feature of the case. There was a verdict for plaintiff for \$2,000, and, after unsuccessful motions for new trial and arrest, the defendant appealed to this court.

1. The opinion of the majority of this court, after laying down the undisputed proposition that a petition which alleges facts sufficient to authorize a recovery is good, notwithstanding it contains other allegations not necessary to make out the plaintiff's case, holds that "plaintiff's petition was complete when the charges had been made that her husband had met his death upon one of the public alleys of the city, when in the discharge of his duty as fireman, and without fault upon his part, by stepping upon an electric wire of the defendant, charged with electricity, that defendant had negligently suffered to become broken in two and fall to the pavement of the alley." And after thus adjudging the petition sufficient, and disregarding the other allegations of the petition as unnecessary, the opinion proceeds: "It is scarcely necessary to assert that it was the duty of the defendant company to so keep at all times its electric wires, over which was continuously being transmitted that most dangerous energy, force, or fluid known to man, called 'electricity,' out of the way of the citizen, that contact with them would not occur as he went to and fro in the prosecution of his business. It was a matter of the plainest duty for the defendant to see that the streets and alleys of the city, along which, by permission, it was suffered to place its overhead wires for its own private gain, were at all times maintained in the same condition as to safety from the danger of electricity as they were before its overhead use thereof was begun; and a most imperative duty was placed upon defendant, in assuming the overhead use of the public alley with its wires, to see that persons passing along and using the alley were not injured thereby; and when proof, under the allegations of plaintiff's petition, was made showing that one or more of defendant's wires, charged with its death-dealing force, was down upon one of the public alleys of the city, and that plaintiff's husband met his death in the discharge of his duty, a prima facie case of negligence was made out against defendant, and the burden was then put upon it to show that its wires were down in the alley through no fault of its agents and servants, notwithstanding the plaintiff had alleged further that said wires were permitted to become broken in two and to remain down and broken in said alley for a long time, when it knew, or ought to have known by the exercise of care and caution, the broken condition thereof. . . . Plaintiff by her testimony made out a prima facie case of negligence against defendant, although her proof was not in full after the manner the negligence was charged in her petition. The proof of facts that were alleged was adequate to cast the burden upon defendant of showing the nonexistence of

negligence on its part, notwithstanding plaintiff went further in her petition, and charged that the negligent act complained of was done under circumstances that could not be defended against." And, having reached this conclusion, the opinion holds that when the burden is thus shifted to defendant to exonerate itself, and it does so by positive evidence that it was wholly without fault or negligence, and when the plaintiff introduces no evidence whatever countervailing defendant's complete exoneration, the court must submit the case to the jury, and cannot direct a verdict for defendant, because the jury are the triors of all questions of fact, and have the right in any case to say, "The uncontradicted testimony does not satisfy or convince us," and to find a verdict in the teeth of the evidence, and that, unless the trial court sees fit to set the verdict aside, this court is powerless to interfere. These conclusions are so much at variance with my understanding of the law and of the prior decisions of this court, that I feel compelled to dissent, and to express my reasons.

Analyzed and reduced to syllogisms, the majority opinion asserts two propositions: First. A live electric wire down on a public highway; the plaintiff injured by contact with it. Conclusion: A prima facie case of negligence made out against defendant. Second. A prima facie case made by plaintiff as stated; the burden shifted to defendant to exonerate himself, which he does by competent testimony which is not assailed or contradicted by plaintiff nor the witnesses attempted to be impeached. Conclusion: A question of fact is presented, which the jury alone has the right to determine. I cannot agree to either proposition, and especially so under the facts in this case. The reasoning of the court may be expressed in a nutshell. It is that it is the duty of a person having such wires strung over a public highway to see that the pedestrians on the highway are as safe from the danger of electricity as they were before the wires were placed there. This can only mean that such users of the highway are at least quasi insurers of the traveling public. No American case that the industry of learned counsel has cited holds such a doctrine. The opinion cites none. After patient research I have found none. Thompson, *Electricity*, § 65, refers to the decision of Mr. Justice Blackburn, in the court of exchequer chamber, in the case of *Fletcher v. Rylands*, L. R. 1 Exch. 265, where the obligation of a landowner who collects water on his own land, and it escapes and injures others, was decided, and says: "It may be doubted whether persons or corporations employing for their own private advantage so dangerous an agency as electricity ought not to be regarded as quasi insurers, as to third persons, against any injurious consequences which may flow from it." The distinguished author cites no authority to support the intimation of his opinion contained in the text quoted, but contents himself with a reference to *Fletcher v. Rylands*, L. R. 1 Exch. 265, which even a casual consideration will show is not applicable. Water collected on one's

land for his own purpose is not, like electricity, conveyed along a public highway for the public purpose of lighting the streets, and furnishing light and power to citizens in their business houses or residences abutting the streets. However, the author says (§ 66) that the doctrine of *Fletcher v. Rylands* has not met with approval in all American jurisdictions, and cites, *inter alia*, the case of *Morgan v. Cox*, 22 Mo. 373, 66 Am. Dec. 623, in which Leonard, J., speaking for this court, held that negligence in the performance of a lawful act confers a right of action upon one injured thereby, and that "reasonable care" means such care as is proportionate to the probability of injury that may arise to others. The cases cited by plaintiff's counsel do not maintain the doctrine that the defendant is an insurer. A fair type of those cases is *City Electric Street R. Co. v. Conery*, 61 Ark. 381, 31 L. R. A. 570, in which the rule is stated to be: "In cases where the wires carry a strong and dangerous current of electricity, and the result of negligence might be exposure to death or more serious accidents, the highest degree of care is required. This is especially true of electric-railway wires suspended over the streets of populous cities or towns. Here the danger is great, and the care exercised must be commensurate with it. But this duty does not make them insurers against accidents; for they are not responsible for accidents which a reasonable man, in the exercise of the greatest prudence, would not, under the circumstances, have guarded against." The degree of care required in law is proportionate to the dangers that reasonable men would apprehend under the circumstances. The failure to exercise such degree of care is negligence. But negligence is the gravamen of the action, and there is no element of insurance or quasi insurance in it. There may be a difference in the degree of care required of an electric company and of a steam or street railway company using or crossing a public highway. All increase the dangers to the pedestrians. But none are required to see to it, at their peril, that the danger to the pedestrian is no greater after they use the highway than it was before. The danger to the pedestrian on a highway increases in proportion to the increased travel and methods of travel on the highway, and in proportion to the ever-increasing burdens cast upon the highway in large cities by the exercise of new and necessary uses, which are lawful because they subserve a public purpose.

The case of *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L. R. A. 810, more nearly resembles the doctrine announced in the majority opinion in this case than any case that has been cited, or that I have found. It announces the doctrine that proof of a "live" wire down in the highway, and injury to a pedestrian, makes a "complete prima facie case of negligence," and the burden is cast upon the defendant to show that the live wire was in the street through no fault of its servants or agents. That court undertook to support the doctrine by reference to other cases and authorities, but an

examination thereof easily shows that they go only to the extent of holding that care commensurate with the dangers to be apprehended must be used. In our progressive day, electricity is a recognized necessity,—as much so to light the streets and alleys, the business houses, and the private residences, as to furnish the motive power for rapid transportation. It can only be conveyed by means of wires strung above or below the highways. It is lawful to so string them, under the laws of this state, if proper consent of the public authorities is obtained, for such uses of the highway subserve a public purpose. Being lawfully on the street, the duty is cast upon those who erect and maintain them to use such care and skill in the erection and maintenance of them as is commensurate with the dangers that reasonable and prudent men would apprehend or expect to flow to the public from their presence, and no further. But it is not the law that it is their duty to see to it, at their peril, that the highway is kept as safe and as free from danger after they were erected as it was before. Their very presence and nature increase the dangers on the highway. If the doctrine announced by the majority opinion is the law, then one of two conclusions must follow: Either it is not lawful to put them there, or else those who do so do it at their peril, and become insurers. I respectfully disagree with such conclusions. The cases in other jurisdictions upon liability in such cases do not proceed upon the idea that the defendant is under such a duty to the public. They are predicated upon the theory that the defendant is liable only for negligence, and turn upon a question of practice as to the proper manner of presenting the case. They hold that when the plaintiff proves that such a wire is down, and that he was injured thereby, he has made out a good prima facie case of negligence, because such things would not usually occur where the defendant has exercised care, and the fact that they did occur in the particular case is presumptive evidence of negligence on the part of the defendant, and that, as the defendant is in a better position than the plaintiff to know and show whether or not there was negligence, the burden is shifted to defendant to disprove negligence. The cases of *Ugla v. West End Street R. Co.* 160 Mass. 351; *Clarke v. Nassau Electric R. Co.* 9 App. Div. 51; *Gilmore v. Brooklyn Heights R. Co.* 6 App. Div. 117; *Jones v. Union R. Co.* 18 App. Div. 267; and *Mullen v. St. John*, 57 N. Y. 570, 15 Am. Rep. 530 (a leading case on the subject),—cited and relied on by plaintiff, assert this doctrine, but none of them hold that it is the duty of the defendant to keep the highway as safe after the erection of wires upon it as it was before. If such is the duty of the defendant, then it may well be asked, what defense could a defendant interpose in such a case? He could not show there had been no negligence on his part; for, in the language of the majority of the court, "a most imperative duty was placed upon defendant, in assuming the overhead use of the public alley with its wires, to see that persons passing along and

using the alley were not injured thereby;" and again: "It was a matter of the plainest duty for the defendant to see that the streets and alleys of the city, along which, by permission, it was suffered to place its overhead wires for its own private gain, were at all times maintained in the same condition as to safety from the danger of electricity as they were before its overhead use thereof was begun." Yet, in spite of this duty, with its resultant consequences, the majority opinion holds that proof that the wires were down in the highway, and that the plaintiff was injured by coming in contact with them, makes only a prima facie case of negligence against defendant, and shifts the burden upon defendant to disprove negligence. Manifestly, the defendant cannot be liable at all events simply because the highway is not as safe from the dangers of electricity after the wires are strung above it as it was before they were put there; at the same time it has a right to disprove negligence. Against an absolute liability there is no defense. The fact that the majority opinion holds that, once a prima facie case is made out, the burden shifts to defendant to disprove liability, establishes beyond cavil that there is no absolute liability, and that negligence is imputed to the defendant, and that he may rebut the imputation by showing that he exercised all the care commensurate with the dangers to be apprehended which careful and prudent men would have exercised under the circumstances. If he does this, he has discharged his full duty to the public, and is not liable. *Suburban Electric Co. v. Nugent*, 58 N. J. L. 658, 32 L. R. A. 700; *Hutchinson v. Boston Gaslight Co.* 122 Mass. loc. cit. 222; *American Brewing Asso. v. Talbot*, 141 Mo. 674. It is fair, therefore, to assume that the majority opinion inadvertently announced an absolute liability, and intended only to assert the doctrine commonly called *res ipsa loquitur*. The reasoning employed in this doctrine is doubtless based upon the common-law rule of pleading that "less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading." Stephen, Pl. § 194. It is applicable only in rare cases. Ordinarily "the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue." 1 Greenl. Ev. 15th ed. § 74. It is often loosely said the burden of proof shifts, but, strictly speaking, the burden of proof never shifts. In cases where the doctrine of *res ipsa loquitur* is applied, the presumption of negligence supplies the want of proof of negligence, and the defendant is obligated to rebut a presumption, instead of evidence; but the case remains one of negligence, and the burden of proof is always on the plaintiff. The question always is, Was the defendant negligent? The presumption of negligence arises only in cases where the circumstances surrounding the accident are such as to indicate that the accident could only have happened through some negligence of the defendant, and are inconsistent with any other theory. The case of *Hutchinson v. Boston Gaslight Co.* 122 Mass. 219, fairly 43 L. R. A.

illustrates the rule. In fact, when properly read, *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530, asserts nothing more, although it is frequently referred to as holding a broader doctrine. Many cases might be cited illustrative of this doctrine, but for present purposes it will suffice to refer to those collated in 16 Am. & Eng. Enc. Law, p. 449, note 1. As before stated, the rule simply supplies the want of proof by plaintiff of negligence of defendant by a legal presumption, arising from the nature of the accident and the circumstances surrounding it, that, if care had been used by defendant, the accident would not have happened; and as the facts lie more in the knowledge of the defendant than of the plaintiff, the burden of the evidence (not of the proof) is shifted to defendant to show that he was not guilty of negligence. In bearing the burden thus cast upon him, the defendant is not required to show that he used every absolutely necessary precaution, care, and skill known to science to prevent the happening of the accident, for this would make him liable in all cases except cases of inevitable accident; but it is sufficient to relieve him from liability if he shows that he used the degree of care commensurate with the dangers which men of prudence would have anticipated under the circumstances. If a defendant makes such a showing by competent testimony, he overcomes the presumption of negligence; and if then the plaintiff introduces no countervailing testimony, and does not impeach defendant's witnesses, the defendant is entitled to a judgment, as a matter of law. *Read v. Morse* 34 Wis. 315; *Chicago, B. & Q. R. Co. v. Stumps*, 55 Ill. 367, 375; *Hutchinson v. Boston Gaslight Co.* 122 Mass. 219-222; *Ward v. Atlantic & P. Teleg. Co.* 71 N. Y. 81, 27 Am. Rep. 10; *Allen v. Atlantic & P. Teleg. Co.* 21 Hun, 22; *Suburban Electric Co. v. Nugent*, 58 N. J. L. 658, 32 L. R. A. 700. The same principle is applicable in ordinary civil cases arising in the commercial world. *Hamilton v. Marks*, 63 Mo. 167; *Johnson v. McMurtry*, 72 Mo. 278; *Henry v. Sneed*, 99 Mo. 407.

Applying these principles of law to the case at bar, and giving the fullest force to the doctrine of *res ipsa loquitur*, it cannot, in my judgment, be successfully maintained that a presumption of negligence attaches to defendant. Prior to the fire the wires were in good condition. If they had been down or grounded, it would at once have been discovered by the lights going out in the engine house. The fire alarm was sounded at 10:56 A. M. When plaintiff's witnesses, who resided in the neighborhood, arrived, the fire had progressed so that it was "pretty hot" in the alley. The fire department began to arrive in two or three minutes. At ten minutes after 11 A. M. the office of the city supervisor of electric lighting was notified by engine house No. 28, which was on the line of wire west of the fire, that the electric lights went out at 11 A. M. This establishes beyond doubt that the wires were not down at 10:56, when the alarm of fire was turned on, and also that the wires broke

and fell at 11 A. M. The fire was then burning fiercely, and so hot that the spectators had to retreat from the proximity of the fire. This fact is corroborated and confirmed by the testimony of James Cain, a pipeman in No. 17 company, and one of plaintiff's witnesses, that when his engine reached the fire and started down the alley the bystanders warned them the wires were down. Andrew J. O'Reilly, the city supervisor of electric lighting, a witness for plaintiff, testified to the proper and safe construction of the wires before the fire; that they were in good condition when he reached the fire, except those that were down, and that in his opinion the wires had not sagged or set fire to the stable, but that the insulation around the wires had been burned off and the wires broken by the heat; that there was no device known to art or science by which the defendant could have ascertained when only one of the wires composing the metallic arc or circuit was down, and that the wires were only charged with the amount of electricity required of defendant by its contract with the city to keep lights constantly burning in the engine houses and public institutions by day as well as by night; and that defendant was notified at fifteen or twenty minutes after 11 o'clock that the lights were out at No. 28 engine house. Plaintiff's testimony further showed that her husband was killed about twenty-two or twenty-three minutes after the alarm was sounded, which would be about eighteen or nineteen minutes after 11 A. M. Upon this showing, no presumption of negligence on defendant's part can properly be indulged. Admitting that properly erected and maintained wires do not ordinarily break in two and fall without some negligence on the part of those having them in charge, it is equally true that the rubber insulation around any wire will burn when subjected to heat, and that the wires themselves will also burn and break when so subjected. That it was the fire which burnt the wires, and not the wires which caused the fire, and that the wires did not fall until after the fire affected them, is clearly shown by the fact testified to by plaintiff's witness, O'Reilly, that when he reached the fire, before it was out (it burned out in about twenty minutes), he found seven wires down,—one telephone wire belonging to the city fire-alarm system, and six copper wires belonging to defendant, of which five were small wires, and had no current of electricity in them except at night, and then only enough to shake a person up and burn him, but not half enough to kill him, and one, the large wire, which carried 2,200 to 2,300 volts all the time, day and night. It was therefore this large wire which caused the accident in this case. Manifestly, therefore, it was the fire which burnt the seven wires in two; for it cannot be presumed that all seven wires went on a strike simultaneously, of their own accord, without any outside interference. This being the condition presented by plaintiff's case, and the circumstances surrounding the accident, instead of a presumption of negligence attaching to defendant, it appears plainly and

affirmatively that the accident was not caused by any defective construction or any improper or negligent maintenance of its wires, but by the fire; and as defendant was not notified that the wires were down until fifteen or twenty minutes after 11 A. M., and as the accident occurred at eighteen or nineteen minutes after 11 A. M., the defendant had no actual notice of the condition of its wires at that point, and as sufficient time had not elapsed after the wires fell, and before the accident occurred, for the defendant to have ascertained the fact by the exercise of the greatest care, no notice can be presumed; and hence it follows that this is not a proper case for the application of the doctrine of *res ipsa loquitur*, but that, instead of its being a case of presumed negligence of defendant, it is clearly apparent from plaintiff's testimony that defendant was not negligent, and is in no wise liable for the death of plaintiff's husband. Therefore, in my judgment, the circuit court erred in overruling defendant's demurrer to the evidence at the close of plaintiff's case.

2. Assuming, however, for the purposes of further discussion of the case, that a presumption of negligence arises from the facts and circumstances shown by plaintiff, and that the burden of the evidence was shifted to defendant to exonerate itself by showing that it had taken care commensurate with the danger which men of prudence would have expected under the circumstances, it is practically conceded by the majority opinion, and will be at once conceded by everyone who examines the defendant's proofs, that the defendant proved that it was guilty of absolutely no negligence whatever. It showed by the testimony of Keightley, Beyer, Wordsworth, Keil, Miss Josie Keil, Fitzgerald, and Foster,—all reputable witnesses,—that they were at the fire before the fire department arrived, and before the alarm was turned on, and that the wires were all properly up on the poles when they reached the fire, and that they saw the wires burn in two, curl up, and fall after it became too hot for the people to remain in close proximity to the fire. It also showed that the wires and circuits before the fire were in first-class condition; that there is no device known to science which will indicate when only one wire is down (there was only one of the two composing the metallic current down in this instance); that the first notice defendant received that the wire was down was at seven minutes past 12 o'clock, and it sent at once and had it repaired; that it received the alarm of fire which was turned in from the box at Leffingwell avenue and Dickson street; and that defendant had no live wires in that neighborhood, and had no idea that there was any disturbance with the wires until the report aforesaid was received. The plaintiff introduced no evidence in rebuttal. The majority opinion concedes that the defendant proved that it was not negligent. But it is held that the jury, under our Constitution and laws, are the sole judges of all questions of fact, and of the credibility of all witnesses, and that they had the right to say, "It fails to convince us. It fails to

satisfy our minds. We do not believe it;" and that this is true notwithstanding the witnesses testify positively, are not contradicted, and no attempt is made to impeach them. The majority opinion concedes that this court held otherwise in *Reichenbach v. Ellerbe*, 115 Mo. 588, but says that the converse of that proposition was held by this court as early as the cases of *Bryan v. Wear*, 4 Mo. 106, and *McAfee v. Ryan*, 11 Mo. 365. It is true that *Bryan v. Wear* and *McAfee v. Ryan* so decide, but the principles so announced have long since been overruled, by implication, at least, in this state; and the rule so clearly and forcibly announced by *Brace, J.*, in rendering the opinion of this court in *Reichenbach v. Ellerbe*, is now the settled law of our state. In speaking of verdicts rendered in such a state of the case, he aptly says: "Such a verdict can be accounted for only on the ground of ignorance, partiality, prejudice, or passion, and, under the repeated rulings of this court, cannot be permitted to stand." *Long v. Moon*, 107 Mo. 334; *Caruth v. Richeson*, 96 Mo. 186; *Avery v. Fitzgerald*, 94 Mo. 207; *Garrett v. Greenwell*, 92 Mo. 120; *Spohn v. Missouri P. R. Co.* 87 Mo. 74; *Whitsett v. Ranson*, 79 Mo. 258. "When the evidence is of that character that the trial judge would have a plain duty to perform, in setting aside the verdict as unsupported by the evidence, it is his duty and prerogative to interfere before submission to the jury, and direct a verdict for defendant." *Jackson v. Hardin*, 83 Mo. 175; *Powell v. Missouri P. R. Co.* 76 Mo. 80." See also *Ackley v. Staehlin*, 56 Mo. 558, and *Hearne v. Keath*, 63 Mo. 84.

In addition to these cases, attention may also be called to the following: In *Hipsley v. Kansas City, St. J. & C. B. R. Co.* 88 Mo. 348, it was held that this court would reverse a judgment where the verdict is so clearly against the weight of evidence as to show passion or prejudice. In *Wilson v. Albert*, 89 Mo. 539, this court said that, while it would not weigh evidence in law cases, yet it would interfere where there was no evidence to support the verdict. In *Davis v. Fow*, 59 Mo. 125, and in *Cornet v. Bertelsmann*, 61 Mo. 118, this court held it would interfere on questions of fact where the judgment below is clearly erroneous. In *McCartney v. Finnell*, 106 Mo. 445, it was held that this court would look into the evidence, and would reverse the judgment below where apparent injustice had been done. In *Bruen v. Kansas City Agri. & H. Fair Assn.* 40 Mo. App. 425, it was held that where the material facts were undisputed it was the duty of the appellate court to review the action of the trial court, and to render such judgment as the facts warranted. In *Rhodes v. Fariah*, 16 Mo. App. 430, it was held that where the defense was the statute of limitations, and the evidence in support thereof was definite, undisputed, and not open to suspicion, the appellate court would direct the proper judgment to be entered by the trial court. In *Hewitt v. Doherty*, 25 Mo. App. 326, it was held that a verdict for one party, where the conceded facts show that the adverse party is entitled to a judgment, 43 L. R. A.

will be vacated on appeal as being unsupported by the evidence. The same rule obtains in other jurisdictions. In *Chicago, B. & Q. R. Co. v. Stumps*, 55 Ill., loc. cit. 375, it is said: "The decision of this case, it is true, involves the question of the credibility of witnesses, and the jury are peculiarly the judges of that question. Still they have not an arbitrary discretion in this respect. This court has said that a jury cannot wilfully, nor from mere caprice, disregard the testimony of an unimpeached witness." In *Read v. Morse*, 43 Wis. loc. cit. 319, it is said: "But we think the court erred in submitting the question to the jury, in any form, as to whether the boat was provided with the necessary means and appliances to prevent the escape of fire. After a careful examination, we think the uncontradicted testimony proves that the boat was properly equipped."

Such being the case, it was error to submit the question to the jury." In *Wise v. Freshley*, 3 McCord, L. loc. cit. 548, it is said: "Where evidence is of a doubtful character, or where there is a conflict among the witnesses of the plaintiff and defendant, the juries are the proper persons to decide. But they have no such arbitrary and capricious power as to give to a citizen one cent for property indisputably proved to be worth \$500 or \$1,000." The same rule is laid down in 1 Greenl. Ev. 15th ed. § 74, and is supported by the numerous cases and illustrations contained in note "a" to the text. See also *Turner v. Haar*, 114 Mo. 335. In *Seibert v. Erie R. Co.* 49 Barb., loc. cit. 586, it is said: "The testimony of these two witnesses is clear, positive, and circumstantial. They could not be mistaken. Their testimony is true, or they both committed wilful and corrupt perjury. I think the jury, so far as anything to the contrary appears in this case, were bound to give credit to their testimony. It was not contradicted. It was really no contradiction for the plaintiff to say he did not hear the whistle or bell. They were not impeached or in any way discredited. The positive testimony of an unimpeached, uncontradicted witness cannot be discredited or disregarded arbitrarily or capriciously by court or jury. *Lomer v. Meeker*, 25 N. Y. 363. If juries are permitted to discredit or disregard such testimony, there is no safety in the administration of justice, and parties might just as well let the result of a litigation abide the cast of a die or a game of chance. It belongs to a jury, I admit, in considering the weight of evidence, to pass upon the credit due to the respective witnesses; but this does not imply that they may, without reasonable or justifiable ground, disbelieve any witness. They have no right to discredit an unimpeached, uncontradicted witness, who testifies fairly, and gives clear, rational, consistent, and relevant testimony. For judicial purposes, all witnesses stand upon a par, and must be believed in their testimony, unless discredited by the inconsistency, incredibility, or improbabilities of their statements on cross-examination, or otherwise contradicted by other witnesses, or impeached in respect to their general character for integrity or

truth." And, because the jury arbitrarily disregarded the uncontradicted testimony of the unimpeached witnesses in the case, the judgment was reversed and a new trial awarded. To the same effect, see *Jackson v. Hardin*, 83 Mo. 175; *Hite v. Metropolitan Street R. Co.* 130 Mo. 132; *Payne v. Chicago & A. R. Co.* 138 Mo. 562; *Morgan v. Duffee*, 69 Mo. 469, 33 Am. Rep. 508; *Travelers' Ins. Co. v. Selden*, 42 U. S. App. 253, 78 Fed. Rep. 285, 24 C. C. A. 92.

In *Crawford v. State*, 44 Ala. 382, it appeared that the lower court, in referring to a portion of the testimony for the defense, said in its charge to the jury: "Yet you are not bound to believe one word of this testimony, unless you are satisfied it is true, and of this you are the judges." And upon appeal the supreme court said: "This clause of the charge must have some meaning. It cannot be construed in support of the veracity of the testimony referred to. It may be construed into an assault upon it, and it would justify the jury in its rejection as unworthy of any influence upon their verdict. In this view of it, it would be erroneous. If the testimony delivered upon the trial is unimpeached, either by the manner of the witness, his knowledge of the facts, his connection with the parties, or by contradictions, or for some other legal reason, the jury must treat it as true. They have no legal right causelessly to discredit any portion of the evidence, unless there are legal grounds for such a discrediting. Any other course would imperil the fairness and impartiality of the trial. If the jury can capriciously and causelessly discredit a portion of the testimony for the defense, they may discredit the whole. If the law exists as intimated by the learned judge on the trial below, it exists without limit; and it may be applied to the testimony of the defense or to the testimony of the prosecution. This would give the jury power to convict or to acquit according to their discretion, and not according to the evidence. This is not a correct statement of their duty. They must try the issue joined according to the evidence." In *People v. Lyons*, 51 Mich. 215, the case presented the converse of the proposition. The lower court instructed the jury that, "although a witness may be completely impeached, they might still believe him," or, in other words, as the supreme court put it, that they were at liberty to convict the defendant on the testimony of one who was shown by impeaching evidence to be unworthy of belief. The supreme court said of this charge: "Of course it was not

the intention of the circuit judge to convey that idea to the jury, but unfortunately his language was so chosen as to carry that meaning," and granted a new trial to the defendant. In a word, the reason is this: Juries try questions of fact; that is, controversies about the facts. Where there is no controversy (meaning an affirmation of a fact on one side, and a denial on the other), there is no question as to the facts. If the facts are shown by competent evidence on one side, and the evidence is not contradicted on the other, and there is no attempt to impeach the witnesses, there is no question of fact involved in the case, but a simple question of law is presented. To permit a jury to say that it will not believe competent, uncontradicted, and unimpeached testimony, and to return a verdict in the teeth of such evidence, is to give the jury plenary power to take a man's life or property as caprice or wilfulness may dictate. If this is the power of a jury in this state, then courts are unnecessary, and the study of the law a waste of time; for what shall it profit us to carefully sift the grain of competent testimony from the bushel of chaff of hearsay testimony, if, after it is all done, the jury can capriciously, arbitrarily, perhaps wantonly, say, "We don't believe it," and find for the litigant who has introduced no testimony, and has not impeached the testimony that has been introduced? Briefly, bluntly, I say this is not the law.

For these reasons I dissent from the second proposition decided by the majority opinion, and think it was the duty of the circuit court to give the instruction asked by defendant at the close of the whole case. It follows that in my opinion the judgment of the circuit court ought to be reversed.

Sherwood and Brace, JJ., concur in all that has been said herein.

Sherwood, J., dissenting:

To the foregoing elaborate and exhaustive opinion I desire to add that outside of this state, "without variation or shadow of turning," the mere conjunction of accident and injury affords no basis for a cause of action; that, if a defect occurs from which an injury results, no cause of action, *prima facie* or otherwise, arises, unless the party whose duty it was to repair that defect had either actual or imputed notice thereof. In this case the evidence shows no actual notice, and also shows no such lapse of time as to amount to imputed notice. Where, then, is your so-called *prima facie* case?

ARKANSAS SUPREME COURT.

Richard FIELDS *et al.*, *Appts.*,

v.

F. C. DANEHOWER.

(65 Ark. 393.)

1. The lien for the unpaid balance of

NOTE.—On the subject of redemption from foreclosure sale in general, see *note* to *Horn v. Indianapolis Nat. Bank (Ind.)* 9 L. R. A. 676, 43 L. R. A.

the mortgage debt is not restored upon a redemption by the mortgagor under statutory authority by repaying the amount for which the property was sold at the trustee's sale, although such amount is less than the face of the mortgage.

2. A tender by a mortgagor seeking to exercise his statutory right to redeem from the trustee's sale of the amount bid at such sale which is less than the face of the

mortgage is ineffectual if coupled with a condition that the mortgagee release all claims upon the land, although the payment would have cut off the mortgage lien, since that question is one which the mortgagee had a right to test in the courts.

(*Bunn, Oh. J., dissents from proposition 2.*)

(June 11, 1898.)

APPEAL by defendants from a judgment of the Circuit Court for Lee County in favor of plaintiff in an action brought to recover possession of certain real estate. *Affirmed.*

Statement by **Riddick, J.:**

Action of ejectment by F. C. Danehower against Richard Fields and Jack Dawson to recover possession of a tract of land held by defendants. The land was formerly owned by F. Trunkney, and he sold and conveyed the land to defendants, Fields and Dawson, upon credit, for the sum of \$1,381. To secure payment of the purchase price, Fields and Dawson executed and delivered a deed of trust to R. D. Griffis, as trustee with power of sale. The debt not being paid, the trustee sold the land under the power contained in the deed, and, Trunkney having died, the land was purchased by his widow and heirs for the sum of \$900, leaving several hundred dollars of the purchase price still unpaid. The trustee conveyed the land to the widow and heirs of Trunkney, and they in turn sold and conveyed the land to Danehower. Within one year from the date of the sale by the trustee the attorney of defendant Fields, who had purchased the interest of Danehower in the land, tendered to the attorney of Danehower and the Trunkneys, who was authorized to receive same, \$1,000, to redeem the land from the sale under the deed of trust. But this tender was made on the condition that the attorney for Danehower and the Trunkneys would execute a receipt for his clients releasing the lands from all liens held by either Danehower or the Trunkneys. The attorney for Danehower and the Trunkneys admitted that Danehower and the Trunkneys had no other claim or lien on the land except such as were claimed by virtue of the trust deed, and admitted that the \$1,000 was sufficient to cover the amount of the purchase price for which said land sold at the sale under the trust deed, together with interest at 10 per cent thereon, and costs of sale, and offered to accept the same as a redemption from said sale, but contended that to release the land from the lien of the mortgage it was necessary to tender, not only the amount for which the land was sold under the trust deed, interest, and costs, but also the balance of the mortgage debt remaining unpaid; and he declined to execute the receipt or accept the tender on the conditions imposed, solely because the effect of the execution of the receipt and the acceptance of the tender would be the absolute redemption of said lands from the mortgage lien. The answer of the defendants set up this tender as a defense to the action of ejectment, stated that they had at all times been ready and willing to pay it, and 43 L. R. A.

offered to bring the money into court. The finding and judgment of the circuit court was in favor of plaintiff.

Mr. James P. Brown, for appellants:

A statutory right of redemption is vastly different from a mere equity of redemption.

Makibben v. Arndt, 88 Ky. 180; *Todd v. Davey*, 60 Iowa, 532; *Escher v. Simmons*, 54 Iowa, 269; *Blake v. Black*, 55 Iowa, 252; *Curtis v. Cutler*, 40 U. S. App. 233, 76 Fed. Rep. 16, 37 L. R. A. 737, 22 C. C. A. 16.

Absolute and entire redemption may be effected by paying or tendering the amount that the land brought at the foreclosure sale, with interest and costs of sale.

Wood v. Holland, 57 Ark. 198; *German Nat. Bank v. Barham*, 57 Ark. 533.

The sole excuse, fully discussed at the time, was a waiver of all other objections to the tender.

Harriman v. Meyer, 45 Ark. 37.

If the required receipt may deprive the creditor of any right which the law does not deprive him of, as the effect of being paid in full by his debtor, then such a condition would invalidate the tender. But it is otherwise where the receipt that is required shows on its face merely the legal effect of full payment, as required by law, for the object intended by the tenderer.

Johnson v. Oranage, 45 Mich. 14; *Halpin v. Phenix Ins. Co.* 118 N. Y. 165; *Bailey v. Buchanan County*, 115 N. Y. 297, 6 L. R. A. 562; *Wheelock v. Tanner*, 39 N. Y. 486; *Cass v. Higenbotam*, 100 N. Y. 248; *Loughborough v. McNevin*, 74 Cal. 250; *Mankel v. Belscamper*, 84 Wis. 218; *Strafford v. Welch*, 59 N. H. 46; *Engelbach v. Simpson*, 12 Tex. Civ. App. 188.

Messrs. McCulloch & McCulloch, for appellee:

In neither the terms nor spirit of the redemption act can be found a purpose to enable the mortgagor to scale his debt and discharge it less than "dollar for dollar." It does not provide a "new way to pay old debts," and its beneficent design cannot be so perverted. It is a shield and not a sword.

Wood v. Holland, 57 Ark. 198, 53 Ark. 69, 64 Ark. 104; *German Nat. Bank v. Barham*, 57 Ark. 533.

If a mortgagor is entitled, as a legal right, to redeem property from a mortgage sale and hold it free from the balance of the mortgage debt by merely paying the purchase price at the sale, a court of equity would not impose such a condition upon him merely because the purchaser or mortgagee has denied him such legal right by refusing the offer and he is forced to go into a court of equity to enforce his clear legal right.

Equity follows the law.

Hanson v. Keating, 4 Hare, 1.

The mortgagor either has a clear legal right after the sale to redeem from the mortgage absolutely by payment of the price, which right he can assert under any circumstances or in any form of action, or his legal right under the statute extends only to a redemption from the effects of the sale, and to redeem from the mortgage he will be required always to pay the balance of the mortgage debt.

Jones, Mortg. § 1075; Kerr's Supp. to Wiltsie, Mortgage Foreclosures, pp. 1627-1628; Pingrey, Mortg. 2011; *Collins v. Riggs*, 14 Wall. 491, 20 L. ed. 723; *Benedict v. Gilman*, 4 Paige, 58; *Martin v. Fridley*, 23 Minn. 13; *Baker v. Pierson*, 6 Mich. 522; *Adams v. Brown*, 7 Cush. 220; *McCabe v. Bellows*, 7 Gray, 148, 66 Am. Dec. 467; *Jones v. VanDoren*, 130 U. S. 684, 32 L. ed. 1077; *Parker v. Dacres*, 130 U. S. 43, 32 L. ed. 848; *Hosford v. Johnson*, 74 Ind. 479; *Hervey v. Krost*, 116 Ind. 268; *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564; *McGough v. Sweetser*, 97 Ala. 361, 19 L. R. A. 470; *McArthur v. Franklin*, 16 Ohio St. 193; *Rorer*, Jud. Sales, § 1178.

In *Ogle v. Koerner*, 140 Ill. 170, and *Anderson v. Anderson*, 129 Ind. 573, it is held that a junior encumbrancer or any other person not liable for the debt may redeem by paying the purchase price at the sale without paying the balance of the mortgage debt, but the rule is clearly recognized in these cases that where the mortgagor himself redeems he must pay the whole debt.

The agreement in the face of the mortgage whereby the mortgagors expressly waived their right of redemption under the statute is binding upon them.

Jones, Mortg. §§ 1542 *et seq.*; *Quartermous v. Kennedy*, 29 Ark. 544.

Even if the mortgagor had the right to redeem absolutely from the mortgage by paying only the purchase price at the sale, the tender was not shown sufficient for that purpose.

2 Benjamin, Sales, §§ 1074 *et seq.*, and note; 1 Addison, Contr. § 357, and note; 2 Wharton, Contr. § 997; *Preston v. Grant*, 34 Vt. 201; *Foster v. Drew*, 39 Vt. 51; *Draper v. Hitt*, 43 Vt. 439, 5 Am. Rep. 292; *Moore v. Norman*, 52 Minn. 83, 18 L. R. A. 359; *Henderson v. Cass County*, 107 Mo. 50; 25 Am. & Eng. Enc. Law, p. 912; 7 Wait, Act. & Def. p. 588; Jones, Mortg. § 900; *Hepburn v. Auld*, 1 Cranch, 321, 2 L. ed. 122; *Storey v. Krevson*, 55 Ind. 397, 23 Am. Rep. 668; *Thayer v. Brackett*, 12 Mass. 450; *Loring v. Cooke*, 3 Pick. 51; *Richardson v. Boston Chemical Laboratory*, 9 Met. 42; *L'Hommédieu v. The H. L. Dayton*, 38 Fed. Rep. 926.

Riddick, J., delivered the opinion of the court:

This case presents the following question: When land is sold under a power contained in a mortgage for an amount less than the debt secured by the mortgage, does the redemption allowed by the statute from such sale leave the premises still subject to the mortgage lien, or does such redemption restore the land to the grantor relieved of both the sale and the mortgage lien? In other words, can an absolute redemption be effected in such a case by a tender of the amount for which the property sells at the mortgage sale, together with interest and costs of sale, or is it necessary that the full amount of the mortgage debt shall be paid? The statute provides that real property sold under a mortgage "may be redeemed by the mortgagor at any time within one year from the sale thereof by payment of the amount

for which said property is sold, together with 10 per cent interest thereon, and cost of sale." Sandels & H. Dig. § 5111. If the effect of a redemption under this statute, when the property has sold for less than the mortgage debt, is to restore the mortgage lien, it is obvious that there is no limit to the number of sales that may be made under the same mortgage. So long as any balance of the debt remains unpaid, and the mortgagor redeems, the mortgagee may, if this be the meaning of the act, continue to sell the property; thus piling up the costs against the mortgagor. Mortgages and deeds of trust to secure debts can, in this state, be drawn so that the creditor may bid at the mortgage sale (*Ellenbogen v. Griffey*, 55 Ark. 268), and this is now usually done; but under such construction of the statute the creditor would be encouraged to bid less than the value of the property, for in that event, if the mortgagor redeemed, the creditor could still hold and sell the property for any balance remaining unpaid, while, if the necessities of the mortgagor prevented him from redeeming, the creditor would obtain the property for less than its value, and have the remainder of the debt as a personal claim against the mortgagor. There is little reason why a creditor should be allowed thus to subject the property of his debtor to repeated sales under his mortgage; and a construction which permits it should not be adopted unless clearly required by the language of the statute. *Hervey v. Krost*, 116 Ind. 268. On the contrary, it would seem to be good public policy to allow the creditor to sell only once under his mortgage, and to make it to his interest to secure a fair price for the property at such sale. *Anderson v. Anderson*, 129 Ind. 573. Poverty may prevent the debtor from bidding the value of this property, for he must pay or secure the price he bids; but the creditor is usually in a position to make the property bring its value, at least, to the extent of the debt for which he exposes it for sale. If the mortgage does not permit him to bid at the sale, he can foreclose in a court of equity, and thus place himself in a position to make the property bring its value. It is not, therefore, unjust, as between him and the mortgagor, to presume that the amount for which he permits the property to sell represents its true value. And this is the basis upon which rests the redemption statute. For the purpose of redemption, the statute conclusively presumes that the price for which the property sells at the mortgage sale represents its actual value, and it allows the mortgagor within a reasonable time after the sale to redeem and reclaim the property by substituting therefor its money value as determined by such facts.

There is nothing in the statute to support the contention that when a redemption is made the mortgage lien is restored, and remains upon the property for any unpaid balance of the debt. We do not believe that the legislature intended any such result. Previous to the passage of this act allowing a redemption, the mortgage lien did not exist after the sale under the power contained in the mortgage. After such sale, the mort-

gage was *functus officio*, except as a part in the chain of title from the mortgagor to the purchaser at the mortgage sale, for the mortgage lien was exhausted and discharged by the sale. *Makibben v. Arndt*, 88 Ky. 180. Now, the statute does not attempt to make any change in the law in this respect, but recognizing that the mortgage lien was terminated by the sale, and that afterwards there was not a mortgagee holding under a mortgage, but a purchaser holding under a sale, it provides for redemption from such sale only. The language of this statute granting the right to redeem upon payment of amount for which the property sells, with interest and costs of sale, means, we think, an absolute redemption, and the mortgage lien is not revived by such redemption. *Anderson v. Anderson*, 129 Ind. 573; *Hervey v. Krost*, 116 Ind. 268; *Makibben v. Arndt*, 88 Ky. 180; *Todd v. Davey*, 60 Iowa, 532. Counsel for appellee contend that the case of *Wood v. Holland*, 53 Ark. 69, 57 Ark. 198, is opposed to this view, but we do not think so. In that case, as in this, there had been a sale of land on credit, and the vendee had executed a mortgage to a trustee to secure payment of the purchase money. The land was sold by the trustee under a power contained in the deed, and purchased by the vendor for less than the debt secured by the mortgage. The vendor took possession of the land under his purchase at the mortgage sale. Afterwards the mortgagor commenced a suit in equity to redeem, and to compel the vendor "to account for the rents and profits, and for other relief." The court, in its first opinion in that case, upon which the two later opinions were based, conceded the right of a mortgagor under our statute to redeem land sold under a mortgage by tendering the amount bid, with interest and costs, whether the debt secured be for the purchase money or not; but the court said that, "when the party goes into a court of equity to redeem, he must offer to pay the whole purchase money due." *Wood v. Holland*, 53 Ark. 69. The court did not, in that opinion, nor in either of the two subsequent opinions rendered in said case, state the reason for requiring the plaintiff to pay the whole amount of the purchase money when he goes into a court of equity to redeem. But in the case of *German Nat. Bank v. Barham*, 57 Ark. 536, it was said that courts of equity in such cases required the payment of the whole debt, upon the principle that "he who seeks equity must do equity"; and this seems to be the correct basis for the decisions in *Wood v. Holland*, 53 Ark. 69. While it may seldom be necessary for a mortgagor to resort to a court of equity to enforce his right to redeem after sale, that being a right conferred by statute, and concerning which he has a remedy at law; yet if, by reason of the fact that an account must be stated, or if, for the purpose of removing a cloud from his title, or to obtain other equitable relief, he comes into a court of equity to redeem, he must submit to such conditions as are imposed by the general rules of equity. And it is an ancient rule of equitable jurisprudence that a court of equity will not confer its equitable relief upon the party

seeking its aid unless he will concede and provide for all the equitable rights justly belonging to the adversary party and growing out of the subject-matter of the suit. 1 Pom. Eq. Jur. § 385. Now, in the case of *Wood v. Holland* the mortgagor was asking the aid of a court of equity to allow him to redeem, and to compel the creditor to account for the rents and profits of land, while on his part he was offering to pay less than half the purchase money he owed the creditor for the land he sought to redeem. The land was the subject-matter of the action to redeem, and, the creditor having a legal demand against the mortgagor for the price of the land, it was right, and in accordance with the rules of equity, that the court should refuse to lend its aid to the mortgagor in the matter of redeeming and reclaiming the land, and calling the creditor to account, until he had offered to pay the balance due for the land. *Anthony v. Anthony*, 23 Ark. 479; *Ruddell v. Ambler*, 18 Ark. 369; *Loney v. Courtinay*, 24 Neb. 580; *Comstock v. Johnson*, 46 N. Y. 615; *Booth v. Hoskins*, 75 Cal. 271; 1 Pom. Eq. Jur. §§ 385, 393. Whether this rule would be applied to other mortgages than those to secure the purchase money of the land mortgaged is immaterial to consider.

The appellant in this case is not asking the aid of a court of equity. He is defendant in an action at law, and therefore the decision in *Wood v. Holland* does not support the contention that he cannot redeem without paying the whole debt, for the decision in that case is, we think, based on the rule that "he who asks equity must do equity." To avoid confusion, it must always be remembered that the question here concerns the statutory right to redeem after sale, and has no reference to the equity of redemption before sale,—a right originating with courts of equity, and enforced only upon equitable principles. In actions to enforce the mortgagor's equity of redemption before foreclosure the rule is that the whole debt must be paid. "The debt being a unit, no party interested in the whole premises . . . can compel the mortgagee to accept a part of the debt, and to relieve the property *pro tanto* from the lien." 3 Pom. Eq. Jur. § 1220. The same rule is applied, even after foreclosure, when one having an interest in the mortgaged property—such, for instance, as a junior encumbrance—is not made a party to the foreclosure proceedings, and afterwards comes into court for the purpose of enforcing his equity of redemption. He must pay or tender the whole mortgage debt. In such cases "the party offering to redeem proceeds upon the hypothesis that as to him the mortgage has never been foreclosed, and is still in existence. Therefore he can only lift it by paying it." *Collins v. Riggs*, 14 Wall. 491, 20 L. ed. 723; *Hosford v. Johnson*, 74 Ind. 479. But the rules applied by courts of equity in enforcing the equitable right of redemption before foreclosure, and the decisions based thereon, have little bearing upon the question here, which is one of statutory construction only. After considering the able argument of counsel for appellee, and the many cases cited by him, our conclu-

sion, as before stated, is that the contention of appellants on this point is correct. He tendered a sum sufficient to cover the amount for which the property sold at the sale under the mortgage, with interest at 10 per cent, and costs of sale; and this was all the law required.

But this tender was made upon the condition that appellee and the Trunkkeys should waive their claim to a lien upon the property for any further sum by virtue of the mortgage. Appellant Fields demanded that Danehower and the Trunkkeys should sign a writing in which was the following stipulation: "We hereby agree with said Richard Fields that by virtue of his payment of said sum of \$1,000 to us all the liens or other claims on said lands ever held by us, or either of us, as the representatives of the said Frank Trunkkey, deceased, are released, and the said Fields redeems said lands free from any further lien or claim of interest thereon or therein by us or either of us." The appellee and the Trunkkeys admitted that they had no claim against the land except that existing by virtue of the mortgage and the sale thereunder. But the mortgage was executed by appellants to secure the purchase price they had agreed to pay for the land. At the sale under the mortgage the land sold for much less than the amount due for the purchase price, and appellee and the Trunkkeys in good faith contended that appellants could not redeem without paying the full amount due for the land. There was a difference of opinion between the parties as to the law on this point, and the object of appellant Fields in requiring the receipt and agreement was to compel both appellee and the Trunkkeys, in the event they accepted the tender, to abandon their claim of a lien against the land for the balance of the purchase money. This balance represented a considerable sum; and while, in view of the unsettled state of the law on that point, we can appreciate the caution which led appellant to impose this condition, we yet have reached the conclusion that it was one he had no right to impose, and it rendered the tender of no effect. It is well established that a tender must be without conditions to which the creditor can have a valid objection. *Noyes v. Wyckoff*, 114 N. Y. 204; *Moore v. Norman*, 52 Minn. 83, 18 L. R. A. 359; *Wood v. Hitchcock*, 20 Wend. 47; *Jones, Mortg.* § 900; 25 Am. & Eng. Enc. Law, p. 912; *Benjamin, Sales*, Bennett's ed. 733. If appellant had only asked appellee to sign a receipt showing the amount of money paid, this would have been a condition to which appellee would have had no reason to object, for it would have barred none of his rights. But appellants had not paid the mortgage debt in full, and there was no statutory or legal requirement that appellee and the Trunkkeys should enter a satisfaction in full on the record, or grant a release, or agree that they would not prosecute their claim for a lien for the balance due. Whether the acceptance of the sum tendered would revest the title of the land in the mortgagor freed from the mortgage lien for the unpaid bal-

ance of the purchase money was a question which appellee and the Trunkkeys had the right to litigate, and to demand of appellee that in accepting the money tendered he and the Trunkkeys should sign an agreement which would estop and prevent them from litigating that question was a condition which appellants had no right to couple with his tender. *Noyes v. Wyckoff*, 114 N. Y. 204. For these reasons we are of the opinion that the circuit court correctly ruled that appellants did not make a valid tender, and that no redemption was made.

The judgment in favor of plaintiff was therefore right, and is affirmed.

BURN, Ch. J., dissenting:

I concur in the opinion of the court in this case in so far as it sustains the mortgagor's right to redeem by paying the sum bid at the foreclosure sale, and the percentage and costs provided by statute; but I dissent from that portion of the decision which holds that the tender made by the mortgagor was insufficient, and therefore unavailable. The case of *Noyes v. Wyckoff*, 114 N. Y. 206, is relied upon to sustain the decision of the court. The court of appeals of New York said: "The tender is best tested by the effect its acceptance would have had upon the defendant, and it needs no argument to show that, had it been accepted, it must have been upon the terms offered, *viz.*, in payment of the debt and extinguishment of the lien of the chattel mortgage, for the words used have no other meaning. This was a condition which plaintiff had no right to attach to its acceptance. He could not say, 'I offer you this money in payment of your debt, but, if you take it, you must extinguish your lien upon the iron ore.' Whether its acceptance would extinguish the mortgage was a question which defendant had a right to litigate, and to demand that in accepting the money offered defendant should create an estoppel which would prevent him from litigating the amount due on the mortgage was a condition which plaintiff could not attach to the offer, and which, being coupled with it, made the tender bad." That was a case where the defendant held a chattel mortgage on a quantity of iron ore lying upon the farm owned by the mortgagor, to secure a debt, or rather several debts, of uncertain amounts. The mortgagor sold the farm to a third party, afterwards plaintiff in the suit, subject to existing liens. The plaintiff purchaser tendered the defendant mortgagee \$3,000 "in payment and extinguishment of the lien of the mortgage," and defendant refused to accept it. It was conceded, in an action for the conversion of the ore (which had in fact been appropriated by the defendant), that the tender was sufficient in amount, but the refusal to accept it was because of insufficiency in form. Held, that the tender was insufficient, because it stipulated for an extinguishment of the lien as well as for the satisfaction of the debt, which question of lien the plaintiff had a right to litigate, and thus the tender was coupled with a condition. The reasoning of the court

would be applicable to every case of ordinary tender in payment of debt, for in every case the creditor has a right to litigate the question of amount, unless he considers that the amount of the tender is correct; and yet, if he refuses to accept a tender of the proper amount, he will lose in the question of tender, and will be compelled to take the tender, and pay costs not covered by the tender. The distinction attempted to be drawn between rules governing the tender of the debt and the tender of the amount to secure which the mortgage lien exists, involves a nicety which I feel incapable of exactly comprehending. After all, it may be that the court in that case only meant to hold that, notwithstanding the admission of the correctness of the amount of the mortgage lien being fully covered by the tender during the progress of the trial, yet, since the amount of the lien was undetermined when the tender was made, the purchaser had the right to litigate, and that, therefore, the tender was not good. In *Halpin v. Phenix Ins. Co.* 118 N. Y. 175,—a later case,—the same court said: "It is claimed that the tender was not effectual to entitle plaintiff to the judgment, for the reason that it was conditional on the execution by defendant of a satisfaction of the mortgage. The cases cited by the learned counsel for the appellant do not sustain this claim. The distinction must be observed between cases in which terms are added, not embraced in the contract, or which the acceptance of the tender would cause the creditor to admit, and those [cases] in which the conditions are such as the debtor, on payment of the debt, has a right to insist upon, and to

which the creditor has no right to object." Such, undoubtedly, is the true rule.

In this state, when a mortgage debt is paid, it carries with it the satisfaction of the mortgage lien; and hence, by statute, the mortgagee, at the demand of the mortgagor, is required to indorse in writing, signed by himself or his duly-authorized agent, on the margin of the record of the mortgage, a satisfaction of the same in full, and a neglect to do so subjects him to a penalty. The execution of such a quitance, receipt, or release was all that was contained in the alleged condition accompanying the tender in the case at bar, and the condition, of course, was no more than the mortgagee was bound by law to perform in any event. The statutes referred to are §§ 5096-5098, Sand. & H. Dig. The controversy, stripped of all mere technical coatings, is whether or not in order to redeem his land from the foreclosure sale to the purchaser, the mortgagor should be required to pay the amount of the bid, the costs, and statutory percentage, or the amount of the mortgage debt, costs, and interest. The purchaser contended that he should pay the latter sum and because he did not tender that sum his tender was refused, and for no other reason. This court has decided that his tender was for the proper amount and it is inconsistent to hold the tender insufficient, I think. So far as the mere form of the tender is concerned, it is not perceived that the case of a tender made to the mortgagee as purchaser is different in effect, from that of a tender to a third party as purchaser. I think the tender should have been held good.

CALIFORNIA SUPREME COURT (Department 1).

Ellen M. WILSON, *Respt.*,

v.

William DONALDSON *et al.*, *Defts.*,

and

C. L. DONALDSON, *Appt.*

(121 Cal. 8.)

A statutory laborer's lien for harvesting grain is not superior to a chattel mortgage executed and recorded before the grain was ready for harvesting, where the statute does not provide for such superiority.

(May 31, 1898.)

APPEAL by defendant C. L. Donaldson from a judgment of the Superior Court for Sacramento County in favor of plaintiff in an action brought to recover possession of certain grain. *Affirmed.*

The facts are stated in the opinion.

Messrs. A. E. Miller and W. A. Gett, Jr., for appellant:

The Constitution, § 15, art. 20, gives laborers of every class a lien on property on which they bestow labor.

Everyone who, while lawfully holding per-

sonal property, renders service to its owner by labor or skill, has a special lien thereon. Civil Code, § 3051.

One who makes, alters, or repairs personal property, at request of the owner or legal possessor, has a lien for reasonable charges for work and materials, and may retain it until paid.

Civil Code, § 3052.

Appellant's services come within these sections.

Rohrbough v. Johnson, 107 Cal. 149; *Douglass v. McFarland*, 92 Cal. 656; *Dano v. M. O. & R. R. Co.* 27 Ark. 564; *Emerson v. Hedrick*, 42 Ark. 263; *Chuch v. Garrison*, 75 Cal. 199.

The person making repairs had a lien against the mortgagee.

Hammond v. Danielson, 126 Mass. 294; *Williams v. Allsup*, 10 C. B. N. S. 417; *Scott v. Delahunt*, 5 Lans. 375; *Smith v. Sterens*, 36 Minn. 303; *Cuse v. Allen*, 21 Kan. 217. 30 Am. Rep. 425; *Paine v. Woodworth*, 15 Wis. 302.

In cases like the one at bar, the laborer's lien is prior.

Howes v. Newcomb, 146 Mass. 76; *Lynde v. Parker*, 155 Mass. 481.

Mr. Albert M. Johnson for respondent.

NOTE.—For the effect of a mortgage of future crops, see extensive note to *Dickey v. Waldo* (Mich.) 23 L. R. A. 449.
43 L. R. A.

Garoutte, J., delivered the opinion of the court:

Respondent, owning a certain tract of land, leased it to defendant William Donaldson for a share of the crop as rent, to be delivered in the sack to her. He also gave her a chattel mortgage upon all his interest in the growing crop to secure a then existing indebtedness. William Donaldson hired appellant, C. L. Donaldson, to harvest the crop at an agreed price of \$1 per acre. The grain was harvested under this contract, and upon the completion of the work this appellant took possession of 250 sacks of the grain, claiming a lien thereon to the extent of his contract price for the labor performed. Respondent claims the property under her chattel mortgage, executed and recorded before the grain was ready for harvesting.

Appellant contends that he is entitled to a lien upon the grain by virtue of §§ 3051 and 3052 of the Civil Code, which relate to statutory liens created when labor is performed upon personal property under the various circumstances there enumerated. Upon principle, *Douglass v. McFarland*, 92 Cal. 656, to some extent at least, supports the right of appellant, Donaldson, to claim a lien upon the grain for his labor under the circumstances we have detailed. For the purposes of the case alone it may be conceded that he is entitled to a lien. Such concession being made, the important question at once presents itself, Does this statutory laborer's lien of Donaldson take priority over the lien created by the chattel mortgage? An examination of the authorities upon the question from the various states of the Union discloses a conflict of judicial opinion. A well-considered case upholding the priority of the statutory or laborer's lien may be found in *Case v. Allen*, 21 Kan. 217, 30 Am. Rep. 425. But the great weight of authority is the other way. *Pingrey, Chat. Mortg.* §§ 730, 731; *Jones, Liens*, § 691; *Jones, Chat. Mortg.* § 472; *Storms v. Smith*, 137 Mass. 201; *Ingalls v. Vance*, 61 Vt. 582; *Hanch v. Ripley*, 127 Ind. 151, 11 L. R. A. 61. It is well said in the case last cited: "As the agister's lien depends alone upon the statute, it can have no greater force than the statute gives it, and as the legislature has, as we have said, manifested no intention of giving to it superiority over other liens, it can have none." In the absence of the statute, the appellant would have no lien whatever. All his rights come from the statute, and therefore must be weighed and limited by the statute. If the legislature had desired to give such lien claimants a priority over contract liens, it was an easy thing to have said so. And a declaration to that effect, not violative of constitutional rights, might be in line with a sound public policy. But here there is no such declaration, and it is not for the courts to ingraft such an amendment upon the law.

We have in this state a legislative declaration as to priority of liens in general which reads as follows: "Other things being

equal, different liens upon the same property have priority according to the time of their creation except in cases of bottomry and *respondentia*." It may well be said that "other things" are equal in this case. If not equal, then they preponderate largely in favor of the chattel mortgage. This is no question of balancing existing equities between the chattel mortgagor and the chattel mortgagee, but a question of equities between the chattel mortgagee and a third party,—a stranger,—and such equities are all in favor of the chattel mortgagee. We find none in favor of the third party, the statutory lien claimant. The chattel mortgagee gave full value for her right of lien, and was first in point of time. She notified all the world of her rights, and warned the world to deal with the property at their peril. She made a contract expressly authorized by the law, and did all that the law demanded of her in order to preserve the fruits of her contract. No court of equity can suggest a single defect in her conduct. Upon the other hand, this appellant, with full knowledge of the existence of the chattel mortgage, contracted to harvest the crop. He did this voluntarily, and if he suffers loss by such conduct it is his own fault. It was a matter of choice upon his part to do the work, and he assumed the risk of losing his hire when he entered into the contract. To be sure, his labor may have been necessary for the preservation of the crop. At the same time it may be said that the chattel mortgage lien was occasioned by the advance of money to furnish the seed and plow the ground. If the words "other things" found in the statute quoted refer to equities (which we do not decide), then it may readily be seen that those words furnish no comfort to appellant.

It would seem that a great number of the cases cited from other states, tending to support appellant's contention as to the priority of a statutory lien over a contract lien, may be distinguished from the principle we deem controlling in this state. In many jurisdictions where these decisions are found a chattel mortgage carries with it title to the property and the immediate right of possession. In this state there is no such law, either as to the title or the right of possession. As the law stands in those states, the mortgagor by consent retaining possession of the property, the courts seem to hold that repairs necessary for its preservation, when ordered by the mortgagor in possession, being made upon the mortgagee's property, are deemed in equity to be made at his request. It may be said that in such cases the question is hardly one of priority of liens. The remaining contention relied upon by appellant has no substantial merit.

For the foregoing reasons *the judgment and order are affirmed.*

We concur: **Van Fleet, J.; Harrison, J.**

Rehearing in banc denied.

ILLINOIS SUPREME COURT.

John P. RANSELL, *Plff. in Err.*,
v.

Louisa BOSTON *et al.*

(172 Ill. 439.)

1. Parol testimony is not competent to prove a testator's declarations prior to or after the execution of his will to aid in its construction.
2. A condition attached to the vesting of an absolute estate under a devise or bequest to a son, that he shall procure a divorce from his present wife, in default of which his interest shall be restricted to a life estate, will not be deemed void as contrary to public policy, where the divorce action between the son and his wife was pending when the will was executed.
3. The condition attaching to the absolute vesting of the fee under a devise in trust to pay the income of real property to the testator's son until he shall procure a divorce from his wife, and upon the happening of that event to convey the fee to him, with a limitation over to "other devisees under the will in case he dies childless without having obtained a divorce,"—is a condition precedent, and if broken prevents him from taking the fee, even if it is invalid as contrary to public policy.
4. The interest of the son during the life of his mother is at most a mere expectancy under a will bequeathing property to a trustee to hold for the benefit of the widow during her life, and upon her death to vest absolutely in the son if he shall procure a divorce from his wife, so that he cannot, during her life, maintain a bill to have the gift to him declared absolute for invalidity of the condition.

(April 21, 1896.)

ERROR to the Circuit court for Morgan County to review a judgment in favor of defendants in an action brought to annul certain conditions in the will of Eli C. Ransdell, deceased. *Affirmed.*

Statement by **Wilkin, J.:**

Plaintiff in error filed his bill in the court below to set aside certain conditions in the last will of his father, Eli C. Ransdell. The facts alleged in the bill material to a decision of the case are as follows: Eli C. Ransdell died, testate, August 28, 1880, leaving, him surviving, Ann Ransdell, his widow, plaintiff in error, John P. Ransdell, his son, and Louisa Boston, his daughter, the latter having a son, William Boston, and a daughter, Olga May Robinson. On July 10 prior to his death, he executed, in due form of law, his last will and testament, which was duly admitted to probate. By the first clause of that will he directed the payment of all his just debts. By the second he gave to his wife lot 161, in Jacksonville, Illinois, for

life, and at her death to be disposed of as afterwards stated, and also certain personal property to be owned by her absolutely. By the third he gave the daughter, Louisa, 80 acres of land in Morgan county for life, and at her death to go to her children in equal parts; also the benefit of \$1,000 for her life, the same to go to her children at her death, in equal parts. The fourth and fifth clauses, being those upon which the bill is based, are as follows: "Fourthly, I give, devise, and bequeath to my executors, as trustees, as hereinafter stated, the west half of the southwest quarter of section number twenty-nine (29), the east half of the east half of southeast quarter of section number thirty (30), the west half of the east half of the southeast quarter of section number thirty-one (31), all in township fifteen (15) north, and range nine (9), in Morgan county, Ill. being one hundred and sixty (160) acres, in trust, however, to permit my son, John P. Ransdell, to take and apply the rents, issues, and profits of the same, or to use and occupy the same without rent, if he shall so elect, until such time as he, the said John P. Ransdell, shall become sole and unmarried; and, upon the happening of that event, my said executors, or the survivor of them, trustees as aforesaid, shall release and convey the title to said lands to the said John P. Ransdell in fee; but if the said John P. Ransdell shall die never having had the bonds of matrimony dissolved between him and Julia Ransdell, his present wife, and he shall die childless, then said lands so bequeathed in trust, as last aforesaid, shall be held in trust for the other devisees under this will; but, if the said John P. Ransdell shall die having issue, the said real estate last aforesaid shall belong to said issue in equal parts, excluding the said Julia E. Ransdell from any and all interest whatever in the same. I enjoin upon my son, John, as a duty, that he furnish his mother the necessary firewood and such articles from the farm as she may need, and that he carefully look after her affairs so long as she may live. Fifth. All and singular the remainder of my said real and personal estate I will and bequeath to my executor, William Ransdell, in trust, however, for the following purposes, to wit: To have, hold, and manage and control the same for the use and benefit of my wife, Ann Ransdell, so long as she shall live. Said trustee shall collect the interest annually on the moneys invested, and pay over the same, less the necessary costs and expenses of managing the same; and the rents and profits of all my real estate not specifically devised shall be paid over to her, or for her use, during her natural life. At the death of my wife, Ann Ransdell, the principal of the fund so directed to be put at interest for her benefit during her life, and all the real estate devised to her for life, and in trust for her benefit during life, shall be held by my surviving executor in trust for the use and benefit of the said John P. Ransdell and

NOTE.—Many authorities upon testamentary conditions in restraint of marriage are found in a note to *Phillips v. Fergerson* (Va.) 1 L. R. A. 837. See also *Mann v. Jackson* (Me.) 16 L. R. A. 707.
43 L. R. A.

Louisa E. Boston, in equal parts, so that they shall share equally in the rents, issues, and profits of the same during life. If the said John P. Ransdell shall during his life be legally absolved from the bonds of matrimony whereby he is now joined in wedlock to Julia Ransdell, then, upon the happening of such event, but not before the death of Ann Ransdell, as aforesaid, the one half of the residue of my estate hereinbefore devised to my wife for her life, or in trust for her for life, shall immediately vest in the said John P. Ransdell absolutely. If the said bonds of matrimony shall be dissolved between the said John P. Ransdell and Julia Ransdell during the life of Ann Ransdell, said dissolution is not to affect in any way the devise for life to my wife, Ann Ransdell. If the said John P. Ransdell shall not be dissolved from the bonds of matrimony, but remain bound in wedlock to his now wife at the time of his death, then the one half of said residue of my estate, at the death of my wife, Ann Ransdell, shall go to and vest in his, the said John P. Ransdell's, issue, if any such there be, to the exclusion of the said Julia F. Ransdell, his present wife. If the said John P. Ransdell shall die without issue, then the said one half of said residue of my estate, after the death of my wife, Ann Ransdell, shall be held by the said William Ransdell, my surviving executor, to and for the use of the said Louisa E. Boston during her natural life, and after death to her children, in equal parts; and the other or remaining half of the residue of my said estate, after the death of my said wife, Ann Ransdell, shall be held by my said surviving executor for the use of the said Louisa E. Boston, with the right for her to receive, use, and apply the annual income arising from the same for and during her life. At her death the same shall vest in the children of her, the said Louisa E. Boston, in fee, in equal parts." The sixth clause empowered his executors named to make, execute, and deliver any and all deeds necessary to be executed in order to carry into complete effect all the provisions of the will, and by the seventh he nominated his brother, William Ransdell, and his wife, Ann Ransdell, to be his executors.

It is alleged in the bill that the testator was unduly prejudiced against the wife of complainant, Julia E. Ransdell, and was desirous that he should procure a divorce from her, and, being so influenced, provided in the fourth clause of his will that complainant should have the occupancy, use, rents, and profits of 160 acres of land for life or until the dissolution of said marriage relation between himself and his wife, when said lands should be by the executors conveyed to him in fee; but if he should die without issue, never having had said marital relations dissolved, then the land should descend to his sister, and at her death to her children. By an amendment to the bill it was further alleged: "That said testator, by the fifth clause of the said will, also devised and bequeathed to your orator one half of certain moneys and land, at the expiration of the

life estate of his widow, Ann Ransdell, to be owned and enjoyed absolutely and in fee simple, conditioned upon the dissolution of the marriage relation existing between your orator and the said Julia E. Ransdell; but, if said marriage relation should not be dissolved, then your orator should only have the use and income of the same for life, and at your orator's death, in default of issue, the same should descend to your orator's sister, Louisa Boston, and at her death to her two children." It is then alleged in the bill that the provisions in said fourth and fifth clauses, being intended by the testator to induce the complainant to secure a divorce from his wife, are void in law, being contrary to good morals and public policy, and, as such, should be so held and decreed. It then sets out that Louisa Boston is the mother of the two children named who are tenants in fee as remaindermen under the provisions of the will, in the event complainant should die without issue, not having been divorced from Julia E. Ransdell; that complainant is not the father of any child or children living, or of any which have been born since the death of the testator. Louisa Boston, her children, and the husband of the daughter, Joel Robinson, together with John A. Ayers, administrator *de bonis non* of the estate of the testator with the will annexed, were made parties defendant. The prayer is that, upon a hearing, "the provisions of said will requiring your orator to procure a divorce from his wife as a condition precedent to the enjoyment of the fee of the 160 acres of land be decreed to be absolutely null and void, and that the title to said land be declared to be vested in your orator in fee;" and, by an amendment to the prayer, that he be decreed "the owner in fee of the property devised and bequeathed to him by the fifth clause of said will, subject to said widow's life estate, free from said illegal and immoral provision." There is also a prayer for general relief. Louisa Boston, her two children, and Joel Robinson filed a general demurrer to the bill, which was overruled, and leave given to answer. By their joint and several answer, they admit the allegations of the bill as to the execution of the will and death of the testator; deny that the testator was unduly prejudiced against Julia E. Ransdell, or that he desired the complainant to procure a divorce from her, or that he intended, by the terms of his will, to induce the complainant to secure a divorce; deny that the provisions of the will are contrary to good morals or public policy; but aver that the same are just and in accordance with sound policy and good morals, and valid and binding upon the complainant and all others; that the claims of complainant are stale, and are and should be barred by lapse of time; that the uses and purposes for which said trust was created by the will were and are lawful; and that said devise to said trustees was and is a valid devise, and the court has no authority to divest said trustees of the title so vested by said devise; and deny any and all other matters not spe-

cifically admitted or denied. To this answer a general replication was filed, and the cause referred to a master to take proofs. Upon the coming in of his report, the same was approved, and a decree entered dismissing the bill for want of equity, and from that decree this writ of error is prosecuted.

Messrs. Lyman Lacey, Sr., and William A. Crawley for plaintiff in error.

Mr. John A. Bellatti, for defendants in error.

Wilkin, J., delivered the opinion of the court:

As will be seen by the foregoing statement, the relief prayed in the bill is based upon the allegation that the condition named in the fourth and fifth clauses of the will of Eli C. Ransdell, upon which the complainant should become the absolute owner of the property mentioned, is contrary to good morals, against public policy, and therefore void. In support of the proposition, the rule announced in 1 Story, Eq. Jur. § 291a, and authorities there cited, 2 Redf. Wills, 293, *Conrad v. Long*, 33 Mich. 78, and 2 Pom. Eq. Jur. § 933, note 1, is relied upon. The language of Judge Story is (having spoken of the law as to devises and bequests in restraint of marriage): "So, also, conditions annexed to a gift, the tendency of which is to induce husband and wife to live separate, or be divorced, are upon grounds of public policy and public morals, held void." But he says (§ 291e): "This whole subject, as to what conditions in restraint of marriage shall be regarded merely *in terrorem*, and so void, and what ones are valid, is certainly, both in England and this country, involved in great uncertainty and confusion." And in § 291d: "The question as to what conditions, affecting marriage, are valid, must depend upon the circumstances of each particular case, and will be very materially affected by the consideration how far the condition was one fairly applicable to the relation of the parties, and the peculiar views and situation of the donor and donee."

While it must be admitted that the language of the testator used in these clauses of his will impress one with the belief that he desired his son to obtain a divorce from his wife, and that he conditioned his gift to him with a view to encourage that result, there are certain facts and circumstances which go far to sustain the view that his purpose was simply to secure the gift to his son in the manner which, in his judgment, would render it of the greatest benefit to him, in view of the relations then existing between him and his wife. They had for several years prior to the execution of the will been separated. A divorce suit between them had then been pending for more than two years, in which they each alleged statutory grounds against the other for divorce, and they continued such divorce proceedings, and lived separate and apart from each other, for many years after the death of the testator. Certainly, it cannot be said that the condition

tended to encourage either the separation or the bringing of a divorce suit, both having taken place long prior to the execution of the will. We do not regard as competent the extrinsic evidence of the declaration of the testator, made some two years prior to the execution of the will, to the effect that he thought, as the son and his wife had separated, they had better remain so, and, if they lived together, he would disinherit the son, and that he could not do much for the son while he lived with his wife. The general rule is that, in the construction of wills, parol testimony is competent to prove the circumstances of the testator at the time, the condition of his property, his relations to his family, etc., but never to prove his declarations prior to or after the execution of the instrument. The testimony, however, was of no controlling importance. He did not disinherit his son upon condition that he should live with his wife or should obtain a divorce from her. He simply made one provision for him in case they were not divorced, and another if they were. While it is of the first importance to society that contract and testamentary gifts which are calculated to prevent lawful marriages or to bring about the separation or divorcement of husbands and wives should not be upheld, it is no less important that persons of sound mind and memory, free from restraint and undue influence, should be allowed to dispose of their property by will, with such limitations and conditions as they believe for the best interests of their donees. On the whole case, we are inclined to the view that the condition in this will should not be held as contrary to public policy and void. This view is in harmony with the cases of *Cooper v. Remsen*, 5 Johns. Ch. 459; *Born v. Horstmann*, 80 Cal. 452, 5 L. R. A. 577; and *Thayer v. Spear*, 58 Vt. 327. It is true that the force of the reasoning in these cases is somewhat weakened, as applied to this case, by the fact that there the gift was to daughters, whereas here it is to a son; but the principle involved is the same.

We do not, however, consider the foregoing conclusion as essential to an affirmance of the decree below, for the reason that, even if the condition should be held void, complainant is not entitled to the relief prayed, on the facts alleged in his bill and the proof made upon the hearing. It is said by Pomeroy in his *Equity Jurisprudence* (vol. 2, § 933, B): "It is ordinarily said that all conditions annexed to gifts which prohibit marriage generally and absolutely are void and inoperative. This, however, is a very inaccurate mode of statement, since a condition precedent annexed to a devise of land, even if in complete restraint, will, if broken, be operative, and prevent the devise from taking effect." And in note 1 to the same section the rule is thus stated: "In devises and other gifts of real estate, courts of equity follow the rules of the common law concerning the operation of conditions generally, and their effects upon the vesting and divesting

of estates. In gifts of real estate, therefore, when a condition in restraint of marriage is precedent and is broken, it prevents the estate from vesting at all, whether the restraint be absolute or partial, and whether there be a gift over or not. When the condition is subsequent and void, it is entirely inoperative, and the donee retains the property unaffected by its breach." We do not understand counsel for plaintiff in error to question the correctness of the rule thus stated. It is contended, however, that the condition here is subsequent, and not precedent. This position is clearly untenable. By the express language of the will, the absolute ownership of the property was only to vest in the donee upon performance of the condition. In other words, by its express terms, it is a condition precedent, and the bill designates it as a "condition precedent." An attempt is made to construe it into a condition subsequent, upon the theory that the trust created in the executors is a mere naked or passive trust, and therefore, the condition being void, the title passed immediately to plaintiff in error, under § 3 of chapter 30 of our statute entitled "Conveyances," and that the limitation over, in case he died childless, to "the other devisees under the will," is void for uncertainty. It is clear that the trust is not a naked one. *Kirkland v. Cox*, 94 Ill. 412; *Perry, Tr. § 200*; *Hill, Trustees*, 4th Am. ed. 376. We are unable to see upon what reasonable grounds it can be said the devise over is uncertain. It seems clear that, even if the condition named in the fourth clause should be held void, the title in fee to the lands therein described could not vest in plaintiff in error, the condition being precedent to the vesting of such title, and the devise being of realty.

The same is true as to any real estate devised by the fifth clause. But it is insisted that, as to any personalty disposed of by that clause (the condition being void), the ownership in plaintiff in error would become absolute, whether the condition was precedent or subsequent. It is true the distinction between bequests of realty and personalty insisted upon exists; but we are unable to agree with counsel that such distinction can be availed of by the complainant below upon the allegations of his bill and the proof made in support thereof. In the first place, in no event can he have any right or title to the property, personal or real, mentioned in the fifth clause, until the death of his mother, Ann Randell. She is still living, and, of course, his death may occur prior to hers, and therefore his present interest is, at most, a mere expectancy. But, aside from this consideration, the allegations of the bill are entirely too vague and indefinite to support a decree vesting any title, present or future, in personal property devised by the will, and certainly there is no proof in the record to authorize such a decree.

We think the circuit court properly dismissed the bill at complainant's costs, for want of equity, and its decree will accordingly be affirmed.

43 L. R. A.

Joseph R. MORTON, Appt.,

v.

Anna MURRAY et al.

(176 Ill. 54.)

1. Parol evidence is admissible to show that an instrument purporting to be signed by one person for another was written and signed by the latter's direction, in his presence.
2. An instrument written and signed by one person for another, in his presence and by his direction, is sufficient to bind him, under the statute of frauds, without any written authority to sign for him.

(Magruder, J., dissents.)

(October 24, 1898.)

APPEAL by complainants from a judgment of the Circuit Court for McDonough County in favor of defendants in an action brought to compel specific performance of a contract to convey land. *Reversed.*

Statement by Carter, Ch. J.:

This bill for specific performance was brought by appellant, Joseph R. Morton, against the heirs at law of John F. Murray, deceased, to compel them to make him a deed to the E. ¼ of the S. E. ¼ of section 18, in township 5 N., and range 3 W., in McDonough county. The bill alleged that appellant, in August, 1873, being then fourteen years old, went to live and work for John F. Murray, whose wife was appellant's aunt, and that he so lived with and worked for Murray on his farm, as a farm hand, until August, 1880; that the work he did was reasonably worth \$20 a month, and that all he ever received for such work was just enough to clothe him,—about \$25 or \$30 a year; that, when he quit working for Murray, he complained to him that he had not been paid enough for his work; and that then Murray, for the purpose of quieting and satisfying him, told him that whenever he got married and settled down, he would give him a piece of land that would more than recompense him for all he had ever done for him, and that he (appellant), believing and trusting in such promise, let the matter of his wages pass; that afterwards he went to Nebraska, and there farmed, and while living in Nebraska, and still being a single man, Murray wrote, or caused to be written, and sent to him by mail, his (Murray's) contract as follows:

Colchester Ill Febuary the 4 1886.

Dear nephew wee are all well ase i hope this will find you the same well Joe your uncle John wanted mee to rit to you for him this is what he sed well Jo ase i have always promest to give yo a farm i have bought the Billey O Stevens farme and the Dan Clark forty for yo i want you to get you a wife and come home and tind it and give me the

NOTE.—As to signature made by proxy, see *Lewis v. Watson (Ala.)* 22 L. R. A. 297, and note.

to fifts ase long as I live then to Lisey as long as she lives and at oure deth the land shall be yours I will make you a dead to it I think this will pay you for all the work you have don for mee I will tile it out and help you to fxt up the house and barn and ase mutch other improving as I see fit to do but dont marry some one that you dont like just to get the land for if you will take it thataway and be satisfied I will cheep it five years for you if you want mee to for the rent I get from others will be the same ase what you would pay me for the land but if not I will sell the land I want to give Wib the same cind of a canche on a pece of land no more at present I will close hoping to her frome you soon

from X J. F. Murray
by Miss John Murray.

The bill further alleges that Murray seldom did any writing, except sometimes signing his name, and that his wife was in the habit of doing his writing for him, and signing his name to all papers, and that she wrote the foregoing letter, and signed his name to it at his instance; that the words "nephew" and "Jo," in the letter, referred to appellant, and "Lisey" to Mrs. Murray, and that the land referred to was the land abovedescribed; that appellant notified Murray that he would take the land and accept the proposition made in said contract in full satisfaction of all claims against him. The bill further alleged, that the complainant was married in March, 1889, and that, on account of the land being then rented, he did not move into the house then on the premises until March, 1890, and that he then took possession for the purpose of complying, and in compliance, with the terms and conditions of the contract; that he remained on the land, and farmed it, until March 1, 1895, and paid Murray two fifths of all that was raised and grown on the land, and also for the use of the pasture, all to Murray's entire satisfaction, and that he made lasting and valuable improvements on the farm; that, wishing to farm more land, he rented 80 acres about three miles distant, and farmed it for several years; that in the spring of 1895, after consultation with and on the advice of Murray, he rented a quarter section in another township, and moved on the same, in order to save the loss of time in going to and from his house; that it was then understood between them that he should move back on the Murray land in the fall of 1896, and farm it and hold it just the same as before, and that Murray would, before his death, convey the same to him; that he had made all arrangements and did intend to move back into the house in October, 1896, when tenant was to move out, but that the heirs of Murray (Murray and wife having died), in order to hinder and prevent him from taking possession, surreptitiously procured one Stoneking to move into the house before the tenant had vacated the same; and that Stoneking was now unlawfully in possession, under one Wilbur Sutton, who claimed the land. The bill further alleged that Murray died, testate, April 9, 1896, and 43 L. R. A.

by his will, devised certain lands to said Wilbur Sutton, but the parcel of land here in controversy was not mentioned in said will; that said Murray left no widow, child, or children surviving him. The bill prayed for specific performance of the contract, and for general relief. Defendants, in their answer, denied all the material allegations in the bill specifically, claiming that appellant's possession was only that of a tenant, and not in pursuance of any agreement that the land was to be his, and set up and pleaded the statute of frauds as to any such agreement. On the hearing, the bill was dismissed for want of equity, and appellant has appealed to this court.

Mr. C. F. Wheat, for appellant:

Parol evidence was properly heard to explain and identify what land was meant and intended by the words "the Billy O. Stevens farm" and "the Dan Clark forty," used in the contract.

McConnell v. Brillhart, 17 Ill. 354, 65 Am. Dec. 661; *Swift v. Lee*, 65 Ill. 337; *Garden City Sand Co. v. Miller*, 157 Ill. 225; *Fry, Spec. Perf. Contr.* 248, note—parol evidence to identify the property sold; *Id.* part 3, chap. 3; *Fowler v. Radican*, 52 Ill. 405.

There was a good and valuable consideration for the alleged contract moving from Mr. Morton to Mr. Murray for this land.

Warren v. Warren, 105 Ill. 568.

No acceptance in writing was necessary in this case.

Farwell v. Lowther, 18 Ill. 252; *Browne*, Stat. Fr. 5th ed. 468.

Messrs. Neece & Son, for appellees:

The contract or some memorandum or note thereof must be in writing signed by the party to be charged or by some person by him lawfully authorized in writing signed by such party.

2 Starr & C. Stat. chap. 59, § 2.

To take a case out of the statute of frauds by a writing signed by an agent, the authority of the agent must be in writing.

Bissell v. Terry, 69 Ill. 184; *Albertson v. Ashton*, 102 Ill. 50; *Edwards v. Tyler*, 141 Ill. 454; *Kopp v. Reiter*, 146 Ill. 437, 22 L. R. A. 273.

The terms of a written instrument giving agent authority to sell cannot be changed by parol.

Kozel v. Dearlove, 144 Ill. 23.

The authority of the husband to bind the wife, or of the wife to bind the husband, must be in writing and signed.

Edwards v. Tyler, 141 Ill. 454; *Kopp v. Reiter*, 146 Ill. 437, 22 L. R. A. 273.

When signature of a deceased person is by mark, it must be proved that decedent signed the writing himself or authorized someone to sign for him.

Chadwell v. Chadwell, 98 Ky. 643.

If witnesses to a will sign by their marks and be dead, it must be proved that such marks were made by them.

1 Jarman, Wills, 5th Am. ed. pp. 213, 214, and notes.

A written contract may be rescinded by a verbal agreement.

Morrill v. Colehour, 82 Ill. 618; *Houston v. Sledge*, 101 N. C. 640, 2 L. R. A. 487.

It must appear that his name was signed, not only at Murray's request, but also in his presence, and this not on the ground of agency, but that he used his wife's hand to write his name.

Rockford, R. I. & St. L. R. Co. v. Shunick, 65 Ill. 223.

The authority to execute an instrument under seal must be under seal, and the principal cannot ratify an instrument under seal executed by an agent without authority, except by a writing of equal dignity.

Ingraham v. Edwards, 64 Ill. 526.

Carter, Ch. J., delivered the opinion of the court:

This was a bill for the specific performance of a contract to convey 80 acres of land. We are satisfied that the principal allegations of the bill were sustained by the evidence, and that the decree appealed from is erroneous. The complainant, Morton, who was a nephew of Murray's wife, from the age of fourteen lived in the family of Murray, and worked for him for upward of six years, performing for the greater part of the time the labor of a hired hand, but received for his services little more than his clothing. Murray regarded him with affection, and considered himself indebted to Morton, and promised to convey to him a tract of land, to become his property at his (Murray's) death. It was proved beyond dispute that Murray repeatedly said that he purchased the two forty-acre tracts, constituting the land in controversy, for Morton, and that he intended to convey them to him. It was also clearly proved that the letter set out in the preceding statement was written, at the request of Murray, by his wife. The contention that it was not shown to have been written in the presence of Murray, at his dictation, so as to avoid the application of the statute of frauds, will be noticed at another place. It was also sufficiently proved by statements of Murray that Morton had written a letter accepting the propositions contained in Murray's letter, and his acceptance was also otherwise shown. One witness testified that he heard a letter from Morton to Murray read in the presence of Murray and his wife, accepting the proposition. He returned from Nebraska, where he was living when the letter was written, got married, and moved upon, cultivated, and improved the land for five years, and paid to Murray two fifths of the crops, as stipulated in the letter. Much evidence was introduced on the hearing tending to prove that the letter dated February 4, 1886, was dictated by John Murray. Jane Hilgen, a witness for complainant, testifies and says: "Am a sister of complainant. John F. Murray's wife was a sister of our mother. Have known Mr. Murray ever since I can remember. I will be forty years old next birthday. I resided with the Murrays. Went there in 1873, and lived there until 1877, when I was married. They never had any children. Mrs. Murray died December 19, 1894. Mr. Murray died April 16, 1896. Mr. 43 L. R. A.

Murray did not do his own writing when I stayed there. He was very nervous. I do not remember of any letter or other paper he wrote while I was there. He made a mark,—kind of a cross. I saw him sign papers that way. It is on my deed that I have. While I lived there, I never saw him make his cross to any papers where his name was signed; only to letters. I have seen them to letters. Mrs. Murray wrote the letters. I am acquainted with Mrs. Murray's handwriting. Would know it anywhere I saw it. While I was there, she always did his writing." Witness was here shown a paper, a letter dated April 25, 1885, and said it was in the handwriting of her aunt, Mrs. Murray. Witness was now shown a paper, a letter dated February 4, 1886, and said it was in Mrs. Murray's handwriting, and that the cross is something like she has seen him (Mr. Murray) make. "I have written letters for him myself, and he signed his mark on the letter." Edgar Sutton testified: "I have seen Uncle John F. Murray write some, but not very much. I never saw him write a letter, but I think I would know his handwriting. I never saw him write anything but his name. I have heard Mr. Murray request his wife, Elizabeth, to write letters for him. During the time I resided there, he always got his wife, Elizabeth, to write such letters as he wished to have written. I have looked at the paper now shown me, dated February 4, 1886. I know the writing. It is in Elizabeth Murray's handwriting,—except I do not know whose handwriting the cross is in. I can recollect of Murray telling his wife to write to Jo; but I do not recollect of him telling her what to put in the letter. I heard him tell her to write to Jo something about the place. I don't know what they put in the letter about the place. The place he spoke of was the Clark forty and the Billy Stevens place. It was about 1886 I refer to. I can recollect him telling her to write to Joseph R. Morton, but I don't think she wrote right at the time. I was not in there at the time the letter was written or for a couple of days afterwards. The writing of the letter was spoken of along in the evening. I was in the house. I did not see her write any that night. Two or three days afterwards I knew of his going to mail a letter. If he had only one, that one was to Joseph R. Morton, for he had her write one to him. All I heard Murray say was that he had got the place for Jo. He told her to write to him that he had got the place for him; and if he wanted it, to come back. I did not know whether he meant for him to farm it, or what he meant." T. J. Ridden testified that he had a conversation with Murray, in which he said "he had got Aunt Liza—he called her—to write a letter to Jo to come back again; he had bought a piece of land, and he wanted him to come back and farm it long as Mr. Murray and his woman lived; then it was to fall back to Jo. His woman wrote it." P. H. McGan testified that he and his wife visited Murray about the time of Jo's marriage. "Murray and I were in the house, and he spoke about it. I told him I noticed Jo had got mar-

ried. He laughed, and said: 'I expect he is aiming to hold me to my contract.' I had never heard of this contract, and I asked him what he meant. He said: 'I had Aunt Eliza write a letter to Jo, in Nebraska, telling him, if he would come home here and marry, I would buy him a place; and he just came back, and did exactly what I wanted him to, and,' he says, 'I am able to do my part of the contract.' He said: 'I bought that Billy Stevens forty and that Clark forty.' He says: 'Jo can't go on this year, because it is rented. He will go on it next year.' " The record contains other evidence of a similar import, but it will not be necessary to repeat it here. The facts that Morton moved off the land in 1895, and that Murray paid him for some improvements which he had made, we do not, in view of the explanatory proofs, regard as of controlling importance. Morton needed more land, and had for a year or two been cultivating another tract a few miles distant; and it seems to have been agreed between them that too much time was lost in passing back and forth, and that it would be better for Morton to rent another farm of 160 acres, and move onto it for two seasons, and for Murray in the meantime to rent the 80 acres in question to others, for the same part of the crops Morton had been paying. It was proved by different witnesses that, after Morton moved off the land, Murray repeatedly said that he was to move back in the fall of 1896, and that he intended to convey the land to him as he had agreed. Murray died in April, 1896, and Morton was prevented by those succeeding Murray in the control of the property from taking possession. There was a sufficient consideration for the agreement to convey, and Morton entered upon and performed his part of the contract.

The only question upon which any doubt can arise is whether or not the statute of frauds must operate to prevent the specific performance of the contract. The 2d section of the statute [Starr & C. Stat. chap. 59] provides that "no action shall be brought to charge any person upon any contract for the sale of lands . . . unless such contract, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party." It is insisted by counsel for appellees that, in writing the letter and signing Murray's name, Mrs. Murray acted as the agent of Murray, and, it not appearing that she had any authority in writing signed by Murray, the statute applies, and the suit cannot be maintained,—citing *Bissell v. Terry*, 69 Ill. 184, *Albertson v. Ashton*, 102 Ill. 50, and *Edwards v. Tyler*, 141 Ill. 454. These cases do not reach the question as presented by this record. It is not pretended that Mrs. Murray had any written authority from Murray to write the letter or to sign his name to it, but it is contended that the letter was the letter of Murray himself,—that it was written in his presence, by his dictation, and in his name; and we are of the opinion that this view is fully sustained by the evidence.

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It is true, as contended by counsel for appellees, that there is no direct evidence that Murray stood by and dictated the letter, or directed his wife to sign his name to it when it was written; but such a fact may be proved by indirect as well as by direct evidence, and we think this fact was sufficiently shown by the circumstances, and Murray's statements and admissions proved on the hearing. It was shown that he rarely did any writing, but that his wife was in the habit of doing his writing for him. He spoke of writing to Morton about the matter before the letter was written, and afterwards repeatedly spoke of having written to Morton about conveying the land to him, and it is not pretended that he wrote or had written more than one letter on this subject. The evidence was clear that he knew of the letter and its contents, and regarded it as his own, and that he expressed his intention of complying with its terms. The testimony tended to prove that he mailed the letter himself. This proof had a further effect than to show a mere parol ratification,—it tended to prove that the act was his own. If it had been proved that, after the letter was written, he stated to others that his wife had written and signed his name to it in his presence and by his direction, it would not be denied that such proof would have been competent to prove that instrument was his own, individual act, and not that of an agent. So, too, then, was it proper to prove the same fact indirectly, and there was practically no evidence to the contrary.

Considering the letter, also, in connection with the circumstances and Murray's admissions proved, it contained some inherent evidence of the fact contended for by appellant. After the first few lines from Mrs. Murray, the language changes, as if coming directly from Murray in the first person, and in substance says: "As I have always promised to give you a farm, I have bought the Billy O. Stevens farm and the Dan Clark forty for you. I want you to get you a wife, and come home and tend it, and give me the two fifths as long as I live, then to Lisey (meaning his, Murray's, wife) as long as she lives, and at our death the land shall be yours. I will make you a deed to it. I think this will pay you for all the work you have done for me. I will tile it out, and help you fix up the house and barn, and as much other improving as I see fit to do," etc. It was then signed, "from X J. F. Murray, by Mrs. John Murray." From an inspection of the original letter it would seem that the cross preceding Murray's name was placed there after the name was written; and while there was no direct evidence that he made this cross, it was proved that he sometimes signed papers in that way.

Without considering whether or not, under the facts of this case, a parol ratification of the act of Mrs. Murray, as Murray's agent, in writing the letter, acted upon in part by both parties, would be sufficient to take the case out of this statute, we are satisfied that from the proof it should have been found that the instrument or letter was that of Murray himself, and that no authority in

writing to Mrs. Murray, signed by him, was necessary. One may write and execute an instrument by the hand of another when done in his presence and by his direction, and the fact may be proved by parol evidence, and an action may be brought upon the instrument without violating the statute of frauds. See 1 Am. & Eng. Enc. Law, 2d ed. p. 956, and cases there cited; *Meyer v. King*, 29 La. Ann. 567; *Rockford, R. I. & St. L. R. Co. v. Shunick*, 65 Ill. 223; *Ball v. Dunster-ville*, 4 T. R. 313; *Truman v. Lore*, 14 Ohio St. 154; *Gardner v. Gardner*, 5 Cush. 483, 52 Am. Dec. 740; *Videau v. Grif-fin*, 21 Cal. 392; *Bartlett v. Drake*, 100 Mass. 175, 97 Am. Dec. 92, 1 Am. Rep. 101. We see no reason why the fact of ex-

ecution cannot be proved by parol evidence on the statements of the party to be charged and of facts and circumstances tending to prove the principal fact as in other cases. Treating the letter as a contract in writing to convey the land, as it was, the statute of frauds was not a defense to the case established by the evidence.

Finding the decree to be against the evidence, it is accordingly reversed, and the cause is remanded to the Circuit Court, with directions to enter a decree for the specific performance of the contract, as prayed in the bill.

Magruder, J., dissents.

IOWA SUPREME COURT.

J. E. BIXBY

v.

OMAHA & COUNCIL BLUFFS RAILWAY
& BRIDGE COMPANY, Appt.

(105 Iowa, 293.)

1. **Medical books**, although admitted to be standard, cannot be read to the jury for the purpose of proving the symptoms of diseases, where they have not been referred to by witnesses whom they are offered to contradict.
2. **Medical works are not admissible under Code, § 4618**, making historical works and books of science or art presumptive evidence of facts of general notoriety or interest therein stated.

(May 10, 1898.)

APPPEAL by defendant from a judgment of the District Court for Pottawattamie County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Wright & Baldwin, for appellant:

The court erred in allowing plaintiff's counsel to read to the jury, over the defendant's objection, the extracts from medical works.

Gallagher v. Market Street R. Co. 67 Cal. 13, 56 Am. Rep. 713; *Ashworth v. Kitt-ridge*, 12 Cush. 193, 59 Am. Dec. 178; *Com. v. Wilson*, 1 Gray, 337; *Washburn v. Cud-dihy*, 8 Gray, 430; *Melvin v. Easley*, 46 N. C. (1 Jones, L.) 387, 62 Am. Dec. 171; *Carter v. State*, 2 Ind. 617; *Fowler v. Lewis*, 25 Tex. Supp. 380.

Facts of general notoriety and interest are facts of a public nature, either at home or abroad, not existing in the memory of man, as contradistinguished from facts of a private nature, existing within the knowledge of living men, and as to which they may be examined as witnesses. It is of such pub-

lic facts, including historical facts, facts of the exact sciences, and of literature or art, when relevant to a cause, that, under the provisions of the Code, proof may be made by the production of books of standard authority.

Morris v. Harmer, 7 Pet. 558, 8 L. ed. 783.

Medicine is not considered as one of the exact sciences. It is of that character of inductive sciences which are based on data which each successive year may correct and expand, so that what is considered a sound induction last year may be considered as an unsound one this year, and the very book which evidences the induction, if it does not become obsolete, may be altered in material features from edition to edition, so that we cannot tell, in citing from even a living author, whether what we read is not something that this very author now regrets.

Wharton, Ev. § 665; Gallagher v. Market Street R. Co. 67 Cal. 13, 56 Am. Rep. 713; *Ashworth v. Kittridge*, 12 Cush. 193, 59 Am. Dec. 178; *Whiton v. Albany City Ins. Co.* 109 Mass. 24; *Com. v. Sturdivant*, 117 Mass. 132, 19 Am. Rep. 401; *Com. v. Brown*, 121 Mass. 69; *People v. Hall*, 48 Mich. 482, 42 Am. Rep. 477; *Pinney v. Cahill*, 48 Mich. 584; *Fraser v. Jennison*, 42 Mich. 206; *Gale v. Rector*, 5 Ill. App. 481; *St. Louis, A. & T. R. Co. v. Jones (Tex.)* 14 S. W. 309; *Com. v. Wilson*, 1 Gray, 337; *Washburn v. Cud-dihy*, 8 Gray, 430; *Fowler v. Lewis*, 25 Tex. Supp. 380; *Ware v. Ware*, 8 Me. 42; *Harris v. Panama R. Co.* 3 Bosw. 7; *Melvin v. Easley*, 46 N. C. (1 Jones, L.) 387, 62 Am. Dec. 171; *State v. O'Brien*, 7 R. I. 336; *Davis v. State*, 38 Md. 35; *Carter v. State*, 2 Ind. 617; *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41; *Stilling v. Thorp*, 54 Wis. 534, 41 Am. Rep. 60; *Fox v. Peninsular White Lead & O. Works*, 84 Mich. 676; *Epps v. State*, 102 Ind. 539; *People v. Sessions*, 58 Mich. 594; *Rogers, Expert Testimony*, pp. 237-273; 2 Rice, Ev. pp. 1254-1255; *Bradner, Ev.* 315; 15 Am. & Eng. Enc. Law, p. 207; *Collier v. Simpson*, 5 Car. & P. 73; *Cocks v. Purday*, 2 Car. & P. 270; *Union P. R. Co. v. Yates*, 49 U. S. App. 241, 79 Fed. Rep. 584, 40 L. R. A. 553, 25 C. C. A. 103.

NOTE.—The use of scientific books and treatises as evidence is the subject of an extensive note to *Union P. R. Co. v. Yates* (C. C. App. 8th C.) 40 L. R. A. 553.
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Messrs. Harl & McCabe, for appellee: This court is now asked to overturn a rule of evidence maintained by the courts of Iowa and observed by the bar for fifty years.

Bowman v. Woods, 1 G. Greene, 441; *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 291, 87 Am. Dec. 391; *Clark v. State*, 12 Ohio, 483, 40 Am. Dec. 481.

All admit that works treating of the exact sciences are competent, and a number of the courts hold that such works of inductive science as are not "each successive year corrected and expanded," are competent.

Sound reason must then be found for the distinction, else the rule making that distinction is unsound. A legal rule not based upon sound reason is not the law, whoever or how many assert it to be the law.

The object of judicial investigations is to discover and elicit truth, not to suppress it. *McKivitt v. Cone*, 30 Iowa, 455.

The best evidence and the best attainable evidence, mean, or should mean, one and the same thing.

Appleton, Ev. p. 190; 1 *Phillipps*, Ev. p. 176; 1 *Starkie*, Ev. p. 39; *Morris v. Harmer*, 7 Pet. 554, 8 L. ed. 781.

In Wisconsin the learned court insists upon at least one case to qualify the witness to testify.

Souquet v. State, 72 Wis. 659; *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41.

A general practitioner is probably not incompetent to give expert testimony on the ground that he has not had, in his experience, a case like the one in question.

Rogers, Expert Testimony, 2d ed. p. 102, ¶ 5; *Finnegan v. Fall River Gas Works Co.* 159 Mass. 311.

Some courts hold that if the witness is a doctor, that is enough to qualify him as a witness.

Missouri P. R. Co. v. Finley, 38 Kan. 550; *New Orleans, J. & G. N. R. Co. v. Allbritton*, 38 Miss. 242, 75 Am. Dec. 98; *Washington v. Cole*, 6 Ala. 212.

Now, measure the folly of a tribunal, seeking truth, that refuses to listen to Gower or Spitzka on nervous diseases, to Carpenter on physiology, to Gray on anatomy, Pasteur on the themes on which, when he spoke, the world listened, until some man whose every idea, if he has any, has been secured from the authors in question, comes out of the brush and "adds an authority which . . . the printed page alone does not possess."

When the work is shown to be a standard to which medical men resort as the highest, clearest expression of the information and judgment of their profession upon that subject, how passing comprehension is the nonsense that demands a filter and then prescribes such an one as is universally accepted.

Citizens' Gaslight & H. Co. v. O'Brien, 19 Ill. App. 233; *Fort Wayne v. Coombs*, 107 Ind. 75, 57 Am. Rep. 82; *Sarle v. Arnold*, 7 R. I. 582.

Ladd, J., delivered the opinion of the court:

This action is brought for injuries sustained by the plaintiff in a collision between

a street car of the defendant and a train on the Chicago, Burlington, & Quincy Railroad. The liability of the defendant appears to have been conceded at the trial, and the extent of the injury and the amount to be allowed as damages were the only questions in controversy. There was some contusion of the skin and bruises, but these soon disappeared, and at the time of the trial there was no objective or external evidence of any injury. The theory of the plaintiff was that he had received a serious shock to his nervous system, and had symptoms indicating locomotor ataxia or some neurotic trouble. Dr. Barstow testified to such symptoms, while Drs. Jennings, Lacey, and Thomas insisted that there existed no signs of any disease. The plaintiff was permitted, over the objection of the defendant, to read in evidence extracts from "Pepper's System of Medicine," Vol. 5, under the heads, "Tabes Dorsalis, Locomotor Ataxia," "Morbid Anatomy" and "Physiology"; from a work by Dr. Ranney under the heads "Nerve Cells and Nerve Fibers," "Spinal Neurasthenia"; from a work by Dr. Hirt entitled "Diseases of the General Nervous System," under the heads "Functional Neurosis," "Diseases of the Pneumogastric Nerve," and "Affections of the Air Passage Due to the Lesions of the Vagus"; also extracts from a lecture by S. Weir Mitchell on "Permanent Headache"; and from a lecture by Dr. H. B. Wood on "The Remote Effects of Traumatism, as Seen by the Neurologist." These works were admitted to be standard, but had not been quoted or cited as authorities by the physicians in giving their testimony. The portions read to the jury treated of the symptoms, and not the cure, of diseases, and might be fairly well understood by those somewhat acquainted with the nomenclature of the medical profession. These extracts cover twenty-four pages of the abstract, and it is impractical to set them out. While they might aid the educated physician to a better understanding of the matters discussed, we are satisfied their tendency was to mislead and confuse the jury. A person of ordinary comprehension could not understand much of the language used, and would be in great danger of being misled by the grouping of symptoms. The learning of these works, if extracted by a skilled physician and applied to the particular case, and thus brought within the comprehension of the jurors, would doubtless have been of great assistance in ascertaining the true condition of the plaintiff. But as they assume a technical knowledge on the part of the reader, and capacity to understand the relative importance to be attached to symptoms, we think they could not be safely left to their interpretation and inferences. As said by Chief Justice Shaw in *Ashworth v. Kittridge*, 12 Cush. 193, 59 Am. Dec. 178: "Medical science has its own nomenclature, its technical terms and words of art, and also common words used in a peculiar manner, distinct from their received meaning, in the general use of the language. From these and other causes, a person not versed in

medical literature, though having a good knowledge of the general use of the English language, would be in danger, without an interpreter, of misapprehending the true meaning of the author. Whereas, a medical witness would not only give the fact of his opinion, and the grounds on which it is formed, with the sanction of his oath, but would also state and explain it in language intelligible to men of common experience." The question is not whether the courts will use the helps of science in the investigation of truth. There is no controversy on that score. The authorities are agreed that the truths of the exact sciences, the established facts of history, and computations from fixed data may be proved by the works of reputable authorities. *Worden v. Humeston & P. R. Co.* 76 Iowa, 310; *Gorman v. Minneapolis & St. P. R. Co.* 78 Iowa, 509; *Scagel v. Chicago, M. & St. P. R. Co.* 83 Iowa, 380; *Schell v. Plumb*, 55 N. Y. 598; *Mills v. Catlin*, 22 Vt. 98. This is on the ground that all men assent to their correctness. But medicine belongs to the class known as inductive sciences. The data are constantly shifting with new discoveries, and the conclusion which may be considered sound to-day is repudiated to-morrow. A medical work may be standard this year and obsolete next. The opinion of the same author changes in the different editions, owing to new discoveries and a better understanding of symptoms. The very best works, aside from observations, are largely made up of the opinions either of the author or of others compiled. It is a well-known fact that physicians after research and investigation often differ radically. It was said in *Clark v. State*, 12 Ohio, 483, 40 Am. Dec. 481, where the sanity of the defendant was involved, that "whenever they have enlisted on the side of either party, or of some favorite theory, and one portion of the profession is placed in array against another, the difficulties mentioned in the passage above quoted are greatly multiplied, and, however honest or renowned for professional character the witnesses may be, such will be the conflict of their testimony, in nine cases out of ten, that it will be utterly unsafe for a jury or court to follow or adopt the conclusions of either side." If those learned in medicine are often unable to determine from the books the nature and extent of injuries and diseases how shall the laymen be better informed by an examination of the books. The situation emphasizes the necessity of cross-examination and the use of an oath, not only that the theory contained in the books may be known and understood, but that practical skill may apply the science of medicine to each case. As said, not the use of the inductive sciences in the investigation of truths, but the manner—the vehicle, as it were—by which the results of research shall be conveyed to the court and jury is involved. We think the safer practice is to rely upon the testimony of living witnesses of the medical profession, who may bring the learning and research of the books within the comprehension of the jurors, and the truths of science to the facts in each particular case. Indeed, the advocates of a contrary rule gen-

erally admit the necessity of additional safeguards, which may only be provided by legislation. (See article by John Henry Wigmore in 26 Am. L. Rev. 390.) The language of the supreme court of Michigan in *People v. Hall*, 48 Mich. 482, 42 Am. Rep. 477, is so pertinent that we quote it with approval: "Scientific or expert testimony must be given by living witnesses who can be cross-examined concerning their means of knowledge, and can explain in language open to general comprehension what is necessary for the jury to know. The only legal reason for allowing the evidence of opinions is found in the presumption that an ordinary jurymen or other person without special knowledge could not understand the bearing of facts that need interpretation. Medical books are not addressed to common readers, but require particular knowledge to understand them. Everyone knows the inability of ordinary persons to understand or discriminate between symptoms or groups of symptoms, which cannot always be described to those who have not seen them, and which, with slight changes and combinations, mean something very different from what they mean in other cases. The cases must be very rare in which any but an educated physician could understand detached passages at all, or know how much credit was due to either the author in general or to particular parts of his book. If jurors could be safely trusted with the interpretation of such books, it is hard to see on what principle living witnesses would be required. Scientific men are supposed to be able from their study and experience to give the general results accepted by the scientific world, and the extent of their knowledge is tested by their personal examination. But the continued changes of view brought about by new discoveries in most matters of science, and the necessary assumption by scientific writers of some technical knowledge in their readers, render the use of such works before juries—especially in detached portions and selected passages—not only misleading, but dangerous. The weight of authority, as well as of reason, is against their reception." The exclusion of such evidence is approved on substantially the same grounds by the following among many authorities: *Johnston v. Richmond & D. R. Co.* 95 Ga. 685; *Fowler v. Lewis*, 25 Tex. Supp. 380; *Melvin v. Easley*, 46 N. C. (1 Jones, L.) 386, 62 Am. Dec. 171; *State v. O'Brien*, 7 R. I. 336; *Epps v. State*, 102 Ind. 539; *Boyle v. State*, 57 Wis. 402, 46 Am. Rep. 41; *Reg. v. Taylor*, 13 Cox, Crim. Cas. 77; *Ware v. Ware*, 8 Me. 42; *Tucker v. Donald*, 60 Miss. 480, 45 Am. Rep. 416; *Ordway v. Haynes*, 50 N. H. 159; *Huffman v. Click*, 77 N. C. 55; *Payson v. Everett*, 12 Minn. 217 (Gil. 137); *Collier v. Simpson*, 5 Car. & P. 73; *Harris v. Panama R. Co.* 3 Bosw. 7.

Our conclusion is somewhat opposed to language contained in *Bowman v. Woods*, 1 G. Greene, 441. In that case a physician was sued for malpractice in an accouchement case, and in defense set up that he had followed the botanic system of practising

medicine. It appears the plaintiff so knew in employing the defendant, and physicians were called to show that his treatment was in accordance with that system. They referred to certain standard works on botanic medicine, from which they claimed to have derived much of their professional knowledge. Such books were held admissible. If a physician is employed to treat a patient according to a certain system, and he does so, exercising ordinary skill therein, he has fulfilled his obligation. Now, in determining whether he has in fact followed that system, the books from which physicians of that school are shown to have derived their knowledge may be admissible, for these expound the very principles which he is alleged to have violated; and certainly, under such circumstances, the books themselves would be better evidence than quotations from them. In such a case a physician might refer to an author as justifying his conclusion that the treatment was or was not in accordance with his system, and as said in this case: "Being permitted to refer to and quote authors, we can see no good reason why they may not read the views and opinions of distinguished authors. The opinions of an author, as contained in his works, we regard as better evidence than the mere statement of those opinions by a witness, who testifies as to his recollection of them." The reasoning does not apply to a case where the school or system is not involved; for it is not the rule to permit the physician to quote from medical works. See *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41; *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Ashworth v. Kirtledge*, 12 Cush. 193, 50 Am. Dec. 178; *Marshall v. Brown*, 50 Mich. 148; *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70; *Collier v. Simpson*, 5 Car. & P. 73. It seems, however, that where the witness has referred to some medical authority to sustain the opinion he has expressed, that authority may be introduced in evidence for the purpose of contradicting him. *Pinney v. Cahill*, 48 Mich. 584; *Ripon v. Bittel*, 30 Wis. 619; *Bloomington v. Shrock*, 110 Ill. 219, 51 Am. Rep. 679. See, *contra*, *Davis v. State*, 38 Md. 15. In *State v. Howard*, 10 Iowa, 101, the only point decided is that a medical work cannot be taken to a jury room. In *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 280, 87 Am. Dec. 391, the Carlisle tables are admitted on the strength of the ruling in *Bowman's Case*. In *Brodhead v. Wiltse*, 35 Iowa, 420, it is held that § 4618 of the Code, adopted after the decision in the *Bowman Case*, was not restrictive in its effect, and rendered no evidence inadmissible which was admissible before, and that standard medical authorities are not the best evidence of what they teach, as was intimated in *Bowman's Case*. In *Quackenbush v. Chicago & N. W. R. Co.* 73 Iowa, 458, the objection to the extract offered was that it was too indefinite, and this was overruled. In *Peck v. Hutchinson*, 88 Iowa, 320, the objection was simply that the medical work offered was an old edition, and its introduction was held to be without preju-

dice. We do not think *Bowman's Case* decisive of the question now before us, and certainly no other can be so construed. In Alabama alone are medical works received in evidence. *Stoudenmeier v. Williamson*, 29 Ala. 558, followed in the subsequent cases of *Merkle v. State*, 37 Ala. 139, and *Bales v. State*, 63 Ala. 30. In the first of the above cases the issue involved the breach of warranty in the sale of a slave. That the objections to the admissibility of such evidence are not answered is evident from the following quotation, which is not inconsistent with the rule we adopt: "The brief period of human life will not allow one man, from actual observation and experience, to acquire a complete knowledge of the human system and its diseases. Professional knowledge is, in a great degree, derived from the books of the particular profession. In every step the practitioner takes, he is, perhaps, somewhat guided by the opinions of his predecessors. His own scientific knowledge is, from the necessities of the case, materially formed and molded by the experience and learning of others. Indeed, much of the knowledge we have upon all subjects, except objects of sense, is derived from books and our associations with men. It is the boast of this age of advancing civilization that, aided and facilitated by the printer's art, the collected learning of past ages has been transmitted to us. Shall we withhold the benefits of this heritage from the contests of the court-room? We think not."

The appellee insists these treatises were admissible under § 4618 of the Code, which is as follows: "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest therein stated." As said in *Brodhead v. Wiltse*, 35 Iowa, 429, the purpose of the legislature was to extend the rule of evidence rather than to restrict it. This extension is limited, however, by the words, "facts of general notoriety or interest therein stated." The supreme court of California in construing a statute identical with ours, except the last two words are omitted, used this language: "What are facts of general notoriety and interest? We think the terms stand for facts of a public nature, either at home or abroad, not existing in the memory of men, as contradistinguished from facts of a private nature, existing within the knowledge of living men, and as to which they may be examined as witnesses. It is of such public facts, including historical facts, facts of the exact sciences, and of literature or art, when relevant to a cause, that, under the provisions of the Code, proof may be made by the production of books of standard authority. . . . Such facts include the meaning of words and allusions, which may be proved by ordinary dictionaries and authenticated books of general literary history, and facts in the exact sciences, founded upon conclusions reached from certain and constant data, by processes too intricate to be elucidated by witnesses when on examination." *Gallagher v. Market Street R. Co.* 67 Cal. 13,

56 Am. Rep. 713. We think this the correct interpretation of this section, and that it does not authorize the admission of medical treatises. This identical question was before the United States circuit court of appeals for this circuit in *Union P. R. Co. v. Yates*, 49 U. S. App. 241, 79 Fed. Rep. 584, 25 C. C. A. 103, 40 L. R. A. 553, and in a clear and exhaustive opinion a like conclusion reached. See also *Van Skike v. Potter*, 53 Neb. 28. The exceptions to the other rulings on the admissibility of evidence are without merit. The other errors assigned are not likely to arise upon another trial.

Reversed.

Rehearing denied.

Lillie SEILER *et al.*

v.

ECONOMIC LIFE ASSOCIATION, *Appt.*

(105 Iowa, 87.)

1. The attachment to an insurance policy of a copy of the application, followed by the word "signed," but without the signature of the applicant, does not entitle the company to rely on any part of such application under Acts 18th Gen. Assem. chap. 211, § 2, providing that neglect to attach to insurance policies "a true copy" of any application shall preclude the insurer from pleading, alleging, or proving such application or any part thereof.
2. An insurance policy containing no stipulation as to suicide, taken out in good faith by the assured, will not be avoided as against the beneficiary named therein by the fact that the assured thereafter, while sane, deliberately and purposely took his own life.
3. An instruction in a suit on a life insurance policy that fraud is not to be presumed, but, like any other fact, may be proved by circumstances from which the inference of fraud is natural and "irresistible," is not ground for reversal because of the use of the word "irresistible" where it is so qualified by the instruction given immediately thereafter that its use could not have prejudiced appellant.
4. Error, if any, in refusing defendant in an action on a life insurance policy the right to open and close is not ground for reversal, where defendant was not thereby prejudiced in any manner.

(April 8, 1898.)

APPEAL by defendant from a judgment of the District Court for Clinton County in favor of plaintiffs in an action brought to enforce the amount alleged to be due on certain life insurance policies. *Affirmed.*

The facts are stated in the opinion.

Messrs. *Hayes & Schuyler*, for appellant:

The copy of the application attached was a true copy, within the meaning of the law. *MacKinnon v. Mutual F. Ins. Co.* 89 Iowa, 173.

NOTE.—The *Ritter Case*, above referred to as determined by the United States circuit court of appeals, is reported in 42 L. R. A. 583. 43 L. R. A.

Statutes should be construed according to their object or purpose, the evil to be remedied, or the right to be accomplished, and the effect of particular constructions, and the legislative intent found and effectuated from these standpoints.

Spencer v. State, 5 Ind. 41; *People, Wood, v. Lacombe*, 99 N. Y. 43; *United States v. Saunders*, 22 Wall. 492, 22 L. ed. 736; *Ryegate v. Wardsboro*, 30 Vt. 746; *Dilger v. Palmer*, 60 Iowa, 117; *Woods v. Mains*, 1 G. Greene, 275; *Haskel v. Burlington*, 30 Iowa, 232; *Stephens v. Davenport & St. P. R. Co.* 36 Iowa, 327; *Noble v. State*, 1 G. Greene, 325; *Tully v. Beaubien*, 10 Iowa, 187; *Williams v. Poor*, 65 Iowa, 410; *State v. Smith*, 46 Iowa, 670; *Crabell v. Wappello Coal Co.* 68 Iowa, 751; *Small v. Chicago, R. I. & P. R. Co.* 50 Iowa, 338; *State v. Botkin*, 71 Iowa, 87, 60 Am. Rep. 780; *Wheelock v. Madison County*, 75 Iowa, 147.

Only a substantially correct copy is required, and mere immaterial variances would not defeat the conditions in application.

Goodwin v. Provident Sav. Life Assur. Asso. 97 Iowa, 226, 32 L. R. A. 473.

A variance between an original and a copy is not fatal unless calculated to mislead or prejudice.

Union Furnace Co. v. Shepherd, 2 Hill, 414; *West v. Francis*, 5 Barn. & Ald. 737.

The intentional taking of his life by the assured, while sane, is a fraud upon the company, not the kind of death insured against or contemplated, and there is no liability in such contingency.

Ritter v. Mutual L. Ins. Co. 69 Fed. Rep. 505; *Moore v. Woolsey*, 4 El. & Bl. 243; *Hartman v. Keystone Ins. Co.* 21 Pa. 466; *Supreme Commandery K. of G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 600, 29 L. ed. 1000; *Ritter v. Mutual L. Ins. Co.* 28 U. S. App. 612, 70 Fed. Rep. 957, 42 L. R. A. 583, 17 C. C. A. 537.

Circumstantial evidence need not be strong any more than direct evidence. It is only necessary that it carries or induces belief or conviction, and to the extent of preponderance; and when any more than this is stated in this regard, the province of the jury is invaded.

Missouri, K. & T. R. Co. v. Kemp (Tex. Civ. App.) 30 S. W. 1117; 1 Greenl. Ev. 13th ed. § 13a; *Gay v. Gillilan*, 92 Mo. 250; *Ferris v. McQueen*, 94 Mich. 367; *Gumberg v. Treusch*, 103 Mich. 543; *Bush v. Delano*, 113 Mich. 321.

On rehearing.

A party claiming through another is estopped by that which is established as to that other respecting the same subject-matter.

Anderson, Dict. title, *Privity*; *Stacy v. Thrasher*, 6 How. 60, 12 L. ed. 343; *Morris v. State Mut. L. Assur. Co.* 183 Pa. 563; *McDonald v. Metropolitan L. Ins. Co.* (N. H.) 38 Atl. 500.

We were entitled to a charge that was correct in the statement of the law, and that left no doubt as to whether the jury could or might go astray.

Muldouney v. Illinois C. R. Co. 32 Iowa, 180; *Perry v. Dubuque S. W. R. Co.* 36 Iowa,

106; *Parkhill v. Brighton*, 61 Iowa, 108; *Hoben v. Burlington & M. River R. Co.* 20 Iowa, 562; *Eyser v. Weissgerber*, 2 Iowa, 463; *State v. Hartzell*, 58 Iowa, 520; *Moore v. Des Moines & Ft. D. R. Co.* 69 Iowa, 491; *Preston v. Dubuque & P. R. Co.* 11 Iowa, 15; *Williamson v. Reddish*, 45 Iowa, 550; *Van Tuyl v. Quinton*, 45 Iowa, 459.

Mr. Calvin H. George, for appellees:

A copy is a true transcript of an original record.

4 Am. & Eng. Enc. Law, p. 146; *Dickinson v. Chesapeake & O. R. Co.* 7 W. Va. 412.

A copy of a book must be a transcript of the language in which the conceptions of the author are clothed.

4 Am. & Eng. Enc. Law, p. 146; *Stowe v. Thomas*, 2 Wall. Jr. 565.

Where a writ of *habeas corpus* described the defendant by the addition of "gentleman," which word was omitted in the copy served, held that this was not a copy of the writ.

Cooke v. Vaughan, 4 Mees. & W. 69.

A copy of an application for insurance which does not contain a copy of the applicant's name appended thereto is insufficient within the meaning of the statute which precludes an insurance company from proving the contents of such application unless a copy is attached to and made a part of the policy.

Dunbar v. Phenix Ins. Co. 72 Wis. 492; *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 226, 32 L. R. A. 473.

An insurance policy shall be strictly construed against the insurer.

Miller v. Mutual Ben. L. Ins. Co. 31 Iowa, 210, 7 Am. Rep. 122; *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 226, 32 L. R. A. 473.

In the absence of a provision in the policy of the insured suicide will not affect the validity of the policy.

13 Am. & Eng. Enc. Law, p. 642; *Niblack, Ben. Soc.* 2d ed. p. 305; *Mills v. Rebstock*, 29 Minn. 380; *Fitch v. American Popular L. Ins. Co.* 59 N. Y. 573, 17 Am. Rep. 372; *Darrow v. Family Fund Soc.* 116 N. Y. 537, 6 L. R. A. 495.

Fraud will not be presumed, but must be proved by the party charging it, and if the facts upon which the charge is predicated are, or may be, consistent with honesty and purity of intention then the charge of fraud will fail.

Kenosha Stove Co. v. Shedd, 82 Iowa, 540; *Prichard v. Hopkins*, 52 Iowa, 122; *Hamilton v. Bishop*, 22 Iowa, 211; *Kansas Mill Owners' & Mfrs. Mut. F. Ins. Co. v. Rammeisberg*, 58 Kan. 531; 2 Rice, Ev. (Civil) p. 97; *Teakle v. Bailey*, 2 Brock. 43; *Bowen v. Evans*, 2 H. L. Cas. 257; *Pike v. Vigers*, 2 Dru. & W. 267; *Kerr, Fraud & Mistake*, p. 283; *Pool v. Ellison*, 50 Hun, 108; *United States v. Hancock*, 133 U. S. 193, 33 L. ed. 601; *Burnham v. Noyes*, 125 Mass. 85.

Waterman, J., delivered the opinion of the court:

1. The undisputed facts in the case are that the defendant company issued to one Joseph Seiler the two policies in suit, numbered, respectively, 17,146 and 17,147. By these policies the life of said Seiler was insured for 43 L. R. A.

the benefit of the plaintiffs in the sum of \$2,000; each policy being for the sum of \$1,000. Both of these policies were issued upon a single application. This application was signed, "Joseph Seiler;" and a copy thereof, with the exception that the signature was omitted, and in its place appeared the word "Signed," was attached to policy No. 17,146. No copy or purported copy of the application was attached to policy No. 17,147, but there was an indorsement thereon in these words: "For copy of application, see policy No. 17,146, issued to same party." The policies were taken out on the 31st day of August, 1895; and, on the 7th day of October following, Seiler committed suicide. The policies contained no provision in relation to suicide, but there was this clause in the application, "I also warrant and agree that I will not die by my own act, whether sane or insane, during the period of three years following the date of issue of the policy for which application is hereby made."

2. Defendant, in its answer, sets up, in one paragraph, that Seiler, while in a sound mental condition, took his own life. This was demurred to by plaintiffs, and the demurrer sustained, to which defendant excepted. No question is made as to the propriety of thus attacking by demurrer a paragraph in pleading. It was alleged by defendant in another paragraph of its answer that Seiler, with the intent to defraud defendant company, procured it to issue said policies; he at the time intending to take his own life, as in fact he shortly thereafter did. This matter was also assailed by a demurrer, which was overruled. Evidence was introduced upon this branch of the case, and this single issue of fact was submitted to the jury.

3. The appellant assigns fifty-nine errors. We think the matters can be condensed under five heads: (1) Was the application a part of policy No. 17,147, to which neither a copy nor a purported copy was attached? (2) Was it a part of policy No. 17,146, to which was attached a copy that omitted the signature of the applicant? (3) Will the suicide of the assured operate to avoid, as against a beneficiary named therein, a policy which does not in terms except death in that manner from the risk assumed? (4) Did the trial court err in its instructions? (5) Had the appellant the right to open and close before the jury?

4. Taking up the questions in the order of stating them, we shall devote no time to the first, for it will be disposed of by what we have to say under the next head.

5. Attached to policy No. 17,146 was a copy of the application made by the assured, except, as already said, that the signature of the applicant was omitted, and in the space his name appeared in the original was the word "Signed." The trial court refused to permit the introduction in evidence of this application, when offered by defendant as part of the contract. This ruling, we take it, was based on the provisions of § 2, chap. 211, Acts 18th Gen. Assem., the material portions of which we set out: "All insurance companies or associations shall, upon the is-

sue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representations of the assured, which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging, or proving such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy. . . . This section has often been construed. For a quite recent exposition of its meaning we refer to *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 226, 32 L. R. A. 473. It is argued on behalf of the appellant that all of the statements and representations made by the assured were in the copy that was attached to the policy, and that he could not have been prejudiced by the omission of his signature, for he must have known that he signed this original. But it seems to us that the very purpose of the statute was to avoid, so far as possible, any dispute as to the assured's knowledge of the contract. The requirement is that a copy of the application shall be attached. We do not understand this to call for a fac-simile, but it certainly demands at least a substantial reproduction of the instrument. The signature is an essential part of the application, and all that is essential in the original should appear in the copy. It will be noted that in the alleged copy it is not stated by whom the original is signed. In Wisconsin they have a statute which is the counterpart of the one under consideration; and in *Dunbar v. Phenix Ins. Co.* 72 Wis. 492, it was held that a copy of the signature of the applicant was essential, in order to make a copy of the application, within the meaning of the law. The case was, in its facts, like the case at bar, except that the blank for the signature in the copy contained nothing to indicate that any signature was appended. The court, in speaking on the subject, says: "We are of the opinion that the copy of the application attached to the policy, not having the copy of the name of the applicant appended thereto, cannot be said to be a copy of such application, within the meaning of the statute. . . . The signature is the thing which gives force to the application, and, when signed with knowledge of its contents, is conclusive upon the insured. . . . We think that the signature of the party to an instrument which receives its vitality solely from such signature is such a substantial part of it that a copy of it must contain such signature." As having some bearing, we also cite *Kyser v. Kansas City, St. J. & C. B. R. Co.* 56 Iowa, 207. The trial court was right in holding that the application in this case was no part of the contract, and that the statements therein could not be given in evidence.

6. The defense of suicide was set up in two forms. In one, as we have said, it went to the jury. The paragraph of the answer 43 L. R. A.

to which the demurrer was sustained was as follows: "That the said Joseph Seiler on or about the 7th day of October, 1895, and while in sane mental condition, and able to understand the moral character and consequences of his act, committed suicide, and intentionally and purposely killed himself, by shooting. The question thus presented by the ruling on the demurrer is: If a policy of insurance on life, containing no stipulation as to suicide, is taken out in good faith by the assured, will it be avoided, as against a beneficiary named therein, by the fact that the assured thereafter, while sane, deliberately and purposely took his own life. The authorities are not many on the subject, and they are not seriously in conflict. While there are a number of cases in which something has been said upon this matter in the way of dicta, there is but one in which it has been expressly decided that the suicide of the assured, if sane, will avoid a policy that contains no provision of forfeiture in such case; and that is *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, decided at the October term, last, of the Federal Supreme Court. The opinion in this case in the circuit court of appeals appears in 28 U. S. App. 612, 70 Fed. Rep. 954, 17 C. C. A. 537, 42 L. R. A. 583. This last citation is given because we shall have occasion to refer to this opinion in the course of what we shall say. It was held in the *Ritter Case* that there could be no recovery on a policy of insurance by the executor of one who, while sane, intentionally took his own life, even though the policy contained no clause of forfeiture because of such act. We think that case is readily distinguishable from the case at bar. In the *Ritter Case* the action was brought by the personal representative of the assured, whose claim had to be made through the wrongdoer, while here the suit is instituted by beneficiaries named in the policy, and who claim in their own right. An investigation will disclose that the distinction we make is material, and supported by authority. In *Moore v. Woolsey*, 4 El. & Bl. 243, the policy contained a stipulation avoiding it, as far as regarded the executors and administrators of the assured, if he died by his own hand, but leaving it in force to the extent of any interest acquired by a third person. The plea was that the assured had committed suicide. Replication that one Kettle, before the death of the assured, had acquired by assignment an interest in the policy. Upon these issues, Lord Campbell, delivering the opinion, said: "If a man insures his life for a year, and commits suicide within the year, his executors cannot recover upon the policy, as the owner of a ship, who insures her for a year, cannot recover upon the policy if within the year he causes her to be sunk. A stipulation that in either case upon such an event the policy should give a right of action would be void." This is the language quoted in the *Ritter Case*, and it was *obiter* only. But Lord Campbell said something more, and something not only pertinent to the issues before him, but that has direct application to the matter we are considering. He continues:

"But, where a man insures his own life, we can discover no illegality in a stipulation that if the policy should afterwards be assigned, bona fide, for a valuable consideration, or a lien upon it should afterwards be acquired, bona fide, for valuable consideration, it might be enforced for the benefit of others, whatever may be the means by which death is occasioned. . . . The supposed inducement to commit suicide under such circumstances cannot vitiate the condition, more than the inducement which the lessor may be supposed to have to commit murder should render invalid a beneficial lease granted for lives. When we are called upon to nullify a contract on the ground of public policy, we must take care that we do not lay down a rule which may interfere with the innocent and useful transactions of mankind." If public policy does not stand in the way of a recovery by an assignee, we can discern no reason why it should in the case of a beneficiary named in the contract. It may be said that the assignee spoken of is one whose claim rests upon a consideration paid. To this we would say that the claim of the beneficiary is also based upon a consideration paid by the assured. If it should further be said that public policy does not bar a recovery by the assignee because the interests of creditors furnish little or no motive for the self-destruction of the assured, our answer would be this: The motives for suicide are manifold and varied. An inquiry as to what inducement is most likely to impel one to the act is profitless, for any rule of law that would prevent a recovery by these plaintiffs would operate in like manner against a mere creditor, if he were the beneficiary named. And, further, we might call attention to the *Ritter Case*, in which the assured admittedly sacrificed his life for the benefit of his creditors. In the opinion in the *Ritter Case* in the circuit court of appeals it is said: "In the cases brought to our attention where suicide during sanity, by the person whose life was insured, was held not to be a valid defense, the policy was issued for the benefit of some other person, or an independent interest, by assignment or otherwise, had been acquired by a third person." Here is the distinction plainly made. So, also, in the opinion of Mr. Justice Harlan on appeal, we think the same idea is expressed. In commenting on an expression used in another case, he says: "This observation . . . was irrelevant to the case before the court, and cannot be regarded as determining the point in judgment. If it was meant there could be a recovery by the personal representative . . . we cannot concur in that view." Another and a convincing reason for thinking that the doctrine announced in the *Ritter Case* was not intended to go further than to deny a right of recovery to the personal representatives of the assured is that no one of the several cases in which beneficiaries named in the contract have been held entitled to recover was mentioned in that opinion. We shall now refer to these cases: *Fitch v. American Popular L. Ins. Co.* 50 N. Y. 559, is the first. Suit was 43 L. R. A.

brought by the widow, to whom the policy was payable. The contract contained no clause avoiding it in case of suicide by the assured. One defense tendered was that the assured took his own life. Evidence to sustain it was excluded by the trial court. In affirming this ruling the court of appeals says: "The policy contained no stipulation that it should be void in case of the death of the insured by suicide. It was not taken out for the benefit of Fitch, but of his wife and children. Although they were bound by his representations, and any fraud he may have committed in taking out the policy, the policy having been obtained through his agency, yet they were not bound by any acts or declarations done or made by him after the issue of the policy, unless such acts were in violation of some condition of the policy." In *Darrow v. Family Fund Soc.* 116 N. Y. 537, 6 L. R. A. 495, the plaintiff was the beneficiary under the contract. The assured committed suicide. There was a provision in the policy that it should "be void if the member herein shall die in consequence of a duel, or by the hands of justice, or in violation of, or attempt to violate, any criminal law of the United States, or of any state or country in which the member herein named may be." Held that, suicide not being a crime in New York, the condition of the policy was not violated, and the plaintiff could recover. *Kerr v. Minnesota Mut. Ben. Asso.* 39 Minn. 174, is a case similar in principle to the last. The same holding in favor of a beneficiary has been made by this court in *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 226, 32 L. R. A. 473. The policy sued upon provided for its forfeiture in the event of suicide within two years, and by its express terms it was incontestable after that time. After the lapse of that period the assured took his own life. The policy was issued to the wife. In an action by her, we held she could recover. Now, if suicide is a risk that the company is forbidden, by considerations of public policy, to take, it could not have been held as within the agreement not to contest; for, if a contract to insure as against the risk of suicide is void, the waiver here must have been invalid, and the defense should have been sustained. The question was brought directly to the attention of the court in argument, as appears from the language of the opinion. These are the cases which we have been able to find. We wish now to add a few words on principle, by way of emphasis of a thought already expressed. It is not the wrongdoer who makes claim here, nor any representative whose rights are to be measured by those of the wrongdoer, but persons who acquired an interest at the time the policy was taken out, and who are not in any way responsible for the loss under it. The defendant might well have guarded against this contingency in its contract. Not having done so, we think it is now in no position to complain.

7. Error is assigned on the refusal of the trial court to give instructions asked by defendant. Fifteen instructions were asked. We need not set them out. We find that the charge, as given, fully covered the case.

8. Instruction No. 7 of the court's charge is complained of. In this paragraph the jury was told that fraud was not to be presumed, but, like any other fact, might be proved by circumstances "from which the inference of fraud is natural and irresistible." It is the use of the word "irresistible" to which objection is made. The word is certainly not well chosen, but it is qualified to such an extent by the instruction next following that its employment could not have prejudiced defendant. We might very well put our rulings on the instructions on another ground. We have carefully read the testimony offered by defendant to establish

the fact that, at the time he took out these policies, Seiler intended to commit suicide, and thus defraud defendant; and we find nothing in it to support any such claim. The trial court might with propriety have taken the case from the jury.

9. What has just been said disposes of defendant's contention that it was entitled to open and close. If error was committed by the trial judge in this matter,—which we by no means hold,—it was wholly without prejudice.

The judgment below will be affirmed.

Rehearing denied.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, *Appt.*,
v.

COMMONWEALTH of Kentucky.

(.....Ky.....)

1. The omission from Stat. § 820, of the proviso found in Const. § 218, that the railroad commission may authorize a less charge for longer than for shorter distances, on application by the carrier, does not make the statute inconsistent with the Constitution, as the proviso is self-executing and the statute expressly provides that the commission may exonerate a carrier from its provisions even without previous application.
2. An allegation that a railroad commission has not authorized a carrier to charge less for a longer than for a shorter distance is a sufficient statement that the commission has refused to exonerate the carrier from Stat. § 820, after investigation of the complaint, if such allegation is necessary.
3. An indictment for charging a greater rate for transportation than for a longer distance over the same line of road, including the shorter transportation, "namely, from Pittsburg to Louisville and to Elizabethtown," is not demurrable as charging two distinct offenses.
4. Competition in transportation does not prevent "substantially similar circumstances and conditions," within the meaning of Const. § 218, and Stat. § 820, but those words relate to the actual cost of transportation.

On rehearing.

5. An argument drawn from hardship or inconvenience should have due weight with the court in determining the true construction of a statute which is doubtful or obscure, but never so much as to induce a construction that is absurd, defeats the evident object in view, or involves a stultification of those who made it.
6. That a construction of a statute regulating railroad rates in such a

manner as to deny power to make special rates to competitive points will injure an industry of the state will not require an opposite construction if the effect of the latter might be injurious to other industries and interests connected or identified with non-competitive points.

7. The court cannot interfere with the refusal of the railroad commission, under Const. § 218, to allow a less charge for a longer than for a shorter haul, as it is permitted to do in special cases by that section.

On motion to modify.

8. An indictment for unjust discrimination by a carrier is fatally defective under Const. § 217, providing for the punishment of such discrimination unless it charges that it was knowingly and wilfully committed.
9. That freight for which different charges were made for transportation between the same points was of the same kind or class must be stated in an indictment for unjust discrimination in rates under Const. § 215.

(*DuRelle and Burnam, JJ., dissent from propositions 1 to 7.*)

(June 23, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for Marion County convicting it of violating the statutory and constitutional provisions against charging greater compensation for transporting property for shorter than for longer distance over the same line. *Reversed.*

The facts are stated in the opinions.

Messrs. William Lindsay, J. W. Alcorn, Walker D. Hines, Lisle & MeChord, H. W. Bruce, and Edward W. Hines for appellant.

Mr. H. W. Rives for appellee.

Lewis, Ch. J., delivered the opinion of the court:

Appellant was, in the Marion circuit court,

NOTE.—The above case appears to be the first to discuss the effect of a state statute including a long and short haul provision similar to that in the Act of Congress to Regulate Commerce. As clearly appears by the opinion of the court, the present decision adopts a construction different from that which the Federal courts put on the act of Congress.

ferent from that which the Federal courts put on the act of Congress.

For legislative power to fix tolls, rates, or prices, see *note* to *Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 33 L. R. A. 177.

upon recommendation of the state railroad commission, indicted for the offense of charging greater compensation for transporting property for a shorter than for a longer distance, the particular circumstances being thus stated: "The defendant, . . . operating a line of railroad in this state extending from Pittsburg through said county of Marion and city of Lebanon, on September 8, 1894, . . . did transport a car load of coal from Pittsburg to Lebanon on said line for J. M. Shreve, and unlawfully charged and received from him as compensation therefor \$40.30, being at the rate of \$1.55 per ton, when for transportation of a similar car load of coal under similar circumstances and conditions for a longer distance over the same line of road, namely, from Pittsburg to Louisville and to Elizabethtown, in the same direction, the distance from Pittsburg to Lebanon being shorter, and included within the longer from Pittsburg to Louisville and to Elizabethtown, said defendant at said time did charge and receive less compensation than \$1.55 per ton from various persons at Louisville and Elizabethtown; defendant at said time not having been authorized by the railroad commission of this commonwealth to charge less for a longer than for a shorter distance for transportation of coal," etc. As the determination of the question of sufficiency of the indictment, also of other legal questions that arose during trial of this case in the lower court, depend upon the construction to be given § 218 of the Constitution and § 820, Ky. Stat., they are here copied entire:

"Sec. 218. It shall be unlawful for any person or corporation, owning or operating a railroad in this state, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier or person or corporation owning or operating a railroad in this state to receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the railroad commission, such common carrier or person or corporation owning or operating a railroad in this state, may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such common carrier or person or corporation owning or operating a railroad in this state may be relieved from the operations of this section."

"Sec. 820. If any person owning or operating a railroad in this state, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than

for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fined not less than \$100 nor more than \$500, to be recovered by indictment in the Franklin circuit court, or the circuit court of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the commission to investigate the grounds of complaint, and if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission, and after such order the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant, and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and, after such order, it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the commission shall use proper efforts to see that such company or carrier is indicted and prosecuted."

It is made ground of demurrer that § 820, under which the indictment was found, is inconsistent with § 218, and therefore invalid, because there is omitted the proviso contained in the latter. But, as that proviso is self-executing, and gives to the carrier immediate right to make the application therein mentioned, and to the commission full power to act upon it when made, iteration of it in the statute was needless. Certainly, § 820 does not at all interfere with the exercise of either the constitutional right of the carrier or constitutional power of the commission. On the contrary, it contains the additional provision that, even without previous application by the carrier, the commission may, after investigation, made upon complaint by another of violation of that section, exonerate such carrier from operation of its provisions.

Another ground of demurrer is that the indictment embraces two distinct offenses, "one the charging of a less rate to Louisville than to Lebanon, and the other of charging a less rate to Elizabethtown than to Lebanon." A statement in the indictment that greater compensation in the aggregate was charged and received from J. M. Shreve for trans-

portation of coal from Pittsburg to Lebanon than was charged and received from various persons for transporting coal from Pittsburg to Louisville and Elizabethtown would have been more apt; but the statement as made does not vitiate the indictment, or involve accusation of more than one offense. Neither § 218 nor § 820 was intended to fix or limit the general rate of compensation for transporting persons and property, but specially to inhibit greater or as great compensation in the aggregate for shorter as for longer distances. So, whatever may have been the amount actually charged and received for transportation of coal from Pittsburg to Louisville and Elizabethtown, the alleged offense was not, and could not be, completed until there was charged and received from J. M. Shreve greater compensation for transporting coal from Pittsburg to Lebanon, which consisted of a single act, and involved a single offense. The Criminal Code requires an indictment to describe and identify an offense in terms so direct and certain as to apprise the defendant of the accusation on which he is to be tried, and to make the verdict and judgment rendered available as pleaded in bar of a subsequent prosecution for the same offense. It was therefore necessary in the present indictment—as was done—to designate the person to the wrong and injury of whom the alleged offense was committed, and to state that the recited amount of compensation charged and received from him, on or about a specified date, for transportation of coal the described shorter distance, was greater in the aggregate than the amount then being charged and received from various or divers persons for transportation of same kind and quantity of coal the described longer distance. But it was not necessary to state the precise amount charged and received for such longer distance, because the fact it was exceeded by or was less than the specified amount charged and received in the particular instance for the shorter distance had been already sufficiently alleged. Nor was it necessary to designate any particular person or persons, probably numerous, than whom Shreve had been charged and required to pay greater compensation; for § 218 was intended to prevent discrimination rather between localities than between persons. So, in order to convict of an offense like the present it suffices to state in the indictment that the specified amount charged or received for the shorter distance was greater than that charged or received from persons generally or usually for the longer distance, and to support the allegation by the carrier's published schedule of rates, or other competent evidence of the fact.

There was also a motion made in the lower court to set aside the indictment because it does not contain a statement that the railroad commission, after investigation of the complaint that § 820 had been violated by appellant, made the required order refusing to exonerate it from operation of its provisions. Assuming, for the present, that such investigation and order following it must, in every case, precede an indictment under that 43 L. R. A.

section, we think the allegation made on the subject sufficient, and consequently the motion was properly overruled.

The facts stated in the indictment as constituting the offense charged were on the trial proved or admitted. But all testimony offered for the purpose of showing existence of competition at Louisville and Elizabethtown between carriers of coal, or other facts affording reason or excuse, irrespective of cost of service, for charging or receiving greater compensation in the aggregate for the shorter than longer distance over appellant's road, was excluded; and all instructions to the jury based upon such facts were refused. The following instruction, showing the construction put upon § 218 by the lower court, was given: "That in determining whether two or more car loads of coal are transported under substantially similar circumstances and conditions when one is transported for a longer distance over the same line of road than for a shorter distance in the same direction, the shorter distance being included within the longer distance, they [the jury] should consider such circumstances and conditions as relate to the nature and character of the service by the defendant in the actual handling and movement of the coal transported." Section 218, as will be observed, does not prohibit less proportional compensation being charged or received for the longer than shorter distance, but makes it an offense to charge or receive, under substantially similar circumstances and conditions, greater compensation in the aggregate for the shorter than for the longer distance. It is proper here to consider the following part of that section: "But this shall not be construed as authorizing any common carrier or person or corporation owning or operating a railroad in this state to receive as great compensation for a shorter as for a longer distance." That particular provision, we think, was not intended to neutralize, nor could it very materially affect, what precedes it; for the difference between greater or as great compensation charged or received for transportation would ordinarily be too minute for calculation. The main inquiry in this case is whether the words "substantially similar circumstances and conditions" were intended to relate to the actual cost of transportation, estimated with reference to necessary outlays and expenditures in carrying passengers and loading, moving, and unloading freight trains, or to competition at particular places in the business of transportation, or other conditions affecting policy or convenience of the carrier only. If attention be given alone to the grammatical construction of § 218, the words in question might possibly be made to apply in either or all the conditions mentioned. But attending to the sense of that section, which in character is both remedial and prohibitory, or restraining, and manifestly intended to conserve mutuality of rights and duties between parties to the contract of carrying, and prevent wrong by one to the other, the natural conclusion would be the words were designed to

relate exclusively to the cost of service, for with that is the general public as well as the carrier concerned. And that legislative power exists to regulate conduct of the business of a railroad corporation, including charges for transportation, so that those dealing with it be not wronged or oppressed, is unquestionable; for the chartered franchise and privileges of such corporation are always, and can be granted only, in consideration of public service to be rendered; and, of course, upon implied reservation of legislative power, to inhibit at any time unjust discrimination between persons and localities. But as the section seems to be not so plain to counsel as to preclude discussion, we will look to the reason for its adoption, —always a sure guide to the meaning of lawmakers. As there existed in neither the former Constitution nor statutes enacted under it any provision of the character, scope, or purpose of § 218, it was obviously adopted to prevent continuance of what was deemed a wrong hitherto committed with impunity by reason of a defect of the law. Therefore, the nature of that wrong being ascertained, as may be readily done by recurring to facts of common occurrence, and too widely known to escape judicial notice, that interpretation should be given which will “most surely advance the remedy and suppress the mischief.” For many years prior to the adoption of the present Constitution there had been general and unavailing complaint of discrimination by railroad companies of this state, respecting compensation charged and received, in favor of localities where existed competition in the business of transportation, and of comparatively excessive compensation being exacted at localities where, because there was not such competition, shippers were at the mercy of the carriers. But it was argued substantially there, as here and now, that competition made such difference of circumstances and conditions as justified the discrimination complained of. The legislature did not attempt to give relief. The court, in absence of an express statute on the subject, and as long as the amount of compensation charged or received was within the charter limit, could not intervene to prevent a railroad company adopting, as matter of assumed business policy, rates to meet competition. There was no complaint of discrimination between places on the same line of railroad where there was not competition. And, if there had been, the court was, upon common-law principles applicable to common carriers, empowered to prevent it, because such discrimination would have been wanton, and without excuse of business policy or necessity. It is thus made manifest the object of § 218 was to remedy a defect of the law by thereafter disallowing competition, or other considerations affecting the carrier only, not the general public, as excuse for charging or receiving greater compensation in the aggregate for transporting persons or property in this state the shorter than longer distance. And it is based upon two propositions: First. That the actual cost of transportation is

not generally greater for the shorter than longer distance; therefore to charge and receive greater compensation in the aggregate for the former than the latter is unfair and oppressive. Second. That it is contrary to usual business methods, and not to be assumed, that a railroad company would, even under stress of competition, reduce rates of compensation for transportation to and from competitive points so low as not to leave a reasonable margin of profit; therefore an excess of aggregate compensation for transportation to and from noncompetitive points is generally an unjust and inexcusable extortion. So, if competition be held to constitute, in the meaning of § 218, the real difference of “circumstances and conditions,” the section, though deemed of such urgent importance as to be made part of the organic law, would be scarcely effectual for any purpose whatever; for there could not be an approach to similarity, but necessarily a complete dissimilarity, of circumstances and conditions of the transportation of persons and property the longer distance, nearly always to and from a place where there is competition, and the shorter distance nearly always to and from a place where there is not competition. Consequently, discrimination in aggregate compensation between such localities could still be made at will of the carrier, and without legal restraint.

It is further contended that a railroad company should be permitted to vary rates of compensation regardless of cost of service, and even to the extent of arbitrary discrimination between localities, in order to develop resources of the state, and at the same time increase its own business. Due estimate should be put upon advantages to society that have resulted from the construction and will continue to result from the extension of railroads; and due regard should be had to the rights and interests of carriers as well as of those who patronize them. But such considerations do not justify a wrong interpretation, and consequent defeat, of the main purpose of § 218. After all, the best guaranty of success by the company and benefit to the general public from the operation of railroads is to abide by the law as it is, and deal fairly, justly, and impartially with persons and localities. It is true that for well-known reasons there cannot be exact similarity of circumstances and conditions as respects proportional cost of transportation the longer and shorter distance. But there is ordinarily a substantial similarity as respects the actual cost. Hence § 218 prohibits, not greater proportional, but greater compensation in the aggregate, being charged or received for the shorter than longer distance. However, the framers of the Constitution, aware of the impracticability of fixing unchangeably relative amounts of compensation to be charged and received, or rules applicable in every case to the complicated and varying business of railroads, and of the injustice that might sometimes result from doing so, invested the railroad commission with power to authorize, in special cases, a railroad company to charge less for

the longer than shorter distance, and to prescribe from time to time the extent to which such company may be relieved from operation of § 218. And § 820, enacted in harmony with § 218, provides that, after an order of the commission exonerating a railroad company from operation of its provisions as to any special violation complained of, the company shall not be prosecuted on account of it. With such order the court cannot interfere. But an order of the commission refusing to exonerate makes the company liable to prosecution; and the court thus acquiring jurisdiction must, of course, determine the proper construction of the two sections, for upon that, the facts being found, depends guilt or innocence in each case. As already indicated, we think the lower court did not err in giving the instruction referred to, nor in excluding all evidence having no bearing upon the cost of transportation.

Counsel have cited *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405; and *Interstate Commerce Commission v. Alabama Midland R. Co.* (recently decided by the Supreme Court of the United States) 168 U. S. 144, 42 L. ed. 414, in which, construing § 4 of the Interstate Commerce Act substantially like § 218, it was held that, when difference of rates between two points of shipment is the ground of complaint, competition is a leading element to be considered; though in each case the court was divided. The Interstate Commerce Act was intended to operate, not within limits of a state merely, but between and through states. And, whatever construction that high tribunal may put upon § 4 of that act, we, in exercise of the province belonging to the supreme court of each state to construe its own laws, have endeavored to so construe § 218 as not to kill it; and, to strengthen the belief we have not misconstrued it, part of the dissenting opinion of Justice Harlan in the last-named case is here quoted: "Besides, the acts of Congress are now so construed as to place communities on the lines of interstate commerce at the mercy of competing railroad companies engaged in such commerce. The judgment in this case, if I do not misapprehend its scope and effect, proceeds upon the ground that railroad companies, when competitors for interstate business at certain points, may, in order to secure traffic for and at those points, establish rates that will enable them to accomplish that result, although such rates may discriminate against intermediate points. Under such an interpretation of the statutes in question, they may well be regarded as recognizing the authority of competing railroad companies engaged in interstate commerce—when their interests will be subserved thereby—to build up favored centers of population at the expense of the business of the country at large. I cannot believe that Congress intended any such result, nor do I think that its enactments, properly interpreted, would lead to such a result."

The judgment is affirmed.

Du Relle, J., dissenting:

The provisions of law involved in this case are § 218 of the Constitution and § 820 of the Kentucky Statutes, as follows:

Const. § 218: "It shall be unlawful for any person or corporation owning or operating a railroad in this state, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier or person or corporation owning or operating a railroad in this state to receive as great compensation for a shorter as for a longer distance; provided that upon application to the railroad commission such common carrier or person or corporation owning or operating a railroad in this state may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier or person or corporation owning or operating a railroad in this state may be relieved from the operations of this section."

Ky. Stat. § 820: "If any person owning or operating a railroad in this state, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin circuit court, or the circuit court of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the commission to investigate the grounds of complaint, and if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and, after such order, the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof

delivered to the complainant, and to the railroad or common carrier, and the same shall be published as a part of the report of the commission; and, after such order, it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the commission shall use proper efforts to see that such company or carrier is indicted and prosecuted."

Without taking time in considering the question whether the statute is in conflict with the constitutional provision, in that it makes no provision for application to the railroad commission by the carrier for authority to charge less for the longer than the shorter haul in special cases, which was the evident intention of the Constitution, but provides only for a complaint against the carrier for a violation of the provisions of the statute, or the question whether the indictment is defective, I wish to call attention to the fact that § 218 of the Constitution is taken almost verbatim from § 4 of the Interstate Commerce Act. Our constitutional convention adopted the long and short haul section at its session closing April 11, 1891. At the time of its adoption into our Constitution, that section had been construed by two United States circuit courts and by the Interstate Commerce Commission, it being held that "substantially similar circumstances and conditions" did not mean solely the cost of carriage, but included also real competition, which the carrier might meet by reduction of rates to the competitive point, without making application to the commission for authority. I attach little importance to the extracts given in the arguments from the constitutional convention debates as a means of ascertaining the intent of the provisions adopted; but in this case those extracts show that the attention of the convention was called to the fact that under the Interstate Commerce Act a less charge for the longer haul was permitted when there was river competition at the more distant point. Under the well-settled rule of construction, the convention must be assumed to have had those constructions in mind when they adopted the section. Those constructions have been followed with strict uniformity in this country, to say nothing of the English authorities, the cases adversely decided having been reversed, with an apparent exception in the *Social Circle Case*. That case was decided by the commission upon the ground, in substance, that there was no competition. The circuit court dismissed the bill on the ground that the transportation for the two hauls was not over the same line. The circuit court of appeals reversed the circuit court without delivering an opinion, and the Supreme Court (162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391) held the decision of the question unnecessary, and declined to decide it.

In the case at bar it was shown that there was a substantial difference in the mileage cost of transportation of coal from Pitts-

burg, Kentucky, to Louisville, as compared with its transportation to Lebanon, for the reason that the greater volume of traffic in coal and other freight to Louisville made it possible to haul the Louisville freight in through trains, loaded to their full capacity, and without delay, while the traffic to Lebanon, by reason of its smaller volume, was necessarily transported in local trains, which is more expensive. It was also shown that the coal destined to Elizabethtown could be handled in the through trains as far as Lebanon Junction, which was the end of the division, and only 12 miles from Elizabethtown. The appellant company was not permitted to prove that the transportation of coal from Pittsburg and all the mining section of Southeastern Kentucky to Louisville was not only affected, but controlled, by competition at the latter point, which did not exist at all at Lebanon. This competition was from West Virginia and Pennsylvania coal brought in barges down the Ohio to Louisville,—by the cheapest known method of transportation. The cheapness of its transportation gave Pennsylvania and West Virginia coal control of the Louisville market, and no other coal could be sold there unless the transportation rates were made so low as to enable it to compete with the coal from those states. Neither the Southeastern nor Southwestern Kentucky coal fields could reach the Louisville market at all but for the very low rates of transportation given to Louisville over the Kentucky railroads; and if those rates cannot be given, Louisville must depend entirely for coal upon West Virginia and Pennsylvania, or upon the mines of other states, which, under the Interstate Commerce Act, can obtain low through rates to competitive points across this state. No injustice from the low through rates to Louisville resulted to Lebanon or other intermediate points, for the rates to those points would have been the same, and the cost of coal probably higher, if the Southeastern Kentucky coal could not have been carried to Louisville. The majority opinion is, in effect, that cost of transportation is the only circumstance or condition that can be considered. If that be so, it is strange that more apt words were not used in the Constitution. The words used are certainly susceptible of a far wider significance. In my view, the section quoted left the railroads in the same condition, and with the same rights, as before its adoption, except in so far as something is expressly forbidden to be done. As said by Judge Jackson (then circuit judge) in a case afterwards affirmed by the supreme court, and twice subsequently quoted with approval (162 U. S. 184, 197, 40 L. ed. 935, 939, 5 Inters. Com. Rep. 391): "Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate so as to give undue preference or advantage, or subject to undue prejudice or disadvantage, persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at common law, free to make special contracts looking to the

increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound and adopted in other trades and pursuits." *Interstate Commerce Commission v. Baltimore & O. R. Co.* 43 Fed. Rep. 37, 3 Inters. Com. Rep. 192. In the case of *Missouri P. R. Co. v. Texas & P. R. Co.* 31 Fed. Rep. 862, it was said: "Nor can it well be denied that, as between the short and long haul, competition may exist to that extent that what would otherwise be similar circumstances and conditions will be dissimilar circumstances and conditions." In *Ex parte Koehler*, 31 Fed. Rep. 315, 1 Inters. Com. Rep. 317, the court said: "Freight carried to or from a competitive point is always carried under 'substantially dissimilar circumstances and conditions' from that carried to or from noncompetitive points. In the latter case the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than a short one. When each haul is made from or to a noncompetitive point, the effect of such discrimination is to build up one place at the expense of the other. Such action is wilfully unjust, and has no justification or excuse in the exigencies or conditions of the business of the corporation. In the former case the circumstances are altogether different. The power of the corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get, or, as was said in *Ex parte Koehler*, 23 Fed. Rep. 533, 'abandon the field, and let its road go to rust.'" In *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.* 50 Fed. Rep. 295, 4 Inters. Com. Rep. 323, the court said: "If the circumstances and conditions are not substantially similar, the prohibition imposed by the statute does not apply at all. . . . The common carrier cannot be required to ignore or overcome existing differences in the transportation facilities of different localities, created, not by its own arbitrary action, but by nature, or by enterprises beyond its control." In the case of *Behlmer v. Louisville & N. R. Co.* 71 Fed. Rep. 835, decided by the United States circuit court for the district of South Carolina, January 22, 1896, the court quoted from Judge Cooley (*Re Louisville & N. R. Co.* 1 Inters. Com. Rep. 57, 1 Inters. Com. Rep. 280), as follows: "The charging or receiving a greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated." This is quoted with approbation by the United States circuit court, southern district of California. *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.* 50 Fed. Rep. 295, 4 Inters. Com. Rep. 323.

ters Com. Rep. 323. When, then, may the circumstances and conditions of the two hauls be said to be dissimilar? Judge Cooley, in the same case, answers this question: 'Among other things, in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition were to continue. And water competition was, beyond doubt, especially in view.' . . . The interstate commerce law was intended to promote trade. Such a construction as is now sought would destroy competition, the life of trade." And see *Interstate Commerce Commission v. Alabama Midland R. Co.* 69 Fed. Rep. 227, 5 Inters. Com. Rep. 308, 41 U. S. App. 453, 74 Fed. Rep. 715, 21 C. C. A. 51, 5 Inters. Com. Rep. 685. The doctrine of these cases has been followed by the Supreme Court of the United States in the recent case of *Interstate Commerce Commission v. Alabama Midland R. Co.* (decided Nov. 8, 1897) 168 U. S. 144, 42 L. ed. 414. Said the court in that case: "The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration." The supreme court expressly states the conclusion that in complying with the provisions of the 3d and 4th sections of the act, competition which affects rates is one of the matters to be considered. The court further holds that, where the circumstances and conditions of the long haul and short haul are substantially dissimilar, there is no necessity for the railroad company to apply to the commission for authority to charge less for the long haul than for the short haul. Of course, whether actual competition exists is a question of fact depending on the matter proved in each case.

It is legitimate to consider a question of state policy as tending to show what was intended by a law, whether a provision of the organic law or a statute. Not that we should decide a case upon what we think the proper policy to pursue, but we may consider the policy which the lawgivers had in view as indicating what is the meaning of their enactment. Surely, the framers of our Constitution did not intend to cripple or destroy a growing industry of the state. But the construction by the supreme court of the Interstate Commerce Act, which is the same which was given it at the time it was copied into our Constitution, and the construction now given to our Constitution by the majority opinion,—directly the reverse of that which prevailed when the instrument was adopted,—work together to accomplish that end. Under the law as laid down by the supreme court, it is perfectly lawful for the appellant company, transporting interstate commerce, in order to meet the Ohio river competition at Louisville, to carry coal from Jellico, Tennessee, to Louisville at a lower rate than it charges from Jellico, Tennessee, to Lebanon, Kentucky. Under the majority opinion, it cannot carry coal from Jellico, Tennessee, to Louisville at a less rate than

it charges to Lebanon. If, therefore, it be true, as claimed, that the low through rate given to the competitive point is not sufficient to pay the cost of transportation, taking into consideration the fixed charges of the railroad,—interest on debt, official salaries, etc.,—it follows, not that the rate to Lebanon and other noncompetitive points will be lowered, but that the through rate to the competitive point (Louisville) must be abandoned. The appellant will therefore be precluded from transporting Kentucky coal to the greatest market for it, and the mines shipping from Tennessee will have the benefit of Louisville as a market for their surplus, without any competition from Kentucky points. It appears that the Louisville market is almost indispensable to the successful working of the Kentucky mines. Giving access to that market by a through competitive rate works no injury to Lebanon, or to any other noncompetitive point, but is a benefit in which Lebanon and other points indirectly share. To deprive the Kentucky mines of that benefit will profit no one except the miners of other states, which will thereby secure a monopoly of the Louisville market. But, without considering the authorities, and without considering what the constitutional convention ought to have intended, and doubtless did intend, as matter of policy, for the interests and industries of the state, the language of the enactment shows beyond question what was the object intended to be effected by this provision of the Constitution, and in what way was that object to be effected. It was made unlawful for the carrier to charge a greater compensation in the aggregate for transportation of passengers or property for a shorter than for a longer haul, over the same line in the same direction, the shorter being included in the longer distance, if such transportation be made under substantially similar circumstances and conditions; but in the prohibition of a greater charge for a shorter distance it was provided that unconditional authority should not be given by implication to make as great a charge for a shorter as for a longer haul. It is therefore unlawful to charge as great a compensation for the shorter as for the longer haul, when the shipments are made under substantially similar circumstances and conditions. But even where the shipments are made under substantially similar circumstances and conditions, and where the carrier would, therefore, be confessedly guilty of violating the section if more were charged for the shorter than for the longer haul, on application to the commission he may be authorized to make less charge for the longer haul, and the commission may prescribe the extent to which he may be relieved from the operation of the section. When charged with a violation of the law, the carrier may answer—First, that the shipments were not made under substantially similar circumstances and conditions, but under circumstances and conditions materially different; or, second, confessing the circumstances and conditions to be substantially similar, the carrier may answer that application has been made to the

commission, and authority given by it to make the less charge for the longer distance. If the circumstances and conditions of shipment are materially dissimilar, the law does not apply at all, and there is no need to be relieved from its operation by the commission. In this case the appellant admits that it has charged a greater sum for the shorter than the longer haul, but claims that the shipments have not been made under substantially similar circumstances and conditions; and has undertaken to make good its defense by showing—First, that the greater relative cost of the short haul makes a substantial dissimilarity; and, second, by offering to show that, by reason of competition from the Ohio river and from other railroads at Louisville, the shipments to that place have not been made under circumstances and conditions substantially similar to those which apply to a shipment to Lebanon. The testimony as to the cost of carriage is admittedly competent. The question presented here is whether proof that Louisville is a competitive point and Lebanon is not is competent to show that the circumstances and conditions are dissimilar.

I have said that, where the circumstances and conditions are dissimilar, the law, under its own terms, does not apply; but this is to be taken with some modification. Because a less charge is allowable under the act for a longer distance than for a shorter, on account of a less cost, it does not follow that the act loses its application entirely. The proper construction is that the less rate is allowable only as it is in proportion to the less cost. The cost might be very little less for the longer haul, and yet the charge made be materially less, in which case the act would apply, because the less charge would not be justified by the less cost, and would clearly be the result of an unjust and arbitrary discrimination. And so, if it appear that a point is a competitive one, it does not follow from that fact alone that the law is not applicable. It must also appear that the less charge is induced solely by the competition, or by it and the fact that the cost is less; otherwise, under pretense of less cost of shipment and alleged competition, the carrier might charge the less price arbitrarily, and solely because of a desire to favor one locality over another. When the real purpose of the provision is considered, it seems plain that its enactment was not at all for the purpose of enforcing reasonable rates of transportation,—a matter which is provided for by other statutes and by the common law. That is clearly not the purpose of this enactment, because, if the charge in this case had been \$1.56 from Pittsburg to Louisville, the rate from Pittsburg to Lebanon being \$1.55, no one would have dreamed of invoking the aid of the provision under consideration to effect a reduction of the rate to Lebanon: nor could it be invoked if the charges had been \$2 to Lebanon and \$2.10 to Louisville. The enactment, therefore, does not prohibit the carrier imposing any rate it desires, so long as a less rate in the aggregate is not charged for the longer than for the shorter haul. Clearly, the only purpose was to pre-

vent the carrier from arbitrarily favoring one locality over another. Complaint had been made that, by discrimination in rates, railroad companies would build up towns and cities where they, or their management, owned property, and to prevent such injustice and arbitrary discrimination this provision was enacted. The act was intended to prevent the building up of favored centers of population at the expense of the country at large. But, if the less rate is fairly attributable to the fact that the cost of shipment for the longer distance is less than the cost of shipment to the nearer point, it follows that the difference in charge is not attributable to an arbitrary design to favor one locality at the expense of another; and so if the less rate for the longer haul is fairly attributable to competition in business, by water or otherwise. The act of arbitrarily favoring one locality over another is that act which it was the purpose of the constitutional convention and the legislature to condemn. But, if the difference in charge is attributable to legitimate motives,—that is, any motive other than that condemned by the law,—then there is no room for the operation of the law, as that which it prohibits is not in fact done. To charge a carrier with a violation of this law is, in substance, to charge it with unjustly favoring one locality over another, by charging the favored place with a less rate, though the shipment is for a longer distance; and it is a legitimate answer to say that the less charge was made for another cause than the one the law prohibits, and therefore, unless the law is one to regulate the cost of shipment or competition in business, the causes named may be shown to have induced the less charge. It can hardly be claimed that the purpose of the law was to deprive Louisville of its low or competitive rate, or to attempt to place Lebanon in as favorable a geographical position as if it were situated on a large water-course. I think, therefore, that, so long as Louisville is given only the benefit of its natural advantages, and only such low rates as flow from geographical position, it cannot be said that there has been any arbitrary discrimination, to prevent which alone this law was adopted. Conceding the force and vigor of the argument of the Chief Justice, I have been compelled to reach a different conclusion.

Burnam, J., concurs in this dissent.

A petition for rehearing having been filed, **Lewis, Ch. J.**, on October 28, 1898, handed down the following response:

Willing to consider all that can be said by those who believe themselves injuriously affected by the opinion in this case, we have, in addition to the petition for rehearing filed by appellant as matter of right, permitted petitions filed in behalf of twenty or more coal companies. It is urged as reason for withdrawal of the opinion that if railroad companies be not permitted to make special rates to competitive points, shipment of coal mined in this state must cease. Though an argument drawn from hardship or inconvenience

is usually more appropriately addressed to lawmakers, it should, of course, have due weight with the court in determining the proper construction of a law the meaning of which is doubtful or obscure, but never so much as to induce a construction that is absurd, defeats the evident object in view, or involves stultification of those who made it. However, the argument in behalf of the coal companies, even if based upon entirely correct premise, is counterbalanced by the fact that, while special rates to competitive points may benefit a particular industry, removal of all restraint upon discrimination by railroad companies might be injurious to other industries and interests connected or identified with noncompetitive points. Conceding that the construction we have been, by a sense of duty, constrained to give § 218, will work injury to the coal industry of this state, the court is not authorized or permitted to afford relief by perverting the true meaning, and thereby defeating the manifest object of the section. The needed relief must be afforded, if at all, according to, and in the manner provided by, the law itself, which will be hereafter considered.

Counsel for appellant, after stating that it had for seven years relied upon a construction of the long and short haul law settled, as they say, by the Interstate Commerce Commission and certain circuit courts of the United States, permit themselves to use this language: "The court of appeals now, at this late day, propose to repudiate that construction, and announce a construction which has never been announced by any tribunal with reference to the law from which our law was copied verbatim." Counsel might without much effort have recollected that the court of appeals does never propose, but finally decides, the construction to be given such parts of the Constitution and statutes of this state as need construction, and cannot be foreclosed or bound by the views in regard thereto by any other tribunal. It is not true that framers of the Constitution adopted § 218 with a view to a construction that had been put upon § 4 of the Interstate Commerce Act adverse to the one we have given § 218. At that time there had been no decision of the question by the Supreme Court of the United States,—the only tribunal empowered to construe § 4 authoritatively and finally. It could, however, be said, if necessary, that, prior to the adoption of our Constitution, it had been held by respectable English courts that cost of service constitutes the difference of circumstances and conditions, in the meaning of their statute on the same subject, and similar in terms to § 218. The language of § 218 plainly shows it was made part of the Constitution for the definite purpose of surely inhibiting railroad companies doing something they had previously done at will and discretion; that is, charging and receiving greater compensation in the aggregate for transportation of passengers and property for the shorter than the longer distance. But if competition at particular localities in the business of transportation, or other circumstances or conditions influencing the common

carrier, not affecting the general public, be held by this court a sufficient reason or excuse for discrimination, railroad companies may, without legal restraint or interference, continue to do precisely what they did before § 218 was adopted, and it becomes a dead letter. In order to give meaning and effect to that section, cost of service must be held to alone constitute the difference of circumstances and conditions which will authorize greater aggregate compensation to be charged or received for the shorter than longer distance of the same line of road; and as, only to the extent of difference in the actual cost of transportation a difference of aggregate compensation may be rightfully charged or received, the general public, as well as the carrier, is affected thereby. As counsel for appellant do not show or attempt to show in what manner railroad companies would or could be restrained or prevented from charging at will greater aggregate compensation for the shorter than longer distance, nor what possible purpose § 218 would or could serve, if the construction they contend for be accepted, we need not consider their petition for rehearing further.

It is argued by counsel for coal companies that the court has and should exercise jurisdiction to revise an order of the railroad commission refusing an application to authorize a common carrier, in special cases, to charge less aggregate compensation for the longer than shorter distance of the same line of road. Unquestionably, framers of the Constitution contemplated probable existence of exceptional circumstances and conditions working hardship or injustice to the railroad company, as well as particular industries or interests, and therefore recognized the justice and necessity of authorizing special rates to be given to competitive points in special cases. But the Constitution does not contain, nor would it have been practicable to put in it, provisions applicable to every state of case that might arise. The railroad commission was therefore created to meet the emergency, and was intended to be invested with full power to authorize or not, in special cases, less compensation to be charged for the longer than shorter distance, and to prescribe from time to time the extent to which the common carrier may be relieved from operation of the section. In our opinion, the court has not jurisdiction to either compel the railroad commission, upon application of the common carrier or those interested in particular industries or callings, to suspend or relax operation of § 218, or, upon application of individuals or corporations feeling aggrieved, to prohibit such suspension or relaxation, in special cases. While the commission is thus and to that extent free from judicial interposition, it cannot, of course, nullify, or, except in special cases, at all suspend, operation of § 218; and, though the railroad commission be invested with this unusual power, it must be treated as a constitutional power, with which the court cannot interfere.

The petition for rehearing is overruled.

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A petition for modification having been filed, *Lewis, Ch. J.*, on December 15, 1898, handed down the following response:

Appellant was indicted for the offense of unjust discrimination, alleged to have been committed as follows: "The said Louisville & Nashville Railroad Company . . . did unlawfully, after having received from the Lebanon Roller-Mills Company the same rate of compensation for the transportation of coal to Lebanon, Ky., that the said defendant had charged, demanded, and collected from J. M. Shreve for the contemporaneous transportation of coal of a like amount, for the same distance, over the same line, in the same direction, refund and pay to the said Lebanon Roller-Mills Company a portion of the amount so received from it for said transportation, to wit, the sum of \$11.88, as a rebate, and failed and refused to refund or pay back to the said J. M. Shreve any portion of the amounts so demanded and collected from him for the transportation of coal as aforesaid, thereby charging, demanding, collecting, and receiving from the said Lebanon Roller-Mills Company a less compensation for services rendered in the transportation of coal to Lebanon, Ky., than was demanded, collected, and received for a like and contemporaneous service in the transportation of a like traffic, contrary to the form of the statute in such cases made and provided," etc.

The indictment was found under section 817, Ky. Stat., as follows: "If any corporation engaged in operating a railroad in this state shall directly or indirectly by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, demands, collects, or receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic, it shall be deemed guilty of unjust discrimination." The penalty for the offense, as prescribed in section 819, is a fine, for the first offense, of not less than \$500 nor more than \$1,000; for the second offense, not less than \$500 nor more than \$2,000; and for the third offense, not less than \$2,000 nor more than \$5,000.

A demurrer to the indictment was filed, consideration of which requires reference to section 215 of the Constitution, to effectuate which seems to be the object of section 817, Ky. Stat. Section 215 provides: "All railway, transfer, belt lines, or railway bridge companies shall receive, load, unload, transport, haul, deliver, and handle freight of the same class for all persons, associations, or corporations from and to the same points and upon the same conditions in the same manner and for the same charges and for the same method of payment." By section 217 of the Constitution it is provided that, for wilfully or knowingly violating any provision of section 215, the penalty, upon conviction by a court of competent jurisdiction, shall be for the first offense, a fine of \$2,000; for the second offense, a fine of \$5,000; and, for the

third offense, a forfeiture, *ipso facto*, of franchise privileges and charter rights. It is further provided that the attorney general shall forthwith, upon notice of violation of section 215, institute proceedings to enforce the provision of it. It will be observed that every duty or requirement, violation of which section 817, Ky. Stat., denominates unjust discrimination, and made punishable by section 819, *Id.*, is, if not specifically, substantially and fully, enjoined upon railroad companies by section 215 of the Constitution; for every device specified in section 817 by which a railroad company may charge or receive a greater or less compensation for transportation of property from one person than from another is a violation of section 215, and, operating in connection with section 217 of the Constitution, it is final and self-executing. It is therefore manifest that, so far as sections 817 and 818 conflict with sections 215 and 218, they are void, and, so far as the indictment in this case lacks any statement of fact necessary to constitute a complete offense under the two sections of the Constitution, it is defective.

1. The offense of unjust discrimination cannot, according to section 217, be punished, unless it is knowingly or wilfully committed. Consequently, omission of the indictment to charge that it was so committed is a fatal defect.

2. A railroad company is required by section 215 to charge the same amount of compensation for transporting, from and to the same points, freight of the same class or kind, not freight of different classes or kinds. And to make a good indictment for violating that section, it should be stated, either affirmatively, that the freight in question, for which the defendant company is alleged to have charged different owners or shippers different amounts of compensation, was of the same class or kind, or, negatively, was not of different classes or kinds. But that averment was omitted, though manifestly material; for that it is allowable and proper for a railroad company to classify freight according to its quality or character and marketable value, and discriminate in charges for carrying different classes or kinds, is not only universally recognized, but plainly authorized by section 215.

3. There cannot be a violation of that section unless different charges be made for transporting freight of the same class from and to the same points and upon the same conditions.

For the reasons mentioned, *the judgment is reversed*, and case remanded, that demurrer to the indictment may be sustained.

George W. DOTY *et al.*, *Appts.*,

v.

DEPOSIT BUILDING & LOAN ASSOCIATION *et al.*

(.....Ky.....)

NOTE.—The above case is somewhat unusual as far as it applies to the enforcement of a vendor's lien upon personal property which was sold with land.

For other cases of vendors' liens, see also *note* 45 L. R. A.

1. A vendor's lien may be enforced against real property for the entire amount remaining unpaid upon a sale for a gross consideration of such property and certain personal property, there being no apportionment of the price between the two classes of property.

2. A circuit court of one county, having jurisdiction of the parties and the original controversy has jurisdiction to decree a sale of land in another county as incidental to the relief originally sought.

3. An officer's return of summons cannot be attacked in the action in which the same was made under Stat. § 3760, requiring a direct proceeding against himself or his sureties for such attack unless there is fraud by the party benefited thereby or mistake on the part of the officer.

(May 26, 1898.)

APPEAL by Doty and wife from a judgment of the Circuit Court for Fayette County establishing certain liens against property claimed by appellants. *Affirmed.*

The facts are stated in the opinion.

Messrs. Z. Gibbons and O. B. Ambrose for appellants.

Mr. A. M. Baker for appellee Taylor.

Mr. J. S. Botts for appellee Deposit Building & Loan Association.

Du Relle, J., delivered the opinion of the court:

Appellant Doty and appellee Taylor entered into a written contract in March, 1893, reciting that Doty had, on that day, traded to Taylor three lots of land in Lexington, together with certain stock in the building and loan association, for 100 acres of land in Owen county, it being stipulated that Taylor was to assume the loans on the building and loan association stock. By an additional clause of the contract it was recited "that the party of the second part [Taylor] also trades to the party of the first part [Doty] the following personalty," naming certain live stock, farming implements, and farm products, concluding: "We each agree to give the other a general warranty deed to the above-described property. Possession given of the property this day and date," etc. Taylor conveyed to Doty the Owen county farm, and delivered possession of the personalty. Doty conveyed two of the lots in Lexington, but did not convey the Fifth street lot, which was under mortgage to the building and loan association. The association instituted this action against Doty and wife to enforce its mortgage, and made Hardin and wife defendants, they being grantors in the deed to Doty of the Fifth street lot, calling upon them to set up whatever claim they had to the lot, and also asserting a lien on one share of stock held by Doty in the association. Hardin, by his answer and cross petition, asserted that, by the terms of the deed from him to Doty of the Fifth street lot,—which it was admitted authorized Doty to execute the

to O'Conner v. O'Conner (Tenn.) 7 L. R. A. 38; also Gessner v. Palmater (Cal.) 13 L. R. A. 187; Frame v. Silter (Or.) 34 L. R. A. 690; and Smith v. Allen (Wash.) 39 L. R. A. 82.

mortgage to the building and loan association,—it was provided that if he should repay to Doty the sum of \$486.70, with interest, Doty should reconvey the land; but that the consideration set out in the conveyance was so set out by mistake, there being no consideration for the transfer except the agreement of Doty to aid in borrowing money from the building and loan association. Hardin prayed for a correction of the deed, and that it be adjudged a mortgage; made tender of the amount which he claimed to be due to the association; and prayed that Doty and wife be required to convey the legal title to him. He made Taylor a party defendant, and called upon him to set up his claim, if any, to the property. Taylor, after reciting the contract before referred to, and averring the performance of his agreement contained therein, prayed that Doty and wife be required to make him a deed to the lot, and, if it should be adjudged that Hardin was entitled to the property, that there should be adjudged due to him (Taylor) \$512, as balance of the purchase money of the Owen county land conveyed by him to Doty, and that he be adjudged a lien upon said land for the payment thereof. Doty and wife failed to answer, and judgment was rendered against them by default. The association was adjudged a lien upon the stock, as well as a lien upon the Fifth street lot. It was adjudged to be indivisible, and a sale ordered, first, of the stock; and, if necessary, of the lot. A sale was had of the stock and the Fifth street lot, and the association became the purchaser of the lot. On motion of Hardin and Taylor, the sale of the lot was set aside, upon condition of their paying off the entire judgment in favor of the building association against Doty. A second judgment was rendered, holding that the deed from Hardin and wife to Doty was a mortgage, and adjudging that, upon the payment by Hardin of the entire judgment in favor of the association against Doty, said deed should be null and void, and the commissioner should reconvey the title to the lot to Hardin, on behalf of Doty and wife, which was accordingly done. It was subsequently adjudged that Taylor should recover of Doty and wife the sum of \$391; that that amount was a part of the purchase price agreed to be paid for the Owen county land; and, to secure it, Taylor was adjudged a lien upon such land, and sale ordered of so much thereof as might be necessary to discharge the debt. Sale thereof was duly made by the commissioner, the entire property not bringing the amount of the debt. Doty excepted to the report of sale, but no bill of exceptions was filed of the testimony heard upon the questions of fact presented by the exceptions. Mrs. Doty entered her appearance for the purpose only of moving to set aside the judgments entered, so far as her interests were affected, upon the ground that process on the petition or either of the cross petitions was never served upon her. Doty's exceptions and his wife's motion were overruled, and they have appealed to this court.

On behalf of appellant, it is contended
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that the lot on Fifth street, in Lexington, being a part of the consideration for the purchase, not only of the Owen county farm, but of the personality as well, the contract being for the realty and personality in gross, without any price fixed for either of them separately, either by the contract or the pleadings, a vendor's lien cannot exist upon the realty for any sum which is a part of the purchase price of both the realty and the personality in gross. It is also objected that, by the judgment, he was given a lien, not only for the difference between the value of the Fifth street lot and the encumbrance upon it, but for the rents thereof, between the date of the contract by which the trade was made and the time of filing the cross petition. But it is evident that the judgment was only for the difference between the value of the property and the encumbrance thereon to the building association, with interest.

The basis of counsel's former contention is correctly stated. By the contract in question, fairly construed, undoubtedly it was agreed to trade the three Lexington lots in gross for the Owen county farm, farming implements, farm products, and live stock in gross, without fixing the price at which any one of the lots, or the farm, or the personal property was taken in the trade. It is earnestly insisted that, the purchase price being the purchase price for both the farm and the personality, no lien can arise upon the land for any part of the purchase price, because it is the purchase price in gross of both the land and the personality. A number of authorities are cited as sustaining this proposition, as well as in support of the contention that no vendor's lien can exist to secure an uncertain or unliquidated demand. Without going though the authorities in detail cited in support of these contentions, we may say that the questions seem to have been decided otherwise by this court, and, as we think, manifestly upon equitable principles. There is no intervening equity of third persons to be considered. It is a question simply between vendor and vendee.

This record discloses the transfer of a farm and the personality upon it for a consideration agreed to be paid in other lands. A part of this consideration has been paid. The value of the balance due can be and has been, judicially ascertained. And the question presented is whether that part of the property sold, which the court can reach, shall be subjected to the payment of the purchase price remaining unpaid, in a proceeding in which the vendor's right to payment has been adjudged, or whether he shall be compelled to await the result of process of execution, or to bring an attachment suit in a court of another county.

The statute (Ky. Stat. § 2358) provides that the grantor shall not have a lien for unpaid purchase money "against bona fide creditors and purchasers, unless it is stated in the deed what part of the consideration remains unpaid." This statute being the same as in the General Statutes, discloses a marked change from the language used in the Revised Statutes, which provided that, if

any part of the consideration remained unpaid at the time of the conveyance, the grantor should not thereby have a lien for the same, unless it were expressly stated in the deed what part of the consideration remained unpaid. By clear implication of the statute, as between vendor and vendee, a lien exists upon the land sold for the purchase price of the land; and it does not seem to be seriously contended that if it appeared, either from the contract or extrinsic evidence, what price in the trade was put upon the realty and what upon the personality sold by Taylor to Doty, a lien would not exist upon the land for that proportion of the unpaid purchase money which was applicable to the sale of the land. We might suggest that, in such a case, no application having been made of the partial payment of the consideration of the two varieties of property sold, equity would make an application of the payment for the parties, and the consideration actually paid would be applied to extinguishing the obligation for the personality. But we think it unnecessary to resort to equitable application of payments in this case.

Doty obtained title and possession of certain realty and personality by one transaction, one contract, and for one consideration. A part of the consideration remains unpaid. What has become of the personality thus sold does not appear in this record. Manifestly, personal property of the character indicated—easy of transportation and finding ready sale—might be disposed of in such time and manner as to prevent the levy of execution thereon. But, as between vendor and vendee, with no intervening equities, it would be manifestly unconscientious to permit a party to retain possession of property without the payment of the consideration. The process of the court may be unable to reach and subject the personality to the payment of that part of the consideration which may be supposed to have been agreed to be paid for the personality, but it can reach the realty, the sale of which was effected at the same time and by the same agreement. The case seems to us strictly analogous to the case of a sale in gross of two lots of land for an agreed lumping consideration, a part of which is unpaid at the date of the conveyance. Undoubtedly, in such case, either lot (no equities intervening) might be subjected to the payment of the unpaid purchase money. Said the New York court in *Warren v. Fenn*, 28 Barb. 334: "It has become one of the best-established principles of natural equity . . . that estates are to be regarded as unconscientiously obtained when the consideration is not paid." Again, in *Fisk v. Potter*, 2 Abb. App. Dec. 138, the court said of a vendor's lien: "Its existence depends upon and is controlled by no well-settled rules, but, on the contrary, the existence of the lien is generally made to depend upon the peculiar state of facts and circumstances surrounding the particular case; that is, whether or not a case of natural equity is established." In *Thacker v. Booth*, 9 Ky. L. Rep. 747, Judge Holt, delivering the opinion of the court, said: "A lien existed in the nature of a trust, because equity will not al-

low one to hold the land of another and not pay for it. To do so would be in violation of good conscience and every rule of right." So, in *Blevins v. Blankenship*, 9 Ky. L. Rep. 852, Judge Holt, discussing the change made by the General Statutes in the statute before quoted, said that, unless it be stated in the deed what part of the consideration remained unpaid, the vendor waived his lien as to creditors and purchasers, who were protected because the conveyance gave them no notice that any consideration remained unpaid; and then added: "The immediate vendee knows, however, whether it has been paid or not; and, if not, the lien, upon equitable principles, exists in favor of the vendor, although the deed fails to state that any, or how much, of it is unpaid."

We think it is proper to treat this transaction as one sale; and assuming, for the purpose of argument, that no lien exists upon the personality, even as between vendor and vendee, after possession has been parted with, we see nothing inequitable in subjecting that part of the property sold which the court can reach to a vendor's lien for the unpaid purchase money due upon all the property sold in the same transaction. In the case of *Davis v. Page*, 17 Ky. L. Rep. 622, this court, in an opinion by Judge Guffy, enforced, as between the parties thereto, a lien retained in an unrecorded title bond executed upon a sale of both realty and personality. And see *Clarke v. Curtis*, 11 Leigh, 559, 37 Am. Dec. 625. And as to the question whether a vendor's lien can exist for an unliquidated claim, as for breach of contract for personal services to be rendered as consideration for the sale of land, the case of *Miller v. Denny*, 99 Ky. 53, is directly in point. Counsel himself states that, in his view, a "vendor's lien is a creature of equity, and that the equity is to be decided as to each case upon its peculiar facts." The peculiar facts of this case are that Doty was in possession of real and personal property, for which he had not paid all the consideration. Having, as we think, incidental jurisdiction of the land, it is manifest equity that the court should subject it to the payment of the entire unpaid purchase money.

And this brings us to the consideration of appellant's contention that the court had no jurisdiction to sell the Owen county land, it being situate in another county. Upon this contention counsel cites the case of *Webb v. Wright*, 1 Bush, 107. That case was again before the court in 2 Bush, 126, on which appeal Judge Williams, delivering the opinion of the court, held that, the court having jurisdiction of the persons and cause of action in a suit which was, in effect, for the settlement of a partnership, the proceeding *in rem* for the sale of land in another county attached as an incidental remedy. In *Fishback v. Green*, 87 Ky. 107, in an opinion by Judge Holt, this court held that, in an action to settle an insolvent estate, the court had jurisdiction to decree the sale of land situated in another county than that in which the action was pending. In the case at bar, having jurisdiction of the parties and the original controversy, we think the court

part of his lot; and, second, damages which result from building the street railway on the land of the turnpike company so close to his building as to materially injure his use of the turnpike. Pleadings being made up, the trial of the case resulted, under instructions given to the jury, in a verdict for appellee for \$665, the basis of the recovery being both elements of damage enumerated above, and we are asked to reverse that judgment.

The court, on motion of plaintiff, instructed the jury, first, that "if they believed from the evidence that the plaintiff, John Faulkner, was the owner and in possession of the property in controversy, and that the defendant, the Ashland & Catlettsburg Street-Railway Company, while plaintiff was the owner and in the possession of said property, by its officers, agents, or employees, entered upon said property, and constructed its line of street railway in front thereof on said prop-

erty, the law is for the plaintiff, and the jury will so find." And, in fixing the measure of compensation under the state of case contemplated in the first instruction, the jury were told by instruction No. 3 that, "if they believed as in instruction No. 1, they will find from the evidence the market value of the entire tract of land just before it became generally known that the street railway was to be constructed in front of it, and find the value of the ground taken and occupied by it for all the purposes for which it was adapted, and to this sum they will add the amount, if any, they believe from the evidence the remainder of the tract is diminished by reason of the construction and operation of defendant's road." On the issues raised by the second paragraph, the court instructed the jury that "if they did not believe from the evidence, and find as in instruction No. 1., but believed from the evidence that the defendant constructed its track upon the Ash-

street and operation of a street railway be a new burden upon the street or not, if by reason of the construction and operation thereof in close proximity to the property of an abutting owner, whereby it is damaged, such owner is entitled to recover therefor. *Campbell v. Metropolitan Street R. Co.* 82 Ga. 320.

And the owner of property abutting on a street is entitled to injunctive relief against a street-car company about to construct a street-railway line thereon, though the fee of the street in front of his lot was in the city, where there was already in operation on that street a double-track street railroad, telegraph and telephone lines, wires and poles for electric lighting, and the street had already become greatly obstructed, and between the third track proposed to be constructed and the sidewalk there would not remain sufficient space for the ordinary traffic of the street free from unreasonable obstruction, and the means of access to the lotowners' premises would be unreasonably and materially abridged and injured. *Dooly Block v. Salt Lake Rapid Transit Co.* 9 Utah, 31, 24 L. R. A. 610.

III. Extent of right to compensation.

No general rule seems to have been laid down by which the extent of the right of an abutting owner to compensation is to be measured, and many of the cases seem to be in conflict. But perhaps the conclusion nearest in accord with all the cases would be that the abutting owner is entitled to compensation whenever the railway tracks on the side of the street interfere with or are detrimental to access to the property in the usual and ordinary ways, and with the use of the property and street in a way which does not interfere with the rights of others. But that an interference with an excessive use, or a use which was or might be an interference with the rights of others, would not entitle the owner to compensation.

Thus, laying a railroad track in a street 70 feet wide, from 10 to 16 feet east from the center thereof, is not such a taking of the property of an owner of the lot on the west side of the street as will entitle him to damages. *First Congregational Church v. Milwaukee & L. W. R. Co.* 77 Wis. 158.

And the fact that the use of the full width of the street in front of the premises of an abutting owner has been restricted by the laying of street-railway tracks does not give him a right of recovery where he had 27 feet of the 43 L. R. A.

street in front of his lots unobstructed. *Wichita & C. R. Co. v. Smith*, 45 Kan. 264.

Nor will an action lie by the owner of property abutting upon a street against a street-railway company for damages arising out of the location and operation of the road so that it obstructed ingress and egress, where the rails of the track were on the level of the street and not nearer to the property than 30 to 40 feet, there being about 20 to 30 feet for pavement and street, within which there would be plenty of room for vehicles to pass without inconvenience and without crossing the track or touching the rails. *Louisville S. R. Co. v. Hooe*, 18 Ky. L. Rep. 521.

So, the proprietor of a store has no such right to the use of the street in front of it for drays and wagons with teams attached to stand upon the street at right angles thereto as the pavement in front of his store while discharging or loading goods as will entitle him to damages against a horse-railway company which has so constructed its track under authority from the city as to interfere with such use, but may be compelled, if the public convenience requires the car line in the position in which it is placed, to load and discharge goods from wagons and drays standing lengthwise of the street. *Hobart v. Milwaukee City R. Co.* 27 Wis. 794, 9 Am. Rep. 461.

And the loading and unloading of vehicles used in the transporting of goods and raw material on the street in front of a manufacturing establishment by backing the wagon or dray up at right angles from the sidewalk necessarily obstructs not only street-car traffic but the proper use of a street for all other vehicles, and the construction of a street railway so near to such an establishment as to prevent such loading and unloading will not be enjoined at the action of the owner or occupant of such establishment. *Louisville Bagging Mfg. Co. v. Central Pass. R. Co.* 95 Ky. 50.

Nor will the construction of a double-track street railway in the middle of a street so located that the space between exterior rails and the sidewalk in front of a public market frequented by sellers, gardeners and farmers with their wagons and teams on market mornings would be too narrow to permit them to occupy it with their vehicles standing at right angles with the street, entitle the lotowner to enjoin the construction and operation of the street railroad, though he owns the fee in the street. *Sells v. Columbus Street R. Co.* 28 Ohio L. J. 172.

land & Catlettsburg Turnpike Road, so close to plaintiff's property as to unreasonably interfere with the ingress and egress to and from said property, the law is for the plaintiff, and the jury will so find." And in defining the measure of compensation, if they found the facts to be as set out in instruction No. 2, they were told to find from the evidence the value of plaintiff's property just before it became generally known that the defendant's railway was to be located in front of plaintiff's property, and then determine what proportion of the value is taken from the property by reason of the construction and operation of defendant's road, and such proportion would be the amount of damage. The proof in the record shows that the east rail of the street-railway track is about seven feet from appellee's building; that the track at that point was laid down at grade on the road, and that the only elevation was the height of the rails, two or three inches;

that the road between the rails was ballasted with gravel; that a crossing of three-inch plank was put on each side of the track, 12 or 15 feet long, making a good crossing where wagons and other vehicles could pass over or be backed in across the track at that point to appellee's house from the turnpike road on the west side of the railway track; and that appellant's road was built on the east side of the turnpike road. There is no proof which conduces to show that the approach to appellee's property has been interfered with by the building of the road, except by its proximity to the building, and that it is a new use of the street at that point, which, in some degree, interferes with appellee's use.

The question before us, therefore, is, Was there such obstruction as to authorize recovery in this branch of the case. If the diminution in the value of appellee's property arose solely by reason of the location of the road in front of his property, this of itself

And the fact that a side track about to be constructed in a street, in which a street-car company had for a long time maintained a single track, would interfere with express wagons and teams in backing up to the curb standing at right angles with the street thereon in front of abutting premises used as an express office and ware-room to receive and deliver the express and freight thereof, rendering the premises less valuable for that purpose, does not constitute such an injury as entitles the lotowner to maintain an injunction against the railroad company to restrain it from constructing the side track, as such lotowner had no easement in the street for backing up teams to the sidewalk for the purpose of loading and unloading freight. *Oviatt v. Akron Street R. Co.* 3 Ohio Dec. 252.

And where a franchise is granted to a street-railway company for twenty-five years authorizing it to construct, maintain, and operate a street railroad with single or double tracks, and it constructs a single track in a street without objection from abutting owners, and later but within the twenty-five years it constructs another track therein to enlarge its facilities, a lotowner cannot interfere by injunction on the ground that the second track would interfere with an express office and ware-room located on his lot by preventing wagons and teams from backing up to the curb and standing crosswise on the street in front of his premises. *Ibid.*

In the above case that of *Cincinnati & S. G. Ave. Street R. Co. v. Cumminsville*, 14 Ohio St. 523, *infra*, was distinguished upon the ground that in that case the railroad track laid upon the side of the highway as proposed would be an obstruction to the convenient access to the houses and other improvements on the side of the highway, the effect of which would be that the abutting owner would sustain special and peculiar injury by reason of depriving him of convenient ingress and egress to his premises from and to the street, which fact being established there could be no escape from the conclusion that the abutting owner was entitled to compensation to the extent he was deprived of his property under the constitutional rule.

So, while the abutting owners have an easement in a street in common with the whole people, to pass and repass, and also to have free access to their premises, the mere inconvenience of such access occasioned by placing a street-car track so near the sidewalk as not to leave sufficient space for a vehicle to stand is not the

subject of an action. *Kellinger v. Forty-Second Street & G. Street Ferry R. Co.* 50 N. Y. 206. And see *ASHLAND & C. STREET R. CO. v. FAULKNER*.

And the fact that a street-railway track constructed in a street in which two others have been previously constructed is thereby brought in such close proximity to the edge of the sidewalk in front of an abutting lot occupied by a storehouse as to materially inconvenience the receiving and delivering goods, and that the car lines practically occupied the entire space covered by the street, is not such an infringement upon the right of access to the storehouse as will entitle the owner to damages against the company last locating its line. *San Antonio Rapid Transit Street R. Co. v. Limburger*, 88 Tex. 79.

The question in an action by the owner of the lot against a street-railway company laying a track in such a position is not whether the construction and maintenance of the railroad interfere with the ingress and egress to and from the storehouse, but whether such construction and maintenance encroach upon the right of access. *Ibid.*

And the right of free access to property abutting on a street is not interfered with by a street-railway track built so close to the curbing that vehicles cannot stand between the tracks and the curbing without interfering with the cars, so as to warrant relief by injunction against the car company, as the rights of both must be exercised in reason, and if at any time the owner has occasion for the presence of vehicles in front of his property to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary, and if in such exercise of the right the passage of street cars is impeded, they must wait. *Rafferty v. Central Traction Co.* 147 Pa. 579; *Sells v. Columbus Street R. Co.* 28 Ohio L. J. 172; *San Antonio Rapid Transit Street R. Co. v. Limburger*, 88 Tex. 79.

So, a street railway, one of the tracks of which was in such close proximity to the sidewalk in front of the premises of an abutting owner as to interfere with, impede, and prevent his complete enjoyment of the use and occupation thereof, leaving insufficient space between the sidewalk and the track to admit of any kind of vehicle to be driven or to remain in front of his premises, is not for that reason a public nuisance where the title to the street vested in the city, but the injuries to the owner are

furnishes no ground of complaint, as the whole trend of modern authorities is to the effect that the operation of a street railway is a legitimate use of the highway, and an exercise of the public right of travel. They are but a means of using the public streets to a greater advantage for the very purpose for which they were laid out, and are recognized as the best and cheapest mode yet devised of getting about in a city, and do not impose any new or additional burdens for which abutters are entitled to compensation, unless they be so constructed as to deprive the abutter of some easement, or in some way cause him special damage for which he is entitled to recover, as they do not hinder the use of the rest of the street for public travel, and in but a very small degree obstruct travel on the part occupied by their tracks. See Wood, Railway Law, § 748, and authorities there cited, and 3 Elliott, Railroads, p. 1635. On this point Judge Dillon

says: "The appropriation . . . of a street for a horse railway, . . . and used . . . in the ordinary mode, is such a use as falls within the purposes for which the streets are dedicated or acquired under the power of eminent domain." Dill. Mun. Corp. 3d ed. § 722. Judge Cooley says: "When land is taken or dedicated for a town street, it is unquestionably appropriated for all the ordinary purposes of a town street; not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use for carriages which run upon a grooved track; and the preparation of important streets in large cities for their use is not only a frequent necessity, which must be supposed to have been contemplated, but is almost as much a matter of course as the grading and paving." Cooley, Const. Lim. p. 556.

As early as 1872 this question was thor-

referable to that class of disadvantages to which one is subjected resulting from the lawful exercise of the absolute power of control vested in the state in connection with the title to the fee of the land. Kellinger v. Forty-Second Street & G. Street Ferry R. Co. 50 N. Y. 206.

And the court in an action for damages and an injunction restraining the defendant from the use and occupation of a street-car track against a street-car company for thus laying the track of its road, thereby incommoding the owner and his family in leaving and returning to their residence, and depreciating the rental value, cannot take judicial notice of the width of the street at that point, or that there was any other available space vacant in which the track could have been laid. *Ibid.*

So, the laying in a public street of a switch turn-out and side-track, and the use thereof, when authorized by an act of the legislature, is the exercise of a lawful right for which no liability for damages for consequential injury arises, unless there is some misconduct or negligence, though it was constructed adjacent to and in front of the property of an abutting owner, so near the sidewalk as to prevent a carriage from standing there while the track was occupied by passing cars. Carson v. Central R. Co. 35 Cal. 329.

And one who sues to abate a turn-out or side-track in a public street constructed under legislative authority as a nuisance cannot give evidence of damages sustained until he has first introduced evidence tending to show that the switch and turn-out were not necessary, though they are so close to his premises as to prevent a carriage from standing there while the track thereof was so occupied. *Ibid.*

And a turn-out and short side-track made from the main track in a public street toward and along the sidewalk upon which cars are run for the purpose of standing until other cars pass, and stop to allow passengers to make an exchange of cars, is a switch and turn-out and presumed to be necessary within the meaning of an act authorizing the laying of the railroad and necessary switches, turn-outs, and side-tracks though it is laid so close to the sidewalk as to prevent carriages from standing there while the track is so occupied. *Ibid.*

And a judgment for damages and an injunction against a street-railway company in an action by an abutting owner in which it was alleged that the defendant constructed a siding or turn-out opposite lots occupied by him, the outer track being 16 inches from the curb of

the sidewalk, and that the siding was used as a stand for defendant's cars, from two to four cars usually standing thereon directly in front of plaintiff's premises and cutting off access thereto, will be reversed where the damages were assessed by a jury on the theory that the whole structure was unlawful, although the judge found that the structure was lawful and placed his direction for an injunction on the ground that the lessor of the railway company could not confer any right to occupy the siding as a stand for the accommodation of cars. Mahady v. Bushwick R. Co. 91 N. Y. 148, 43 Am. Rep. 661.

Switches and turn-outs built in a public street under legislative authority to construct a railroad and necessary switches and turn-outs therein are presumed to be necessary, and an abutting owner alleging them to be a nuisance has the burden of proving them to be so, though they are so near the sidewalk in front of his premises as to prevent a carriage from standing there while the switch or turn-out was occupied by passing cars. Carson v. Central R. Co. 34 Cal. 329.

In Kellinger v. Forty-Second Street & G. Street Ferry R. Co. 50 N. Y. 206, however, holding that the laying of a street-car track so near the sidewalk as not to leave sufficient space for a vehicle to stand will not be enjoined and is not the subject of an action for damages, it was said that the court did not intend to determine that there were no circumstances which would justify an action. All the authorities concur that an injury to private rights of property committed through negligence or willful misconduct, even though in the pursuit of a lawful purpose, may be redressed by an action.

And it has been held that a municipality cannot grant permission to a street-railway company to lay a railroad track upon the side of a street where it would be more of an obstruction to the convenient access to the houses and other improvements on that side than it would be if laid in the center of the street. Cincinnati & S. G. Ave. Street R. Co. v. Cumminsville, 14 Ohio St. 523.

And in Scioto Valley R. Co. v. Lawrence, 38 Ohio St. 41, Cincinnati & S. G. Ave. Street R. Co. v. Cumminsville, 14 Ohio St. 524, *supra*, was sanctioned and affirmed, though in the former case there is nothing to show that the railroad in question was placed elsewhere than in the center of the street.

A street-railway company authorized to con-

oughly considered by the court of appeals of New York in the case of *Killinger v. Forty-Second Street & G. Street Ferry R. Co.* 50 N. Y. 206. In that case the plaintiff alleged that the track of defendant's road was unnecessarily or negligently or wilfully laid so near the sidewalk as to impair the use of his premises, and depreciate its rental value. The court held that "abutting owners have an easement in the street, in common with the whole people, to pass and repass, and also to have free access to their premises; but the mere inconvenience of such access occasioned by the lawful use of the street is not the subject of action." The supreme court of Pennsylvania has also thoroughly considered this question in the case of *Rafferty v. Central Traction Co.* 147 Pa. 579. This was an injunction suit to prevent the laying of rails on a street in such proximity to the curb as to interfere with the ingress and egress of the abutting property holders, and

the rights of such property holders were exhaustively discussed by the court. It was claimed by the plaintiffs that their right of free access to their property along the street was interfered with because vehicles could not stand between the tracks and the curbing without interfering with the cars. It was held that "the right of the property owner in this respect is not at all changed. He has the same right after the tracks are laid . . . that he had before. It is a right which must be exercised in reason, whether there are car tracks on the street or not. In no circumstances does it confer the privilege of obstruction by unreasonable exercise, but the reasonable exercise of the right gives no right to the street car companies to arrest it"; the court finally holding that "the operation of a street railway by electricity is not an additional servitude or burden on the land which will entitle the owner of property abutting on the street to compensation,

struct a track along and upon a highway, and to use and occupy any such parts of it as might be required for the purposes of their railroad track and the running of their cars, should exercise the right given them in accordance with the use and purposes of the highway so as to cause as little inconvenience as possible to the public and adjoining proprietors, and should construct their tracks upon the part of the highway used by carriages, and not on the side thereof by foot passengers and within a few feet of the adjoining property line, where the running of the cars would interfere with access to the adjoining property, and greatly diminish its value. *Ross v. Montreal Street R. Co.* 24 L. C. Jur. 60.

So, municipal power to control streets does not include the right to permit a private corporation to operate a street-railway line upon a street, where there was already in operation upon that street a double-track street railroad, with telegraph and telephone lines, and wires and poles for electric lighting, and the street had already become greatly obstructed, and between the third track proposed to be constructed and the sidewalk in front of an abutting owner's premises there would not remain sufficient space for the ordinary traffic of the street free from unreasonable obstruction, and the means of access to his premises would be unreasonably and materially abridged and injured. *Dooly Block v. Salt Lake Rapid Transit Co.* 9 Utah, 31, 24 L. R. A. 610.

And where the tracks already upon the street afford ample facilities to run all cars necessary for public convenience, it cannot permit the laying of an additional line where it would not leave sufficient space between the outside of the additional line and the gutter in front of the premises of an abutting owner for vehicles to pass each other with safety, and would materially and unreasonably abridge and injure such owner's right of access. *Ibid.*

So, an allegation in an action by an abutting owner against a street-railway company that the west rail of the track of the railroad was laid within 18 inches of the curbstone on the abutting owner's side of the street in front of his lot, and that the cars are running daily from 6 o'clock A. M. to 10 o'clock P. M., passing the premises every five minutes and often as many as four, five, and six cars following in trains one immediately after the other, effectually cutting off all safe entrance to and exit from said property by any kind of vehicle, substantially

asserts that by reason of the construction and operation of the road the plaintiff was deprived of ingress and egress to and from his property which would be sufficient to entitle him to recover damages therefor. *Campbell v. Metropolitan Street R. Co.* 82 Ga. 320.

And the question whether the premises of an abutting owner are interfered with by a street-car line to such an extent as to materially depreciate their value, thus rendering the street-railway company liable, is one of fact for the jury under an allegation that the company wilfully made a large curve in its road, and built it so near the curb in front of such lot that a wagon could not pass between the curb and the track. *McQuaid v. Portland & V. R. Co.* 18 Or. 237.

An allegation in an action by an abutting owner against a street-railway company for laying its track in close proximity to his premises that the street being an up-grade, the horses and mules drawing the cars were often driven under the lash, causing them to rear, plunge, pitch, and jump upon the sidewalk in front of the plaintiff's property greatly to the annoyance and disturbance of himself and family, however, is demurrable as alleging a nuisance to the occupancy only, since to recover the damage must be to the property, and not consist merely of an inconvenience or nuisance. *Campbell v. Metropolitan Street R. Co.* 82 Ga. 320.

But where the question in an action by an abutting owner against a railroad company occupying the street is the absolute obstruction of access to his property by the building of the road, it is impossible to separate the construction from the operation thereof within the intent of the principle of law that where injuries result from the exercise of a lawful business in a lawful manner without negligence and without malice they are *damnum absque injuria*. *Pennsylvania R. Co. v. Walsh*, 1 Pa. Dist. R. 121.

In England there is a rule that 9 feet and 6 inches shall intervene between the tramway rail and the nearest foot path.

But this rule was departed from in Edinburgh Street Tramways Co. v. Black, L. R. 2 H. L. S. C. App. Cas. 336, where, in reliance upon preliminary agreements the abutting owners on a narrow thoroughfare abstained from opposing the Edinburgh tramway bill authorizing the construction of a tramway therein and its location not in accordance with the rule, and afterwards upon an attempt by them to prevent the tramway from being placed nearer the footpath,

either by injunction for damages by the construction and maintenance of such a track. . . . If at any time, the owner [of property abutting on the street] has occasion for the presence of vehicles in front of his property on the street to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary for his purposes; and if, in the exercise of such right, the passage of street cars is impeded, the street cars must wait." In the case of *Williams v. City Electric Street R. Co.* 41 Fed. Rep. 556, the court said: "The operation of a street railway by . . . [mechanical power] is not an additional servitude or burden on the land already dedicated or condemned to the use of a public street, and is therefore not a taking of private property, but is a modern and improved use only of the street as a public highway, and affords to the abutting property holder, though he may own the fee of the street, no legal ground of complaint." In the case of *Briggs v. Leviston & A. Horse R. Co.* 79 Me. 363, the court said: "We do not think the construction and operation of a street railroad in a street is a new and different use of the land from its use as a highway. . . . The laying down rails in the street and the running street cars over them for the accommodation of persons desiring to travel on the street is only a later mode of using the land as a way, using it for the very purpose for which it was originally taken." In the case of *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 213, the supreme court of New Jersey held that abutting owners' rights in a street in front of their property are subservient, unless such use imposes an additional servitude upon the land taken by the street or the abutting land; but when a public use, authorized by law, takes no property of the individual but merely affects him by proximity, the necessary interference in his business or in

the enjoyment of his property occasioned by such use, furnishes no basis for damages." In the case of *Detroit City R. Co. v. Mills*, 85 Mich. 634, the court held that "street railways, when constructed so as not to interfere with the rights of others upon the streets, form no obstruction to such use and enjoyment. They make no more noise than the omnibus and other heavy vehicles, are not more dangerous, and no more interfere with access to the abutting lots. They constitute a modern and improved use only of the street as a public way"; holding that the abutting property owner would not be entitled to compensation for such use, in the absence of a statute giving it or plain proof of such injury. In the case of *Louisville Bagging Mfg. Co. v. Central Pass. R. Co.* 95 Ky. 50, this court said: "It is well settled that the use of a public street for travel and transportation by means of railway cars falls within the purposes for which streets are established and dedicated; and it is only when other ways of travel and transportation are prevented or unreasonably obstructed that courts can interfere to either enjoin or limit operation of railroad upon a public street. . . . The trolley system of operating street-railway cars, when properly adjusted and supervised, is not much, if any, more dangerous than horse power. . . . Moreover, while street-railway cars thus operated go at greater speed, are more comfortable, and must in time become a cheaper mode of travel, they can be easier controlled than horse cars, and do not really more obstruct the streets or interfere unreasonably with business transacted thereon."

This question has been so exhaustively discussed, both in cases and text-books, as to leave but little to be said; and the rule is that a street railway may be placed and operated upon any part of a public street of a municipal corporation which is used by

it was held that the statute not only furnished authority for the location of the road, but that the company was bound to obey it.

IV. Damages.

The amount of any depreciation in the value of premises abutting on a street, caused by the location, conducting, and operation of a street railway so near them as to prevent or materially affect access thereto, is the measure of damages in an action therefor. *McQuaid v. Portland & V. R. Co.* 18 Or. 237.

It is the difference between the value of the property before and after the building of the road. *Ellizabethtown, L. & B. S. R. Co. v. Combs*, 10 Bush, 392, 19 Am. Rep. 67.

An injury to the property of an owner abutting upon a street caused by the location of a railroad track within a few feet of the sidewalk opposite his premises so that carriages drawn by horses cannot pass or stand in front of his lot while trains are passing, and his means of ingress and egress are interfered with, is permanent and enduring in its nature, so that a single recovery may be had for the whole injury to result from the acts complained of. *Ibid.*

V. The California statute.

The provision of the California statute is that street-railway companies shall construct their

tracks on those portions of the street designated in the ordinance granting the route which must be as nearly as possible in the middle of the street, and a general ordinance applicable to all street-car companies providing that the track shall be laid as near the center of the street or streets along the route of the railway as practicable, are to be strictly construed and a strict compliance therewith must be had. *Finch v. Riverside & A. R. Co.* 87 Cal. 597.

But these provisions mean as nearly as practicable, since the location in the middle of the street could not always be made, and the location must be controlled in some degree by the circumstances of the particular case. *Ibid.*

A street-railway company violating these provisions without reason is liable to an action of ejectment by an abutting owner owning the fee in the street. *Ibid.*

And evidence that a street was only 40 feet wide, and that consequently it would interfere with traffic to place a street-car track in the middle of the street, in the absence of anything to show how much travel there was because teams could not pass each other on either side of the track without crossing it, is not sufficient to show why the track could not be located in the middle of the street under a statutory and municipal provision requiring tracks to be laid as near the center of the street as practicable. *Ibid.*

F. H. B.

vehicles without increasing the burden of the servitude, and the owner of the fee is not entitled to compensation because of such use of the street upon which his property abuts merely because he is affected by the proximity of the tracks to his property, without proof of special damage resulting therefrom. It does not appear that there was such obstruction of appellee's use of the public highway in front of his house by the railway as would justify recovery, if, as a matter of fact, the railway was built entirely upon the turnpike road. While it is true that there is not sufficient room between the tracks and the house of appellee for wagons and other vehicles to stand as they formerly did, there is nothing to hinder vehicles from being driven across the tracks at that point, or standing on the space between the rails, as cars pass there only at intervals of ten or fifteen minutes. Most of the witnesses who testify on this point state that there was no diminution whatever in the salable value of appellee's property resulting from the operation of the road, and no witness except appellee himself fixes the damages as high as the verdict of the jury. The verdict is excessive, and palpably against the weight of the evidence, and the proof did not authorize the submission to the jury of the questions of fact embraced in instructions Nos. 2 and 4. But upon the question as to whether appellant had appropriated, for the use of its track, land to which appellee actually held the legal title, the proof is conflicting, and, in our opinion, this issue was properly submitted to the determination of the jury; but, as it is impossible to say how much the verdict of the jury may have been affected by the other question, *the judgment is reversed*, and the cause remanded for proceedings consistent with this opinion.

Guffy, J., dissenting:

The object of the suit instituted by appellee (plaintiff below) was to recover damages against defendant upon two grounds: First, that it had forcibly entered and taken possession of his property, and entered thereon a street-railway track; and, second, had built the same so near to his property as to obstruct his ingress and egress to and from the turnpike road upon which his property fronted. A trial resulted in a verdict and judgment in favor of plaintiff for \$665, and appellant appealed to this court, and this court, in an opinion by a majority, reversed the judgment appealed from. It seems to me that the majority opinion is not sustained by the law, and is so far-reaching, in its effects upon the rights of property holders that I feel constrained to enter and file this dissenting opinion.

It seems to me that the reversal of the judgment was unauthorized for several reasons. The opinion in effect decides that the railway as built does not interfere with the ingress or egress of appellee to and from the turnpike road when in fact several witnesses testified that it did seriously obstruct the ingress and egress. One witness stated that vehicles could not be driven across the track of the railway without breaking them,

and, while it may be true that appellant's proof was quite different, yet it was the province of the jury to weigh and determine as to the truth of the matter, and especially so in this case, for this record discloses that, upon motion of appellant, the jury were permitted to view the track and surroundings. It seems to me that the majority opinion is an invasion of the province of the jury as to the finding of facts, and will upon the next trial bar appellee's right to show and recover for the obstruction complained of. The majority opinion seems to proceed upon the idea that the building of a street railway is no new servitude imposed upon a street, and therefore abutting property owners cannot recover anything resulting from injury to their property on account of the building of such railways, and certainly so unless such building practically destroys ingress and egress to and from the street.

Quite a number of authorities are cited in support of the opinion. I have examined most of them, and am unable to see that they support the opinion of the majority. Almost if not every one recognizes the law to be that, if the railway materially obstructs the ingress and egress, the property owner can recover. I think that all the authorities relied on in the opinion apply to cases in states having a different constitutional provision from that in our Constitution in regard to the taking of private property for public uses. It is a well-settled rule of law in this state that a party may have a perfect and legal right and title to an easement, and, although it may not be exclusive of the public generally, yet he can no more be deprived of such right to such easement than he can be deprived of any other right.

The case referred to in the opinion of *Louisville Bagging Mfg. Co. v. Central Pass. R. Co.* 95 Ky. 50, is not applicable in the case at bar. The main question in the case *supra* was whether the railway company should be enjoined from erecting an electric street-car line which it was alleged, among other things, would prevent the bagging company from unloading vehicles by backing them up to and at right angles to the sidewalk. The court held that such loading and unloading would necessarily obstruct the proper use of the street for other vehicles, and, besides, is forbidden by city ordinance. It is further said in the case *supra* that the plaintiff had signally failed to show that he had been unreasonably obstructed or hindered in his business, or that his rights had been illegally interfered with. No reference is made in the opinion *supra* to §§ 164 nor 242 of the present Constitution, if, indeed, the present Constitution was in force at the commencement of the suit referred to above. It is perfectly manifest to my mind that the majority opinion is in direct conflict with the opinion in the case of *Henderson v. McClain* (decided by this court December 9, 1897) (Ky.) 39 L. R. A. 349. McClain recovered a judgment against the city of Henderson for injuries to his property resulting from street improvements. There was no physical taking of the property, nor was the work of improvement done in an unskilful manner, but the result of the

improvement was to materially decrease the value of McClain's abutting lot. It has often been decided by this court, under the former Constitution, that no recovery could be had in such cases. Section 14 of the Constitution of 1850 says: "No person shall, for the same offense, be twice put in jeopardy of his life or limb; nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." The same provision is in § 13 of the bill of rights of the present Constitution. The first part of § 242 of the present Constitution reads as follows: "Municipal or other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by them; which compensation shall be paid, before such taking, or paid or secured at the election of such corporation or individual before such injury or destruction."

This court, in case of *Henderson v. McClain* (Ky.) 39 L. R. A. 349, after reviewing the law as it existed prior to the adoption of the present Constitution, and as expounded by this court, and after referring to §§ 242 and 13, quoted above, said: "The adoption of this section, in addition to the provisions of § 13, in our view undoubtedly indicated an intention to change the organic law of the state, and to abolish the requirement of direct physical injury to the property in order to establish a claim for damages. The language used is that municipal corporations shall make just compensation for property taken, injured, or destroyed by them. The city undoubtedly has the right to take private property, having the right of eminent domain. It also has the undoubted right to improve the streets for the public use, in a proper manner, when thereto authorized by legislative authority. If, however, in making the improvements, it takes, injures, or destroys private property, compensation must be made, unless consent has been given. This exact question appears to have been decided in several of the states in which new constitutions, containing similar provisions, have been adopted in recent years. In Illinois the old Constitution contained a provision similar to that contained in § 13 of our Constitution. By the Constitution of 1870 [art. 2, § 13], the provision was made to read: 'Private property shall not be taken or damaged for public use without just compensation.' And, while the rule under the former Constitution had been held as in the section quoted above from Dillon (§ 722), it has been held in numerous cases that the new rule introduced by the present Constitution required compensation in all cases where it appears 'there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.' *Rigney v. Chicago*, 102 Ill. 64. It was there held 'that the introduction of that word (dam-

age), so far from being superfluous or accidental, indicated a deliberate purpose to make a change in the organic law of the state, and abolished the old test of direct physical injury to the corpus or subject of the property affected.' This doctrine was approved by the Supreme Court of the United States, in an opinion delivered by Mr. Justice Harlan, in the case of *Chicago v. Taylor*, 125 U. S. 162, 31 L. ed. 639. Referring to the *Rigney Case*, he said: "The conclusion there reached was that, under this constitutional provision, a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character—that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but, if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question. The case of *Pittsburg, Ft. W. & C. R. Co. v. Reich*, 101 Ill. 157, is in point on this question of damages; and the case of *Chicago v. Union Bldg. Asso.* 102 Ill. 379, 40 Am. Rep. 598, also reviews the authorities, and approves the doctrine in *Rigney v. Chicago*, 102 Ill. 64.' In Missouri a similar constitutional provision has been adopted, and a similar construction given. *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 574. In Pennsylvania a constitutional provision was adopted in 1874, exactly similar to § 242 of our Constitution, which has been construed in *New Brighton v. Peirsol*, 107 Pa. 280, as the provision of the Illinois Constitution. In a number of other states which have adopted the same or similar constitutional provisions the courts have gone as far or farther than the Illinois courts in permitting recovery for consequential damages in such cases. See 2 Dill. Mun. Corp. 4th ed. §§ 990-995a, inclusive, and notes. We conclude that, under the averments of the petition in this case, admitted by the demurrer to be true, there was a right of recovery."

Several states have, of late years, inserted in their Constitutions, provisions similar to § 242 of our Constitution. Section 8 of article 15 of the Constitution of Pennsylvania, adopted in 1874, provides that municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by their construction or enlargement of their works, etc. The supreme court of Pennsylvania, in *New Brighton v. Peirsol*, 107 Pa. 283, discussed and construed the section of the Constitution aforesaid. Peirsol brought suit against New Brighton to recover damages for the injury caused to plaintiff's property abutting on Lock street by reason of a change of grade of said street, made after the plaintiff purchased his lot, and obtained a verdict for \$193. The court clearly recognized the importance of the change made by the Constitution of 1874. The concluding portion of the opinion is as follows: "The claim now is for change of grade made since the defendant in error purchased, and for

damages sustained by work done since the adoption of the Constitution of 1874. Judgment affirmed." The decision *supra* was rendered some time before the adoption of our present Constitution, and § 242 thereof is the same in substance as the section of the Constitution of Pennsylvania, before quoted; and it is a well-settled rule of construction that the framers of the present Constitution intended § 242 to mean and have the same effect given by the supreme court of Pennsylvania, in the case, *supra*, to § 8 of the Pennsylvania Constitution. The provision of the Constitution of Illinois adopted in 1848, in regard to the taking of private property for public use, was the same as § 13 of the present Constitution of this state; but in 1870 Illinois adopted a new Constitution, which provided that private property should not be taken or damaged for public use without just compensation.

In *Rigney v. Chicago*, 102 Ill. 75, the supreme court of Illinois, in a very elaborate opinion, discussed the rights and remedies of abutting property owners, and also discussed and construed the new Constitution of Illinois. Rigney sought to recover against the city of Chicago for injury to his property resulting from street improvements. The trial court dismissed his petition, and an intermediate court, called the "court of appeals," affirmed the judgment, and he appealed to the supreme court of the state. The court, among other things, said: "The position of appellee that the new Constitution was simply intended to conserve existing rights, and that, therefore, there can be no recovery in any case except where there has been an actual appropriation of or physical injury to the plaintiff's property, is founded in part upon certain expressions to be found in some of the cases which have arisen since the adoption of the new Constitution, which seem to recognize as still existing the old test that the injury must be direct and physical, where there has been no actual appropriation or taking of the property. It is hardly necessary to observe that what is said in any case upon a matter not necessarily involved in the decision is not to be regarded as authoritative or binding. Such expressions can only be regarded as indicating the views of the members of the court, and particularly that of the writer of the opinion, upon a matter which the court is not required to, and consequently cannot, judicially determine; and hence, while they are entitled to respectful consideration, they are never accepted as authoritative. An examination of the cases, it is believed, will clearly show that no express decision to that effect has ever been made; and, even if such a case could be found, it must have been made without due consideration, and should not be followed, for to recognize such a rule would, in effect, as we have already shown, be to render inoperative a plain provision of the Constitution. . . . The question, then, recurs: What additional class of cases did the framers of the new Constitution intend to provide for which are not embraced in the old? While it is clear that the present Constitution was intended to afford redress in a cer-

tain class of cases for which there was no remedy under the old Constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns or cities which directly impair the value of private property, for which the law does not, and never has, afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of neighboring property; yet that is clearly a case of *damnum absque injuria*. So, as to an obstruction in a public street, if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that, by reason of such disturbance, he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases; and we have no doubt it was the intention of the framers of the present Constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law. The English courts, in construing certain statutes providing compensation for injuries occasioned by public improvements, in which the language is substantially the same as that in our present Constitution, after a most thorough consideration of the question, lay down substantially the same rule here announced. *Chamberlain v. West End of London & C. P. R. Co.* 2 Best & S. 605; *Beckett v. Midland R. Co.* L. R. 1 C. P. 241, on appeal, L. R. 3 C. P. 82; *M'Carthy v. Metropolitan Bd. of Works*, L. R. 7 C. P. 508. These statutes require compensation to be where property was 'injuriously affected,' which the English courts construe as synonymous with the word 'damage.' *Hall v. Bristol*, L. R. 2 C. P. 322; *East & West India Docks & B. Junction R. Co. v. Gattke*, 3 MacN. & G. 155. The rule we have adopted was unanimously sustained by the house of lords in the *M'Carthy Case*, L. R. 7 C. P. 508, and is believed to be in consonance with reason, justice, and sound legal principles; and while it has not heretofore been formulated in express terms, as now stated, yet the principles upon which the rule rests are fully recognized in the previous decisions of this court, particularly in *Shauneeetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321; *Pekin v. Brereton*, 67 Ill. 477, 16 Am. Rep. 629; *Chicago & P. R. Co. v. Francis*, 70 Ill. 238; *Pekin v. Winkel*, 77 Ill. 56; and *Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412. In this last case the *Shauneeetown* and *Brereton Cases* are approvingly referred to. In the *Shauneeetown Case* it was said: 'The true question is whether the property was injured by the improvements. If not, then there is

no damage, and can be no recovery. If there is, then the recovery must be measured by the extent of the loss,' etc. One of the elements of damage distinctly recognized in this case was the physical obstruction of the right and means of access to the plaintiff's premises. And so of the *Brereton Case*, 67 Ill. 477, 16 Am. Rep. 629; *Winkel Case*, 77 Ill. 56, and *Eaton Case*, 83 Ill. 535, and *Stack Case*, 85 Ill. 377. In the light of these authorities, we are clearly of the opinion that the circuit court erred in refusing appellant's instruction, and also in giving appellee's; and for these errors the judgment of that court should have been reversed by the appellate court, and for not doing so the judgment of the appellate court must be reversed, and the cause remanded, with directions to that court to reverse the judgment of the circuit court, and remand the cause for further proceedings in conformity with the views here expressed. Judgment reversed."

In *Chicago v. Taylor*, 125 U. S. 164, 31 L. ed. 640, the same question was under consideration. Taylor had brought a suit, and obtained judgment against the city of Chicago for injury to his property by reason of certain street improvements erected by special ordinances of the city council, and the city appealed. Justice Harlan delivered the opinion of the court, and, upon a thorough review of the authorities, he sustained the contention of Taylor that, under the Constitution of 1870, he was entitled to recover for the injury resulting to his property by reason of the street improvements. The opinion concludes as follows: "It would serve no useful purpose to examine in detail all the requests for instructions, and compare them with the charge, or discuss the questions arising upon exceptions to the admission of evidence. After a careful consideration of all the propositions advanced for the city, we are unable to discover any substantial error committed to its prejudice. It may be as suggested by its counsel, that the present Constitution of Illinois in regard to compensation to owners of private property 'damaged' for the public use has proved a serious obstacle to municipal improvements; that the sound policy of the old rule, that private property is held subject to any consequential damages that may arise from the erection on a public highway of a lawful structure, is being constantly vindicated; and that the constitutional provision in question is 'a handicap' upon municipal improvement upon public highways. And it may also be, as is suggested, doubtful whether a constitutional convention could now be convened that would again incorporate in the organic law the existing provision in regard to indirect or consequential damage to private property so far as the same is caused by public improvements. We dismiss these several suggestions with the single observation that they can be addressed more properly to the people of the state in support of a proposition to change their Constitution. We perceive no error in the record, and the judgment is affirmed."

The supreme court of Missouri has passed upon a constitutional provision similar to section 242. Sheehy sued the Kansas City 43 L. R. A.

Cable Railroad Company for injury to his property on account of a change of grade of the street. It was admitted that the city had a right to authorize defendant to change the grade, but Sheehy recovered judgment for \$5,000, and the defendant cable railroad company appealed. The case is reported in 94 Mo. 574. I quote as follows from the opinion: "The court, as shown by the instructions given as well as by those refused, tried the case on the theory that while the city had the right by ordinance to change the grade of said street in front of plaintiff's property, and to authorize defendant to make such change, still the defendant was liable for any damage resulting to plaintiff by reason of such change. It is insisted by counsel that this theory was erroneous and that the city being fully empowered by its charter to grade, alter, and change the grade of its streets, and having changed the grade of Ninth street at this locality by ordinance, and authorized and permitted defendant to grade the same for the purpose of constructing its road thereon, it is not liable for damages resulting therefrom. This point is not well taken. Anterior to the adoption of the Constitution of 1875 and as far back as the case of *St. Louis v. Gurno*, 12 Mo. 414, it was the established rule in this state that where a municipality was invested with the control of its streets, and the power to fix, alter, and change the grade of the same, that any damage resulting to an abutting property owner from the change of grade was *damnum absque injuria*, unless the injury could be shown to have resulted from the negligent or improper manner in which the work was done. Section 21, art. 2, of the Constitution of 1875 which provides that 'private property shall not be taken or damaged for public use without just compensation,' has changed this rule. *Werth v. Springfield*, 78 Mo. 107. In this case it is held that 'when property is damaged by establishing the grade of a street, or by raising or lowering the grade of a street previously established, it is damaged for public use within the meaning of the Constitution.' It is clear that the city of Kansas, under its charter, had the power to change the grade of Ninth street, and it is equally clear, under the provision of the Constitution above quoted, that if, in the exercise of that power, the property of an abutting owner was damaged, such owner would be entitled to recover such damages from the city. And, if such liability would attach to the city, it necessarily and logically follows that a railroad company which had the right conferred on it to alter the grade of the street for the purpose of constructing its road would also be liable to an abutting property owner for damages to his property by reason of such alteration. In such case the privilege granted the railroad 'would be yoked with a liability.' That the owner of property abutting on a street has such an easement therein as would support an action for damages peculiar to him is sustained by the following cases: *Lackland v. North Missouri R. Co.* 31 Mo. 181; *Werth v. Springfield*, 78 Mo. 107; *Householder v. Kansas City*, 83 Mo. 488; *McElroy v. Kansas City*.

21 Fed. Rep. 257; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268; *Gulf, C. & S. F. R. Co. v. Eddins*, 60 Tex. 663; *Cross v. St. Louis, K. C. & N. R. Co.* 77 Mo. 318. The theory upon which the court tried the case, as embraced in the instructions, was a correct one. . . . The judgment is affirmed with the concurrence of the other judges, except Ray, J., absent."

I respectfully submit that the foregoing authorities show conclusively that the majority opinion is not sustained by the authorities relied on therein, and is contrary to the weight of all the authorities bearing upon the question at issue. I further submit that the doctrine of the majority opinion is contrary to equity and natural justice. The majority opinion in this case as I understand it, holds that a street railway may be located and run by the very door of the house of the abutting lotowner if his house happens to be upon the line of the street, and, if the track is leveled up as described in the opinion, that the property owner can have no redress, although we know that such a use of a street would necessarily greatly lessen the value of his property, and cause the lives of himself and children to be in imminent peril whenever they went out of the house for any purpose whatever, for they would then be upon the railway track, liable to be struck by the electric car. If the above is not the true construction of the majority opinion yet it is unquestionably true that the opinion sustains the right of a street railway to be run right along the curbing of a sidewalk, which would practically destroy all the business houses which might be on that side of the street. If a street railway was erected along the curbing of the sidewalk on the west side of Fourth street in Louisville, who would dispute the statement that the property on that side would at once be injured 50 per cent or more of its value if it was believed that the street-car line was permanently so established?

I have discussed this question so far upon the ground upon which the majority opinion seems to be based, namely, that the doctrine of street railways and the uses for which streets were established and dedicated applies. In my opinion, the power to establish street railways in towns and cities has no application to the case at bar. The answer of defendant (now appellant) shows that the line of railway and property in contest is not within the boundary of any town or incorporated city. That plea is made in the answer, and by it the appellant was by the court below held to be exempted from the provisions of § 164 of the Constitution; but, if the appellant is held to be entitled to all the privileges and protection of the law applicable to cities and towns, then it should be held to be subject to the provisions of § 164 of the

Constitution, and, if so held, the entire power exercised by it was and is unconstitutional. My judgment is that no turnpike company or commissioners or the county court have any legal power or right to authorize the construction of a street railway upon any turnpike or county road. It would be a new service, and one not contemplated by the law authorizing the establishment of county roads or turnpike roads, and would seriously interfere with the safe and convenient and proper use of such highways. It is evident to my mind that the turnpike company in this case had no authority to authorize the construction of the railway in question. It will be seen from the record, as I understand it, that appellant and appellee both hold under Kinner. Kinner only granted the right of way to the turnpike company for a turnpike road; hence it could be used for nothing else. The fee remained in him, and passed to his vendees, subject only to the use granted by Kinner. If I am right in this, it follows that appellant violated both the property right and right of easement of appellee, and the instructions were more favorable to appellant than it was entitled to. There may be some reason and equity in ruling the law as strictly as it can be legally done as to improving streets in towns, and allowing railways to be established therein, because the public are to be greatly benefited; but in the case at bar it is manifest to me that the railway in question was erected for the sole benefit of the corporation, and that neither the turnpike company nor the commissioners had any lawful authority to grant to the railway the right of way over any part of the county road, and certainly none to the injury of the plaintiff's property, nor to the detriment of his easement. It appears in this case that appellant, by force, sawed off part of appellee's porch or platform, and removed it, and by force held or tied him while they laid the track at that point. From the proof in this case, I incline to the opinion that the appellee was the rightful owner of the land in contest. Appellant's contention is that the rail of the track is seven feet from appellee's house. Conceding that to be true, I still think that a court must judicially know that his ingress and egress to and from the road is materially and unreasonably obstructed thereby. Corporations should be protected in the full enjoyment of their legal rights, but the individual property holder should also have the full protection of the law. Section 242 of the Constitution was evidently made to give greater protection to the citizen than he had theretofore enjoyed, but, if the majority opinion in this case is to be the law of the land, the section *supra* amounts to nothing. The importance of the questions involved is my only apology for this dissenting opinion. I think the judgment appealed from should be affirmed.

MICHIGAN SUPREME COURT.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

v.

Elizabeth DICK, Appt.

(114 Mich. 337.)

Equity has jurisdiction of a suit to obtain the cancelation and surrender of a receipt renewing a lapsed life insurance policy, which was obtained by fraud, although the fraud would be a good defense to the pending action at law on the policy.

(September 14, 1897.)

APPEAL by defendant from a decree of the Circuit Court for Wayne County, in Chancery, overruling a demurrer to a bill filed to cancel a renewal receipt on a life insurance policy. *Affirmed.*

The facts are stated in the opinion.

Mr. Philip T. Van Zile, for appellant:

The jurisdiction in equity is divided into three general subdivisions or classes: (1) Cases exclusively within its jurisdiction; (2) cases where the jurisdiction is concurrent with the legal jurisdiction; (3) auxiliary jurisdiction.

1 Pom. Eq. Jur. § 136.

The concurrent jurisdiction embraces all those civil cases in which the primary right, estate, or interest of the complaining party sought to be maintained, enforced, or redressed is one that is cognizable by law, and in which the remedy conferred is of the same kind as that administered under the like circumstances by the courts of law—being ordinarily a recovery of money in some form.

The fact that the legal remedy is not full, adequate, and complete is, therefore, the real foundation of this concurrent branch of the equity jurisdiction.

1 Pom. Eq. Jur. § 139.

The action at law in this case was upon the policy of insurance for the full amount. The defense was that, because of the fraudulent acts of the insured, the defendant and her son, the policy was void, and the receipt given for the last payment was fraudulently obtained. If the company can prove this upon the trial the defense is complete.

1 Pom. Eq. Jur. § 178.

Whenever an action at law will furnish an adequate remedy, equity does not assume jurisdiction because an accounting is demanded or because the case arises from fraud.

Bay City Bridge Co. v. Van Etten, 36 Mich. 210; *Shaw v. Chambers*, 48 Mich. 355,

NOTE.—As to reinstatement of insurance policy, see also *Heinlein v. Imperial L. Ins. Co.* (Mich.) 25 L. R. A. 627; *Goodwin v. Provident Sav. Life Assur. Soc.* (Iowa) 32 L. R. A. 473; and *Carlson v. Supreme Council A. L. of H.* (Cal.) 35 L. R. A. 643.

As to payment of premium after the death of the insured to reinstate a life insurance policy, see *note to Wright v. Supreme Commandery K. of G. R.* (Ga.) 14 L. R. A. 283. 43 L. R. A.

358; *Wyckoff v. Victor Sewing Mach. Co.* 43 Mich. 309; *Tompkins v. Hollister*, 60 Mich. 479; *Toft v. Stewart*, 31 Mich. 367; *Hagenbuch v. Howard*, 34 Mich. 1; *Torrent v. Rodgers*, 39 Mich. 85; *Petrie v. Torrent*, 88 Mich. 43; *Druon v. Sullivan*, 66 Vt. 609; *Stannard v. Whittlesey*, 9 Conn. 556.

The court of law having taken jurisdiction of the case, and the case being at issue and ready for trial, a court of equity having co-ordinate authority will not be permitted to interfere with its action.

Maclean v. Speed, 52 Mich. 257; *Barnum Wire & Iron Works v. Speed*, 59 Mich. 272; *Stearns v. Stearns*, 16 Mass. 170; *Home L. Ins. Co. v. Selig*, 81 Md. 200; *Phœnix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 616, 20 L. ed. 501; *Ætna L. Ins. Co. v. Smith*, 73 Fed. Rep. 318; *Walker v. Micklethwait*, 1 Drew. & S. 54; *Stewart v. Great Western R. Co.* 2 Drew. & S. 443.

Mr. Alfred Russell, for appellee:

According to the ancient and original jurisdiction in England, which is not restricted by any statute in this state, equity has concurrent jurisdiction with a court of law, and it makes no difference that a suit at law has been begun and that there may be a remedy at law, whether adequate or inadequate.

1 Dan. Ch. Pl. & Pr. p. 576; *Heard, Eq. Pl. p. 159*; *Stewart v. Great Western R. Co.* 2 DeG. J. & S. 321.

Whenever a person conceals a material fact, substantially the consideration for the contract, and peculiarly within his own knowledge, the transaction will be void on the ground of fraud.

Chitty, Contr. p. 153; *Dolman v. Nokes*, 22 Beav. 402; 1 Story, *Eq. Jur.* § 216.

The cases in this state fully sustain this suit.

Wheeler v. Clinton Canal Bank, Harr. Ch. (Mich.) 449; *Wales v. Newbould*, 9 Mich. 45; *Wright v. Hake*, 38 Mich. 525; *Wyckoff v. Victor Sewing Mach. Co.* 43 Mich. 309; *Tompkins v. Hollister*, 60 Mich. 470; *Brown v. Buck*, 75 Mich. 274, 5 L. R. A. 226; *Sherman v. American Stove Co.* 85 Mich. 169; *Cogswell v. Mitts*, 90 Mich. 353; *Chicago & G. T. R. Co. v. Miller*, 91 Mich. 166; *Warren v. Holbrook*, 95 Mich. 185.

This is a case of delivery up and cancelation of instruments, and this remedy is exclusively within the jurisdiction of equity.

There is no jurisdiction at law at all with respect to surrender and cancelation.

Pom. Eq. Jur. §§ 170, 171; *Wales v. Newbould*, 9 Mich. 45; *Sherman v. American Stove Co.* 85 Mich. 169; *Cogswell v. Mitts*, 90 Mich. 353.

Hooker, J., delivered the opinion of the court:

The complainant's bill alleges:

(1) That the complainant issued a life policy of \$2,000 on the life of John J. Dick, payable to the defendant, wherein it was stipulated that, if any instalment should not be paid when due, the policy should be

void, except as to its paid-up value. That the company was accustomed to accept past-due instalments, and to reinstate the policy, provided the insured would furnish a proper certificate of good health; said certificate stating further that the insured agrees that the payment is received and policy reinstated on condition of the truth of such certificate.

(2) This practice was followed by Dick, who defaulted habitually.

(3) January 8, 1896, an instalment became due, notwithstanding two notices to pay, and the policy lapsed, except for its paid-up value.

(4) Thirty-eight days after default, Dick became ill, and died within forty-eight hours.

(5) He called his family doctor that day, Dr. Judson, to attend him; and the same day Dick's son, learning of his father's illness and of the physician's visit, went to the company's agent, and, concealing the facts of illness, and doctor's attendance, offered to pay up. The agent suspecting nothing, said a health certificate must be furnished, and handed the son a printed form, which insured signed; and on the same 18th of February the son's wife took the form, which was signed by the patient, to the physician, to get his name as a witness, although he had not seen the insured sign. The physician signed the attestation, and added the words, "Physician of family," and the next morning February 19, the son took the certificate and money to the agent, who received the same, and gave receipt reinstating the policy.

Copy of certificate:

Detroit, Mich., Feb. 18, 1896.

I, John J. Dick, of Detroit, Mich., being the person whose life is insured under policy number 28.251, in the John Hancock Mutual Life Insurance Company, do hereby certify that I am in as good health as when first examined on my application for said policy, and that my family record is unchanged. I also understand and agree that the payment of premium due January 8, 1896, is received, and said policy is now reinstated, by said company, on condition of the truth of the above statement.

[Signed]

John J. Dick.

Witness: _____

Note any change in family record below.

I witness the above.

[Signed] H. C. Judson, M. D.,
Physician of Family.

The next day, February 20, the insured died of the said illness.

(6) The bill charges that the representations in the certificate were false, and were known to be so by the insured, his son, his son's wife, and his physician; and that they confederated to defraud the company by preparing and delivering the certificate to the agent, with intent, by means thereof, to procure the acceptance of the past-due quarterly premium; and that the agent relied on the false certificate, and accepted and received for the money in ignorance of the facts.

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(7) "April 11, 1896, the agent, having ascertained the fraud, tendered the quarterly premium back, and also the paid-up value, and offered to pay the same (and same is paid into court). Defendant refused the tender, and has sued the company at law in Wayne circuit court, although she is bound, in equity, to surrender the policy and receipt.

"Prayer: To declare the policy void (except for paid-up value), and that it may be delivered up to be canceled; and that the receipt reinstating policy so obtained by fraud be delivered up, and for a preliminary and final injunction against the prosecution of the suit at law."

(8) Action was commenced on the policy, and was enjoined in these proceedings pending the suit.

This bill was demurred to (1) for want of equity; (2) because a legal remedy exists. The demurrer was overruled, and the defendant has appealed from the order.

There is no doubt that the alleged fraud, if proved, should defeat the claim of the plaintiff to any sum beyond the paid-up value of the policy in a court of law. Such court could not, however, have canceled or compelled the surrender of the renewal receipt, though there is force in the suggestion that such cancellation would be of little importance after an adjudication that it was void. It is urged that the case falls within the general rule that equity has no jurisdiction where there is an adequate remedy at law, especially when the latter has been resorted to by the opposite party. Counsel for defendant cites two cases decided by the Federal courts, which sustain his contention, under circumstances closely resembling the situation in this case. These decisions are based upon the 16th section of the Federal judiciary act, which provides that "suits in equity shall not be sustained in either of the courts of the United States, in any case, where plain, adequate, and complete remedy may be had at law." 1 U. S. Stat. at L. 82, chap. 20, § 16. We have no similar statute, and we are cited to several similar cases which sustain the jurisdiction of chancery, even after action at law is commenced. These cases will be found collected in the complainant's brief, and they seem to rest upon two grounds: (1) That the jurisdiction is concurrent in cases of fraud; (2) that the equity courts may grant more complete relief, where an instrument is fraudulently obtained, by compelling cancellation or surrender, and by rendering equitable relief. As counsel suggest, there are cases which, to some extent at least, may seem to militate against this theory, but they do not appear to have been so considered by the court. See *Bay City Bridge Co. v. Van Etten*, 36 Mich. 210; *Teft v. Stecart*, 31 Mich. 367; *Shaw v. Chambers*, 48 Mich. 358. *Shaw v. Chambers* was an ejectment case, and the only ground of equitable jurisdiction was an alleged estoppel *in pais*. This was disposed of on the well-settled rule (in Michigan) that titles to land cannot rest on estoppel *in pais*, and nothing remained but a legal defense. In

Teft v. Stewart a jurisdiction was invoked for chancery so broad that Mr. Justice Graves said, in disposing of the case: "It appears to me quite impossible, in the face of the objection taken and insisted on, to sustain this decree without sanctioning the right to come into equity in all cases to recover damages where the grievance asserted is a fraud committed by one upon another in a dealing in personal property. If the right contended for and carried out by the decree can be maintained, no reason is perceived why, upon the same principle, a party claiming to have been cheated in a horse trade, or in a purchase of any chattels where the amount is sufficient, may not, at his election, proceed to sue in chancery for damages and preclude an investigation before a jury." We must therefore consider the question settled in this state in accord with complainant's claim. We see no occasion to disturb the order of the circuit court in chancery, which is therefore *affirmed*.

The other Justices concur.

John B. SWEETLAND, Admr., etc., of Eva-
line A. Aldrich, Deceased,
v.

CHICAGO & GRAND TRUNK RAILWAY
COMPANY, Plff. in Err.

(.....Mich.....)

1. Damages for pain and suffering cannot be allowed in an action for the negligent killing of a passenger in a railroad accident where the force of the collision was such that many passengers were instantly killed and there is nothing to show that the death for which the action was brought was not instantaneous or that deceased was conscious after the shock.
2. To recover for suffering of a person killed by negligence, plaintiff has the burden of showing that conscious suffering on the part of deceased existed.

(*Montgomery and Hooker, JJ., dissent.*)

(June 28, 1898.)

ERROR to the Circuit Court for Cass County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinions.

Mr. E. W. Meddaugh, with Messrs. Geer & Williams, for plaintiff in error:

It was not intended to give a right of action for the benefit of the estate, in case of death from an injury, under 3 How. Anno. Stat. § 7397, and also allow the heirs to re-

NOTE.—Respecting the right to maintain more than one cause of action for injuries resulting in death, see *note* to *Louisville & N. R. Co. v. McElwain* (Ky.) 34 L. R. A. 788; also *Hill v. Pennsylvania R. Co.* (Pa.) 35 L. R. A. 196.

As to recovery for pain and suffering in an action for injuries resulting in death, see also cases in *note* to *Morgan v. Southern P. Co.* (Cal.) 17 L. R. A. 71.
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cover under §§ 8313 and 8314, for their pecuniary loss.

Section 7397, which provides for the survival of common-law actions for negligent injuries to the person, should be construed to apply to cases where death results from some other cause than the injury.

Holton v. Daly, 106 Ill. 131; *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586; *McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46, 26 Am. Rep. 742; *Hulbert v. Topeka*, 34 Fed. Rep. 510; *Louisville & N. R. Co. v. McElwain*, 98 Ky. 700, 34 L. R. A. 788; *Lubrano v. Atlantic Mills*, 19 R. I. 129, 34 L. R. A. 797.

Where the deceased in his lifetime brings an action and recovers damages for the injury sustained, his representatives cannot maintain an action for damages where death results from the same injury for which the former recovery was had.

3 Elliott. Railroads, § 1375; *Read v. Great Eastern R. Co.* L. R. 3 Q. B. 555; *Pulling v. Great Eastern R. Co.* L. R. 9 Q. B. Div. 110; *Griffiths v. Dudley*, L. R. 9 Q. B. Div. 357; *Haigh v. Royal Mail Steam Packet Co.* 52 L. J. Q. B. N. S. 640; *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271; *Hegerich v. Keddie*, 99 N. Y. 258, 52 Am. Rep. 25; *Legg v. Britton*, 64 Vt. 652; *Hecht v. Ohio & M. R. Co.* 132 Ind. 507; *Foulkes v. Nashville & D. R. Co.* 9 Heisk. 829; *Holton v. Daly*, 106 Ill. 131; *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586; *McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46, 26 Am. Rep. 742; *Louisville & N. R. Co. v. McElwain*, 98 Ky. 700, 34 L. R. A. 788; *Lubrano v. Atlantic Mills*, 19 R. I. 129, 34 L. R. A. 797.

The word "actions" is used in every instance in § 7397, and not the words, "cause of action," or "right of action."

An "action" is the "lawful demand of one's right in a court of justice."

1 Am. & Eng. Enc. Law, 2d ed. p. 577; 3 Bl. Com. p. 3.

A "right of action" is "the right to bring an action."

21 Am. & Eng. Enc. Law, p. 404.

The action itself is the proceeding instituted by the personal representative to recover damages resulting from the "cause of action."

In order to maintain an action, there must exist a "right of action" as well as a "cause of action."

Indianapolis & St. L. R. Co. v. Stout, 53 Ind. 143.

If the legislature had intended, in the face of the universally accepted meaning of the word "action," in a legal sense, to have included the right to bring the action in the first place, as well as the right to revive an action once brought, after the death of the party beginning it, why did they not make their intention clear by including the words "cause of action?"

Where one receives an injury from which he dies immediately, the legislature did not intend to give a right of action for the physical pain and mental suffering which were substantially contemporaneous with the death.

The Corsair, 145 U. S. 335, 36 L. ed. 727; *Cheatham v. Red River Line*, 56 Fed. Rep. 248; *Sherman v. Western Stage Co.* 24 Iowa, 515; *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90, 28 Am. Rep. 214; *Tully v. Fitchburg R. Co.* 134 Mass. 499; *Mulchahey v. Washburn Car Wheel Co.* 145 Mass. 281.

An action cannot be maintained for personal injuries, under § 7397, resulting in death, if the evidence wholly fails to show whether or not death was instantaneous.

Corcoran v. Boston & A. R. Co. 133 Mass. 507; *Riley v. Connecticut River R. Co.* 135 Mass. 292.

The object of the statute was to continue the cause of action which the person injured had, and which he had not enforced, but might have enforced, if death had not ensued, for the benefit of the widow and next of kin, to enable them to obtain their damages, resulting from the same primary cause, and not to create an entirely new and different right of action.

Dibble v. New York & E. R. Co. 25 Barb. 188; *Proctor v. Hannibal & St. J. R. Co.* 64 Mo. 119; *Fowlkes v. N. & D. R. Co.* 5 Baxt. 663; *Cooley, Torts*, 2d ed. p. 309.

Messrs. **Marshall L. Howell** and **Edward Bacon** for appellee.

Grant, J., delivered the opinion of the court:

We do not think that there was any tangible evidence from which the jury had the right to infer that the deceased endured pain and suffering. The two trains collided with terrific force, and many were instantly killed. The witness Allan testified that he reached the telescoped car within three or four minutes after the collision; that he heard wails and groans within; that the car took fire within a minute or two afterwards; that within ten or fifteen minutes they were driven away by the heat of the flames. Plaintiff was a physician, and brother of the deceased. He testified that both the upper and lower extremities of the body were burned completely off, that the upper part of the scalp was entirely denuded, and that her left thigh bone was either burned off diagonally or had been fractured. From his examination of the body, he gave his opinion that death was not instantaneous. It is mere conjecture how long she lived, and there is nothing to indicate that she was conscious at any time after the accident, and before death, if death was not instantaneous. If she was not conscious, how can it be said that she suffered pain? Whether death was instantaneous, or whether, if not instantaneous, she was conscious after the injury, is purely conjectural. Where one was found about ten minutes after the accident with his body crushed, and his bowels disrupted, and he was still breathing, but unconscious, and died almost immediately, without recovering consciousness, held that no damages could be recovered for pain and suffering. *Mulchahey v. Washburn Car Wheel Co.* 145 Mass. 281. The court said: "But as the plaintiff can only recover such damages as she can show were sustained by her intestate, if he became instantly insensible, and so remained 43 L. R. A.

until his death, nothing can be recovered for any physical or mental suffering sustained by him." Where a boat struck in the bank of a river, and sank in about ten minutes, and a passenger was drowned, held that there could be no recovery for mental and physical pains and shock before death; that they were substantially contemporaneous with her death, and inseparable, as a matter of law, from it. *The Corsair*, 145 U. S. 335, 36 L. ed. 727. In *Cheatham v. Red River Line*, 56 Fed. Rep. 248, damages were claimed for suffering while the deceased was struggling in the water before drowning. Held, there could be no recovery. Where one was struggling in the water ten minutes after being thrown in by the wrongful act of the defendant, held that death was instantaneous. *Sherman v. Western Stage Co.* 24 Iowa, 515. See also *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90, 28 Am. Rep. 214; *Tully v. Fitchburg R. Co.* 134 Mass. 499. The rule deducible from the above authorities, and we think also from sound reason, is that plaintiff must show that there was conscious suffering in order to sustain his suit for damages. It is not sufficient to show that the deceased might have lived a few moments after the accident. We are therefore of the opinion that the verdict based upon this count in the declaration cannot be sustained.

Judgment reversed as to this count, and no new trial ordered.

Long, Ch. J., and **Moore, J.**, concurred with **Grant, J.**

Long, Ch. J., concurring:

This suit is brought to recover damages for personal injuries caused to the plaintiff's intestate by the collision of defendant's trains through the negligence of defendant; also to recover damages for her death resulting from such collision, and also for loss of personal property. The first count of the declaration is upon the common-law liability for pain and suffering, etc., endured by the deceased prior to death, which, it is claimed, was not instantaneous, and the right of action for which, it is insisted, survives by § 7397, 3 How. Anno. Stat., and is for the benefit of her estate. Under this count plaintiff had verdict and judgment for \$1,000. The second count is for loss of personal property, and for which plaintiff had verdict and judgment for \$110. The third count is for the benefit of William W. Sweetland, a brother of deceased, who, it is claimed, was dependent upon her for support, and in whose interest the administrator claims the right to recover under §§ 8313, 8314, 2 How. Anno. Stat. Under this count the jury found in favor of defendant. Defendant brings error.

The provisions of § 7397, 3 How. Anno. Stat. have been in force since 1838. In 1846 it read: "In addition to the actions which survive by the common law, the following shall also survive, that is to say: Actions of replevin and trover; actions for assault and battery, or false imprisonment,

or for goods taken and carried away; and actions for damages done to real or personal estate." This statute was amended by act No. 113, Pub. Acts 1885, by inserting into the original act the clause, "for negligent injuries to the person." Sections 8313 and 8314 are substantially a re-enactment of Lord Campbell's act, omitting the preamble and 3d section, which was first incorporated into our statutes in 1848, and was amended in 1873. As amended, it reads as follows:

"Sec. 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, should be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 2. Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and the amount recovered in every such action shall be distributed to the persons and in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered."

It will be noticed that until 1885 there was no statute in this state providing for the survival of actions for negligent injuries to the person, and no suit could be maintained for the injury after the death of the injured person for the pain and suffering arising from such injuries. Was it the intention of the legislature under § 7397 to give a right of action for the benefit of the estate in case of death from an injury, and also to allow the heirs to recover under §§ 8313 and 8314 for their pecuniary loss? I think not. The fact that the common-law right of action which survives under § 7397, is for the benefit of the decedent's estate and that the right of action under §§ 8313 and 8314 is given for the benefit of the decedent's heirs, can make no difference in the construction which I think must be placed upon these statutes. It was not the intention of the legislature to give two rights of recovery for the same injury which results in death. The act giving a right of action for damages for wrongful death was passed by our legislature several years after the act providing for survival of actions, and was intended to provide the only remedy where death resulted from any wrongful act. If Mrs. Aldrich, the decedent, had lived long enough to bring suit against defendant for injuries, etc., and pain and suffering, both past and future, and the jury had awarded her damages, which had been paid, and then she had died from the same injuries so wrongfully inflicted, would it be held that 43 L. R. A.

the administrator might maintain another action under §§ 8313 and 8314? Or, had she survived her injuries long enough to have settled with the defendant, and had so settled, would it be held that the administrator could maintain an action under these sections? It is generally held that if the deceased had settled for injuries received in his lifetime, or recovered damages in an action, an action cannot be maintained, under Lord Campbell's act, after his death. Cooley, Torts, p. 309. It must follow, therefore, that if such judgment obtained by her in her lifetime or settlement so made by her is a bar to a recovery by the heirs under §§ 8313 and 8314, then a judgment obtained by the heirs for a cause of action accruing to them by survival under § 7397 would be a bar to the right to recover for her death under §§ 8313 and 8314. In other words, it is apparent that it has not been the understanding of the courts and law writers that such statutes intended to create two rights of action for the same wrongful act. It is true that repeals by implication are not favored in the law. There is, however, no such repugnance in these statutes that both cannot stand. Section 7397, which provides for the survival of common-law actions for negligent injuries to the person, applies to cases where death results from other causes than the wrongful injury. It seems to me that this is made plain from the terms of the statutes. In *Rogers v. Windoes*, 48 Mich. 628, the action was brought for the wrongful conversion of testator's property during his lifetime. The court below held that the action died with the person, and no action survived. It was held that the action did survive, and the judgment below was reversed. That case in no way conflicts with the interpretation which we give to these statutes. It is true that some language was used in *Hurst v. Detroit City R. Co.* 84 Mich. 544, which might be taken as holding that satisfaction under one of these statutes would be no bar to a suit under the other; but that question was not involved in that case, and the language was but mere *dictum*.

The Illinois act passed in 1853 is almost identical with our §§ 8313, 8314. The revival act of that state includes within the actions which survive, actions to recover damages for injury to the person. This last act was passed in 1874. In *Holton v. Daly*, 106 Ill. 131, one Michael Daly was injured, and brought suit, and recovered judgment, which was afterwards set aside. Subsequent to this he died intestate, and Mary Daly was appointed administratrix. She was substituted party plaintiff in the cause, which was again tried, and resulted in favor of plaintiff. The supreme court, in construing the two acts, held that the death act applied, and that no recovery could be had under the survival act. The court said: "The act of February 12, 1853, applies, as we have seen, by its own terms, to all cases where the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, and re-

cover damages in respect thereof. As was said in *Chicago v. Major*, 18 Ill. 356, 68 Am. Dec. 553: "This language is very broad and comprehensive, embracing in direct and positive terms, all cases where, if death had not ensued, the injured party could have maintained an action for the injury; and, as we have already observed, it is the wrongful act, neglect, or default that constitutes the cause of action. A right of action which at common law would have terminated at the death is continued for the benefit of the wife, husband, etc., and its scope enlarged to embrace the injury resulting from the death."

There were left, however, injuries to the person not resulting in death, for which, in the event of the death of the injured party before obtaining judgment, no remedy was provided affording a proper subject-matter for the act of 1872. If a party receiving injuries died from other causes, no action could be maintained under the act of February 12, 1853; but now, under the statute of 1872, the cause of action survives to his personal representatives. It is not to be presumed it was intended there should be two causes of action in distinct and different rights, by the same party plaintiff for the same wrongful act, neglect, or default.

It is true, the measure of recovery in the different cases is not the same, but the cause of action is, viz., the wrongful act, neglect, or default. We feel, therefore, constrained to hold that the act of 1872 was not intended to apply to cases embraced by the act of February 12, 1853." In *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586, it appeared that Jeremiah O'Connor, in his lifetime, brought suit against the railroad company for damages for personal injuries, and obtained judgment. An appeal was taken, and pending the appeal O'Connor died from causes other than the injuries complained of in the declaration. His son was substituted as plaintiff in the suit. It was said by the court: "The action being for personal injuries caused by the negligence of the defendant, it is within the statute, and survives."

There is nothing in *Holton v. Daly*, 106 Ill. 131, which holds to the contrary. Indeed, it is expressly therein recognized that such actions do survive upon the death of the plaintiff; and it was held, when death is the result of the injuries for which the suit is brought, the action must be prosecuted, after the death, for the benefit of the widow and the next of kin, and that in such case there can be no recovery for the bodily pain and suffering, but that, where the death results from a cause other than the injuries for which the suit is brought, there may be a recovery, notwithstanding the death, for precisely the same injuries that the party himself could have recovered for had he lived until after the final trial."

The statutes of Kansas are similar to our own. Section 420 of the compilation of 1879 is the revival act, and provides for the survival of actions to recover damages for an injury to the person. Section 422 of the same is the death act. In *McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46, 26 Am. Rep. 742, these two sections were construed, 43 L. R. A.

and it was held that they must be construed *in pari materia*. The court said: "The purpose of § 422 is evidently, not only to fix the amount of damages, and limit them to the use of the widow and children, or next of kin, but to take away the right of the administrator to sue for the benefit of the estate generally, where death resulted from the injuries. Section 420, as construed with § 422, only causes the actions to survive for injury to the person when the death does not result from such injury, but does occur from other circumstances. The right of action under § 422 is exclusive; and an administrator could not maintain an action under §§ 420 and 422 for the same injury. When death results from wrongful acts § 422 is intended solely to apply,"—citing *Keed v. Great Eastern R. Co.* L. R. 3 Q. B. 555; *Andrews v. Hartford & N. H. R. Co.* 34 Conn. 57. In *Hulbert v. Topeka*, 34 Fed. Rep. 510, where the action was brought by the administrator for injuries to the decedent in her lifetime, and from which she died, Mr. Justice Brewer, before whom the cause was tried, held that no recovery could be had under Comp. Laws, § 420, and that in cases of death from negligent injuries § 422 applied. Justice Brewer was on the bench of the state court when the *McCarthy Case* was decided, and joined in that opinion; but in the case in the Federal court he expressed some doubt about the correctness of the ruling in that case, though he followed it in the *Hulbert Case*. This doubt seems to have been based upon the rule laid down in *Needham v. Grand Trunk R. Co.* 38 Vt. 294, where it was held that, where death occurs in consequence of a bodily injury, two causes of suit or action may arise,—one in favor of the decedent for his loss and suffering resulting from the injury in his lifetime, and revived by the act of 1847; the other founded on his death, or on the damages resulting from his death to his widow and next of kin, under the act of 1849. But, however much Mr. Justice Brewer may have been shaken as to the correctness of his conclusions in the *McCarthy Case* by the *Needham Case*, it seems that the supreme court of Vermont in a later case (one decided in 1890) was not satisfied with the conclusions reached in the *Needham Case* in 1865. As early as 1881 Judge Veazey of the Vermont court wrote an opinion which met the approval of a majority of the court in effect overruling some of the conclusions reached in the *Needham Case*. This opinion was not filed, as the case went off on other questions. In *Legg v. Britton*, 64 Vt. 656, it was held that the act providing for the recovery of damages for the benefit of the widow and next of kin where death results from the neglect or default of another does not create a new and additional cause of action; thus fully overruling the *Needham Case*.

In *Louisville & N. R. Co. v. McElwain*, 98 Ky. 700, 34 L. R. A. 788, the court, speaking of the two statutes, says: "We cannot believe that the general assembly intended that the personal representative should maintain an action for the death of the wife, practically for the husband's benefit, and

allow at the same time the husband to maintain one on his own account, for the same acts or negligence."

In *Lubrano v. Atlantic Mills*, 19 R. I. 129, 34 L. R. A. 707 (decided in 1895), the question was whether, under the statutes of that state, an administrator had the right to maintain two actions for negligences resulting in death,—one for the benefit of the widow and next of kin, according to Lord Campbell's act; and another for the damage to the person, under the statute for the survival of actions. The action was brought for the pain and expense arising from injuries to the plaintiff's intestate before his death, which resulted therefrom. The defendant pleaded a judgment in its favor in a suit by the plaintiff in the same cause of action. The plaintiff replied that the former action was brought by him as trustee for the next of kin of the deceased, and in a different right from that involved in the present action, which was for the benefit of the estate. To this replication defendant demurred, and the demurrer was sustained. In substance these statutes are like our own. The opinion of the court in that case is so well reasoned, and the cases which seem to differ from the correct principle so well explained, that I quote from it at some length. In speaking of the survival statute, the court said: "It is under this section that the plaintiff claims. In support of his claim he relies on *Bradshaw v. Lancashire & Y. R. Co.* L. R. 10 C. P. 189; *Leggott v. Great Northern R. Co.* L. R. 1 Q. B. Div. 599; *Barnett v. Lucas*, Ir. Rep. 6 C. L. 247; *Bowes v. Boston*, 155 Mass. 344, 15 L. R. A. 365; and *Needham v. Grand Trunk R. Co.* 38 Vt. 300. The opinion in *Bowes v. Boston* is based upon the statutes of Massachusetts, and holds that two actions, one for the benefit of the family and one for the benefit of the estate, may proceed at the same time, on independent grounds, and for different purposes. It cites no authority. In *Needham v. Grand Trunk R. Co.* the point decided was that, the injury to the deceased having occurred in New Hampshire, where no right of action in either form survived, the plaintiff could not maintain action therefor in Vermont. The dictum relating to two causes of action has recently been overruled in *Legg v. Britton*, 64 Vt. 652. *Barnett v. Lucas* was an action for injury to personal estate, and is therefore not in point. *Bradshaw v. Lancashire & Y. R. Co.* was on demurrer to the declaration, which alleged a breach of contract to carry a passenger safely, and it was held that the action could be maintained, notwithstanding the fact that provision for compensation for the death was made by Lord Campbell's act. The case was decided in 1875; and *Leggott v. Great Northern R. Co.*, decided in 1876, was a case upon a similar contract, to which the defendant pleaded a denial of the averments of fact and a recovery by the plaintiff under Lord Campbell's act. The plaintiff replied that the defendant was estopped by the judgment in the former case to deny the facts, and to this replication the defendant demurred. The court held that there was no estoppel, be-

cause the plaintiff sued in a different right; and, in so deciding, followed *Bradshaw v. Lancashire & Y. R. Co.*, but not without protestation. Mellor, J., said: 'With the single exception, so far as I am aware, of the case in the common pleas (*Bradshaw v. Lancashire & Y. R. Co.*), there appears to be no authority that an action will lie by the executor in respect of what is claimed in this action. But, as that case has been decided on the very point, I entirely yield to the authority of the decision so far as to say that in this court it cannot be questioned, and we must, therefore, abide by it.' In *Pulling v. Great Eastern R. Co.* L. R. 9 Q. B. Div. 110, the *Bradshaw Case* was further commented upon. Denman, J., said: 'None of the authorities go so far as to say that where the cause of action is in substance an injury to the person, the personal representative can maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury. The case of *Bradshaw v. Lancashire & Y. R. Co.* certainly does not go to that length, because the judgments in that case are expressly based upon the distinction, in this respect, between actions of contract and actions of tort, and upon the fact that in that case the action was an action of contract.' The opinion (Pollock, B., concurring) decided that the plaintiff could not sue for damage to the intestate's person. In view of these comments, the support which the *Bradshaw Case* gives the plaintiff turns out to be more apparent than real. Prior to these cases, that of *Read v. Great Eastern R. Co.* L. R. 3 Q. B. 555, had been decided in 1868, holding that satisfaction received by the deceased in his lifetime for the injury was a bar to the suit for the death. That case stated the principle upon which the compensatory act is founded. It creates no new cause of action by reason of the death, but gives a new right of recovery in substitution for the right of action which the deceased would have had if he had survived. Upon this principle the new remedy must be exclusive, since otherwise there would be two recoveries for the same cause of action, namely, the negligence of the defendant, which is the cause of action on which the deceased would have sued at common law if he had survived. Moreover, the recognized rules of construction lead to the conclusion that the remedy for the death is exclusive. While the act relates to a remedy, it is, nevertheless, in derogation of the common law, because it gives a right of action where none existed at common law; and so it should be strictly construed. The provisions for survival of actions for damages to the person and for the remedy for the death have been embodied in the same statute in this state since 1857, although the latter was first adopted. The general provision should not be construed to modify the special, since the intention to modify the former statute by giving an additional remedy is not plain, and both can stand together; the act of survival embracing damages to the person other than those which result in death. This is the construction which was given to precisely

similar provisions in *Holton v. Daly*, 106 Ill. 131, where it was held that the only cause of action was the wrong done, irrespective of consequences, and that a statute of survival subsequently passed did not give a remedy additional to that of the prior act relating to the death. . . . So in *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586, it was held that where the plaintiff, pending an action for injuries, dies from some other cause than the injury, the action survives, and may be prosecuted by his administrator. In *McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46, 26 Am. Rep. 742, where both provisions for an action for death and for survival of an action for injury to the person had been embodied in a revision, as in our own statutes, it was held that they must be construed *in pari materia*, and that the latter provision applied only to cases where the death did not result from the injury. This decision was followed in *Hulbert v. Topeka*, 34 Fed. Rep. 510."

In *Griffiths v. Dudley*, L. R. 9 Q. B. Div. 357, Field, J., said: "*Read v. Great Eastern R. Co.* L. R. 3 Q. B. 555, is a clear decision that Lord Campbell's act did not give any new cause of action, but only substituted the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived." In *Canadian P. R. Co. v. Robinson*, 19 Can. S. C. 292, Taschereau, J., quotes with approval the language of Field, J., in *Griffiths v. Dudley*, L. R. 9 Q. B. Div. 357. In *Wood v. Gray* [1892] A. C. 576, it appears that a workman, having been injured through the fault, as he alleged, of his employers, brought an action against them for damages. While the action was pending, he died intestate and unmarried. His mother was appointed his executrix, and she raised a second and concurrent action for *solutum* for her son's death, and asked that the second action should be remitted to the same jury who were to try the first. It was held, affirming the court of sessions, that the second action was incompetent. Lord Watson, who delivered the opinion of the house of lords, among other things, said: "There is not a single instance in which the court has allowed two actions to be brought in respect of the same negligent act leading to the injury and death of one person. Even in cases where the right of relatives to sue has been recognized, they must bring one suit, and one only, in which the damages due to them respectively may be assessed. In that state of the law, I do not think this house ought to encourage the creation of a new right and corresponding liability which are at present unknown in Scotland." Lord Field, concurring in that opinion, said: "The appellant did cite to your lordships a great many cases. I have been carefully through them, and have considered them, and it seems to me, so far as I can follow the question, that there is no foundation whatever for the appellant's contention." That two actions cannot be maintained for the same wrongful act, see *Bigelow v. Nickerson*, 34 U. S. App. 261, 70 Fed. Rep. 113, 17 C. C. A. 1, 30 L. 43 L. R. A.

K. A. 336; *Re City of Norwalk*, 55 Fed. Rep. 98; *American S. B. Co. v. Chase*, 16 Wall. 532, 21 L. ed. 372; *Dibble v. New York & E. R. Co.* 25 Barb. 188; *Proctor v. Hannibal & St. J. R. Co.* 64 Mo. 119; *Foulkes v. N. & D. R. Co.* 5 Baxt. 663.

In a late case in Kansas, decided July 10, 1897,—*Martin v. Missouri P. R. Co.* 58 Kan. 475—it was held that § 420 of the survival statute only permits actions to survive for injury to the person when death does not result from the injury, but occurs from other causes; but, however, where death results from the wrongful act or omission of another, § 422—the death act—is exclusive. That court cites in support of that rule of construction: *Andreus v. Hartford & N. H. R. Co.* 34 Conn. 57; *Read v. Great Eastern R. Co.* L. R. 3 Q. B. 555; *Chicago & E. I. R. Co. v. O'Connor*, 19 Ill. App. 591; *Holton v. Daly*, 106 Ill. 131; *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586; Tiffany, *Death by Wrongful Act*, § 119.

In *Hill v. Pennsylvania R. Co.* 178 Pa. 223, 35 L. R. A. 196, decided by the supreme court of Pennsylvania November 9, 1896, it appeared that the act of 1851 of that state provides that no action for personal injuries by negligence or default shall abate by reason of plaintiff's death, but shall survive to his personal representatives; that where the injured person did not sue during his life, his widow or personal representative may sue; that the right of action to children and parents of a decedent be extended; and also provides for the distribution of damages recovered. It was held that a widow was not given an independent cause of action for an injury causing her husband's death which he could not in his lifetime release or compound. In that case the court cites *Read v. Great Eastern R. Co.* L. R. 3 Q. B. 555, and the opinion of Lush, J., with approval, in which he said: "The intention of the statute is not to make the wrongdoer pay damages twice for the same wrongful act, but to enable the representatives of the person injured to recover in a case where the maxim, *Actio personalis moritur cum persona* would have applied. It only points to a case where the party injured has not recovered compensation against the wrongdoer."

I am aware that in some of the states it is held by the courts that two actions may be maintained under statutes somewhat similar to our own; but the case of *Needham v. Grand Trunk R. Co.* 38 Vt. 294, we have seen, has been effectually overruled by the later case of *Legg v. Britton*, 64 Vt. 652, and the case of *Boues v. Boston*, 155 Mass. 344, 15 L. R. A. 365, shown not to be well reasoned, by the Rhode Island court in *Lubrano v. Atlantic Mills*, 19 R. I. 129, 34 L. R. A. 797. In *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693, it is held that two actions may be maintained under somewhat similar statutes to our own; but the court cites no cases sustaining such a rule, though counsel for plaintiff in that case in his brief seems to rely upon *Needham v. Grand Trunk R. Co.* 38 Vt. 294. In *Davis v. St. Louis, I. M. & N. R. Co.* 53 Ark. 117, 7 L. R. A. 283, the

court seems also to have relied upon *Needham v. Grand Trunk R. Co.* 38 Vt. 294. In the case of *Hedrick v. Ilwaco R. & Nav. Co.* 4 Wash. 400, decided by the supreme court of Washington in 1892, the statutes treated of are very different from our own, and the case is not authority for the contention made for it.

It is claimed that in construing these acts the amendment of 1885 of the survival act must speak from the date of the original act. This is undoubtedly true. But it has never been contended in this state, so far as I can ascertain, until the present action was brought, that a cause of action survives for a negligent injury, or for an assault and battery, where death results from the wrongful act, though these two statutes have been on the statute books for fifty years, and the amendment of 1885 as to negligent injuries over twelve years. Apparently it was thought by the profession that actions in such cases must be brought under the death act, as no one ever before claimed that two actions would lie for the same wrongful act. From the history of the cases in this state, it is at once apparent what the legislative intent was in passing the amendment of 1885. Prior to that time, if the party negligently injured brought suit for damages, and died during the pendency of the case from some other cause than the negligent injury, the suit immediately abated, and no right of action accrued to his personal representatives under §§ 8313 and 8314, because his death was not the result of the wrongful act or omission. The profession was often confronted with this condition, as all such suits abated by the death of the party. But since 1848, when death resulted from the wrongful act, actions could be maintained under the death act. It was not necessary to amend either statute to give a right of action where death did result from the wrongful act. That right already existed. The purpose of the legislature, therefore, was to provide a remedy when one was lost by the death of the party, by the survival of the action which the party himself might have brought in his lifetime for wrongful injuries not resulting in death, and which cause of action did not survive under the former acts. The only logical construction of these statutes, so as to give effect to both, is that the death act applies to cases of death caused by wrongful injuries, while the survival act applies to cases of personal injuries not causing death. If these two acts had been passed at the same time, each being embodied in different sections of the same act, what ground would this have afforded for the contention that the survival section applies to injuries resulting in death? We should then have to reconcile and render operative both sections, as now. The question of the legislative intent of the survival provision in reference to injuries causing death would still be open. The illogical result of holding that the survival provision was intended to cover cases of wrongful killing would still be presented, and would force the conclusion that the legislature intended the survival provision should apply only to 43 L. R. A.

personal injuries not causing death. If we start with the survival act as in existence at the date when the death act was passed, the result is not changed. We then have an act which provided for the survival of actions for personal injuries followed by another giving a right of action for personal injuries resulting in death. It cannot be contended that the survival act conferred a right of action for wrongful killing. More definite and specific language indicative of the legislative purpose to do this would be required. In Illinois the death act was passed first. In *Holton v. Daly*, 106 Ill. 131, both these Illinois statutes were construed, and it was held that both should be given effect; that where death occurred from the injury the death act applied, and where the person died from some other cause than the injury the survival act applied. This decision was not based upon the fact that the death act was first passed. In Rhode Island the survival act was passed first; and the court, in the *Lubrano Case*, 19 R. I. 129, 34 L. R. A. 797, construed these statutes with the same result as reached in *Holton v. Daly*, and by the same reasoning, that both acts must be construed together. In the *McCarthy Case*, 18 Kan. 46, 26 Am. Rep. 742, it appeared that both acts were passed and took effect upon the same day, and effect was given to both, and it was held that the survival act applied to cases only where the death resulted from some other cause than the wrongful act. In all the cases cited by counsel where a different result has been reached the decisions have been based upon the ground that Lord Campbell's act created a new cause of action. I think there is nothing, either upon principle or authority, in the fact that one act was passed before the other which affects the construction to be given these statutes. The real question is (both statutes being in force), How should they be construed so as to give effect to both? And I think the only logical construction is that given by most of the cases; that is, that the survival act applies to cases of negligent injuries to the person that are not fatal, and that Lord Campbell's act applies to fatal cases.

But it is suggested that another view might be taken of these statutes, and thus give a definite and certain rule; that is, that where the person is injured, and survives the injury for a time, a right of action accrues to him which survives in case of his death before judgment, and that in such case the death act has no application. But, if the person is killed outright, no right of action could accrue to him; therefore none could survive, and the death act would necessarily furnish the only relief. Let us see how this construction would leave the parties who were dependent upon the deceased. Under the survival act, the amount recovered goes into the estate for the benefit of creditors, and, if the estate be insolvent, the creditors might receive every dollar of the amount. Is it possible that the legislature was so solicitous for the creditors of the deceased that a limitation was put upon the death act, and a recovery under that act

(the proceeds of which go to the dependent ones) made possible only when the death was instantaneous? To illustrate: Suppose A is thirty years of age, has a wife and children, earns \$125 per month, and receives an injury which he survives one hour. During that hour a right of action has accrued to him. The death act, then, has no application to the case, and no recovery can be had under it. The administrator, under such a construction, could recover under the survival act for the pain and suffering caused by the injury, which might be merely nominal, and this would go to the creditors if the estate were insolvent. If the action could be brought under the death act, the widow and children would receive the whole of the fund recovered, and the damages would be founded upon the pecuniary loss of those dependent upon the deceased. It cannot be possible that the legislature ever intended such a limitation upon the death act. A recovery under the death act has always been permitted in this state when the death results from the wrongful act, and this without regard to whether the death was instantaneous or not. In *Van Brunt v. Cincinnati, J. & M. R. Co.* 78 Mich. 530, it appeared that the plaintiff's intestate was injured January 1, 1888, and died from the injuries on the next day. On the trial it was shown that the deceased was an unmarried man, and had no one dependent upon him for support. The court below directed the verdict in favor of defendant. In this court the case was fully considered, and it was assumed that, if the plaintiff had been able to show pecuniary loss by next of kin, a recovery might be had. A point was made that a recovery might be had under the survival act, and that point overruled. In *Hunn v. Michigan C. R. Co.* 78 Mich. 513, 7 L. R. A. 500, plaintiff's intestate, a fireman, was killed in a collision of defendant's trains. The action was brought under the death act. Just how long he survived the injury does not appear, but that fact was ignored. The case was reversed upon the ground that the court improperly admitted certain testimony, and a new trial was granted. In *Sweet v. Michigan C. R. Co.* 87 Mich. 559, plaintiff's intestate was injured by striking against a shed adjacent to the track. He lived thirty minutes after the accident. The action was brought under the death act, and judgment was rendered for \$5,000, and was affirmed in this court. Mr. Justice Grant dissented, but not on the ground that the action could not be sustained under the death act. In *Richmond v. Chicago & W. M. R. Co.* 87 Mich. 374, plaintiff's intestate, a street-car driver, was killed in a collision of the defendant's cars with the street car he was driving. The injury occurred about 4 or 5 o'clock in the afternoon, and he survived until the evening of the same day. The action was brought for the benefit of the mother and an invalid sister, and a recovery had under the death act. The judgment was for \$5,313, and was affirmed in this court. Justices Grant and Champlin dissented, but not upon the ground that the action could not be maintained under the death act. In *Schlacker v. Ashland Iron* 43 L. R. A.

Min. Co. 89 Mich. 253, the action was under the death act. The plaintiff's intestate was injured, and survived several days. The fact that the death was not instantaneous was ignored. The judgment was reversed, and a new trial ordered. In *O'Donnell v. Duluth, S. S. & A. R. Co.* 89 Mich. 174, though the deceased lived about an hour after the injury, the action was brought under the death act, and no one questioned that the act was applicable if the circumstances had been such that a recovery might have been had. In *Pennington v. Detroit, G. H. & M. R. Co.* 90 Mich. 505, plaintiff's intestate was injured while switching cars. He survived six hours. The action was brought under the death act. Plaintiff recovered in the court below for the pecuniary loss sustained by the widow and children, and for the expense of his care, nursing, and funeral expenses. While the case was reversed, no one questioned the right of recovery upon the ground that the action could not be maintained under this act, or questioned that the damages claimed could not be recovered as claimed if the defendant had been guilty of the several acts of negligence averred in the declaration. In *Racho v. Detroit*, 90 Mich. 92, it appeared that the plaintiff's intestate was injured June 25, 1889, and died June 10, 1890. No action was instituted in the lifetime of the intestate. After his death the widow, as administratrix, brought suit under §§ 8313, 8314, 2 How. Anno. Stat. The lower court directed verdict and judgment in favor of defendant. That judgment was reversed, and a new trial ordered; it being held that the widow, as administratrix, could recover under the above sections of the statute. Not one of these cases could have been maintained if these statutes had been construed as now contended for, for in no case was the death instantaneous. Other cases of like character might be cited. I have examined the cases with some care, for the purpose of ascertaining in what proportion of them the death was shown to have been instantaneous, and find but very few. If, therefore, the death act can be applied only to cases where the death is instantaneous, it should be amended in order that the widow and children of the deceased may have some benefit under it. From the cases it appears that few persons were killed who did not have some one dependent upon them, and that few were killed outright. Are we, by construction of the statute, to cut off all the rights which such dependents may have? No case can be found in this state giving such construction, though this statute (the death act) has been upon the statute books for upwards of fifty years. I am aware that in Maine this construction is given to a similar statute. *State v. Maine C. R. Co.* 60 Me. 490. But in no other jurisdiction is such a limitation put upon the death act, that I am aware of. In Massachusetts a contrary view is expressly held under a statute similar to the Maine statute. *Com. v. Metropolitan R. Co.* 107 Mass. 236.

It must be held that the plaintiff could not maintain this action under the first count of the declaration. The only remedy

was under §§ 8313 and 8314. The court below was in error in permitting a recovery on the first count of the declaration. That part of the verdict and judgment must be reversed and held for naught. The verdict and judgment for the value of the personal property destroyed will stand. No new trial will be permitted. Defendant should recover the costs of this court.

Grant, J., concurred with **Long, Ch. J.**

Montgomery, J., dissenting:

The plaintiff brought an action based on the negligence of the defendant company, resulting in the death of the plaintiff's intestate. The evidence shows that while deceased was a passenger on one of defendant's trains a collision occurred with another of defendant's trains on the same track; that the car in which deceased was riding took fire; that when she was extricated from the car life was extinct. The plaintiff offered testimony which it is claimed shows that death was not instantaneous. The declaration contains three counts: The first, based upon the cause of action which accrued in favor of the deceased for pain and suffering caused by the injury; the second, for the loss of personal property in the possession of the deceased at the time of the accident, and consumed by fire; and the third count, on the statute permitting a recovery of the pecuniary loss sustained by the next of kin, in case of death caused by the wrongful act of another. The verdict of the jury was taken separately on each count, and was for the plaintiff in the sum of \$1,000 on the first count, and also for the plaintiff in the sum of \$110 on the second count, and for defendant on the third count. The defendant brings error, and contends that there is no testimony fairly tending to show that the decedent's death was not instantaneous, and, further, that under our statute no right of action in favor of the administrator generally survives for injuries causing death, but that in such case the sole remedy is under the statute giving relief to the next of kin. Counsel on both sides are to be commended for the instructive briefs which have been furnished, and which have been of great aid to the court.

1. The question which lies at the threshold of the case is whether a cause of action lies in favor of the administrator, under § 7397, 3 How. Anno. Stat., as amended in 1885, or whether in case of death the remedy given under §§ 8313 and 8314 is exclusive. This question has arisen elsewhere under statutes somewhat similar to ours, and the decisions are inharmonious; nor are they in all cases to be reconciled on differences which exist in the terms of the statutes. Before entering upon a discussion of the cases, reference should be had to the history of our legislation, with a view of ascertaining, if possible, whether the legislative intent can be clearly gathered therefrom. The act embodied in §§ 8313 and 8314 is substantially a re-enactment of Lord Campbell's act, omitting the preamble and the third section. Our statute provides that wherever the death of a

person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as in law amounts to a felony. The second section provides that the action shall be brought in the name of the personal representatives of the deceased, and that the amount recovered shall be distributed in the proportions required by law in relation to the distribution of personal property left by persons dying intestate, and that in every such action the jury may give such damages as they shall deem fair and just, in reference to the pecuniary injury resulting from such death to those persons who may be entitled to such damages when recovered. This statute was first enacted in 1848, and amended in 1873. Section 7397, as it now reads, is as follows: "In addition to the actions which survive by the common law the following shall also survive, that is to say: Actions of replevin and trover; actions of assault and battery, false imprisonment, for goods taken and carried away, for negligent injuries to the person; and actions for damage done to real or personal estate." Except for the interpolation of the words, "for negligent injuries to the person," which were incorporated in 1885, this section reads precisely as it has since the adoption of the Revised Statutes of 1846, and was therefore in force at the time of the adoption of Lord Campbell's act, in 1848.

The inquiry naturally suggests itself, What were the rights under § 7397 before Lord Campbell's act was adopted? Could a recovery have been had by the executor for an assault and battery committed on the person of his testator, resulting in the latter's death? It is contended by the defendant's counsel that § 7397 was intended to apply to pending actions, and was intended to provide for the revival of the action when commenced by the deceased in his lifetime; and this view is supported by considerations of great weight, among which is the fact that this statute is found in chapter 261, 3 How. Anno. Stat., the title of which is, "Of Death, Marriage, or Other Disability Occurring after the Commencement of the Suit." If the question were altogether new, we should strongly incline to the view presented by defendant's counsel; but as early as 1882 this question was before the court, and in the case of *Rogers v. Windoes*, 48 Mich. 628, it was held that the section in question was intended to provide for the survival of the cause of action. It will be seen, therefore, that when the words providing for a survival of the cause of action in this case were incorporated into, and became a part of, § 7397, that section as it theretofore existed had a judicial construction; and it is fair to assume that the amendment in question

was made in view of such construction, and that, therefore, the legislative intent was to provide for the survival of the cause of action in the cases specified, as by the amendment of 1885 the right to recover for injuries resulting from negligence is placed on the same plane as the causes of action enumerated in the section before its amendment.

The question recurs, What were the rights, as to injuries causing death, prior to the act of 1848? Could a recovery for damages prior to the death of the injured party have been had? We think this question should be answered in the affirmative. Any other conclusion must rest upon the idea that the legislature, by providing in § 7397 that the action for assault and battery should survive, intended that, if the injuries were not severe enough to result in death, an action might lie by the executor, but, if the assault were of so aggravated a character as that death ultimately resulted from it, no action could be maintained. To what extent, then, was the statute of 1848 intended to amend or repeal the provisions of § 7397? Having in mind the rule that repeals by implication are not favored, we turn to the act of 1848 to ascertain if it is reasonably clear that the legislature intended to substitute for the provisions of section 7397 the provisions of the later section in all cases in which death ensued. There are some considerations which tend to support the view that such was the intent,—as the one that it is not to be inferred lightly that two remedies are given for the same evil, and that the act of 1848 is apparently broad enough to cover all cases in which death results from the wrongful act of another. The remedies afforded are, however, quite distinct and different. Under § 7397 it is clear that no recovery could be had by the executor because of the fact of the death of his testator, but he could recover for such injuries as his testator sustained in his lifetime, notwithstanding his death, while under the act of 1848 the recovery is limited to the pecuniary loss resulting from such death to the persons who may be entitled to such damages when recovered. It is clear, therefore, that the act of 1848 does not cover the whole ground, as, if the case be such that the widow or next of kin is unable to show pecuniary loss resulting from the death, no recovery can be had, notwithstanding the deceased may have been entitled to substantial damages if he had taken action in his lifetime, and notwithstanding the express provision of § 7397 that his cause of action shall survive. It is generally held—and, we think, properly—that, if the deceased settles for the injuries received in his lifetime, or recovers his damages in an action, an action cannot be maintained after his death under Lord Campbell's act. Cooley, Torts, p. 309. Plaintiff's counsel contends that this view tends to show that two causes of action are not created. It is of equal force to show that the remedy under the act of 1848 is not exclusive. But in the wording of the act of 1848 is found authority for this limitation upon the right given in favor of the widow or next of kin. Under this act it is only where the default or wrong

would have entitled the injured party to maintain an action had death not ensued, that the remedy is given to the widow or next of kin. Plainly, if the injured party had recovered damages or settled for the injury, he would not at the time of his death have been entitled to maintain the action if death had not ensued. See *Littlewood v. New York*, 80 N. Y. 24, 42 Am. Rep. 271; *Legg v. Britton*, 64 Vt. 652. Judge Cooley, in his work on Torts, 2d ed. p. 309, says: "It is seen, on a perusal of this statute, that it gives an action only when the deceased himself, if the injury had not resulted in his death, might have maintained one. In other words, it continues, for the benefit of the wife, husband, etc., a right of action which at the common law would have terminated at the death, and enlarges its scope to embrace the injury resulting from the death. If, therefore, the party injured had compromised for the injury, and accepted satisfaction, previous to death, there could have been no further right of action, and consequently no suit under the statute." It is hardly accurate to say that under the statute of 1848 the right of action is continued for the benefit of the widow or next of kin; for this court has held repeatedly that in the action under this statute no recovery could be had for the pain and suffering preceding death, nor, indeed, for any damages resulting to the injured party which precede his death. Nor, as we have seen, can there be any recovery at all, under the statute of 1848, unless, in addition to the injury and the resulting death, the fact exists that by withdrawing the means of support a direct pecuniary loss is shown to have resulted to some one or more of those who take of the estate of the injured party under the statute of distribution. Certainly this statute does not continue the right of action in all cases. It must be held that two distinct actions are provided by law,—the one under § 7397, and the other under §§ 8313 and 8314. This view was indicated in *Hurst v. Detroit City R. Co.* 84 Mich. 539, and again in *Racho v. Detroit*. 90 Mich. 95, and is supported by *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693; *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117; *Bowes v. Boston*, 155 Mass. 344, 15 L. R. A. 365; *Needham v. Grand Trunk R. Co.* 38 Vt. 294; *Hedrick v. Ithaco R. & Nav. Co.* 4 Wash. 400; *Belding v. Black Hills & Ft. P. R. Co.* 3 S. D. 369. See also *Whitford v. Panama R. Co.* 23 N. Y. 465.

In a carefully prepared series of articles published in 28 Am. L. Reg. N. S. 385, 513, 577, the statutory provisions of the various states are reviewed, together with the decisions which had been rendered up to that date; and the conclusions reached are: First, that the right of action under Lord Campbell's act is a new cause of action; and, second, that, where there is likewise a survival act, two remedies are intended. The learned author says: "As to the right to maintain two actions after the death of the injured person (supposing him not to have recovered damages in his lifetime), where there is, in addition to the special act, a general provision of law making rights of

action for injury to the person survive, it seems that such right should be ordinarily recognized, in the absence of an express provision to the contrary. The opposite and inconsistent courses adopted by different courts, in the attempt to escape from this result, seem to convict them all of being without warrant." This criticism of decisions which deny the existence of two remedies is fully justified. In Illinois it is held that the remedy under Lord Campbell's act is exclusive. *Holton v. Daly*, 106 Ill. 131. The same view is taken in Kansas (*McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46, 26 Am. Rep. 742), and in Rhode Island (*Lubrano v. Atlantic Mills*, 19 R. I. 129, 34 L. R. A. 797), while in Kentucky it is held that the election of the legal representative determines which action may be maintained (*Conner v. Paul*, 12 Bush, 144); thus leaving the right conferred under Lord Campbell's act dependent upon the question of whether the executor shall be more concerned for the creditors than for the beneficiaries named in the act,—a view which we regard as totally untenable. In Vermont, in *Legg v. Britton*, a view which to us seems equally untenable was taken, viz., that a previous recovery under the survival act would bar a recovery under Lord Campbell's act, although the converse is not declared. In two of the states in which the existence of two remedies is denied, the reasoning of the court does not meet the reasoning which we have attempted in this opinion. On the contrary, in the leading case which denies the existence of two remedies (*Holton v. Daly*, 106 Ill. 131), the reasoning of the court sustains the conclusion which we have above stated. It appears from that report that a death act corresponding to Lord Campbell's act was enacted February 12, 1853. In 1872 an act was passed providing that certain actions named therein, including "actions to recover damages for an injury to the person, . . . shall survive." The question considered was whether this act gave the executor a right of action for an injury resulting in death, over and above that provided by the previous statute. It was held that it did not, and this conclusion was reached by applying the rule that repeals by implication are not favored, and where statutes are seemingly repugnant they should, if possible, be so construed as that the latter may not operate as a repeal by implication of the former. Under this rule the court held that the survival act, having been passed after the death act, should be construed as applying to such personal injuries as were not covered by the death act; that is, injuries which did not result in death. The chronology of our legislation is the reverse of this. The survival act (§ 7397) was in force before the death act was passed. It is clear that under the former statute, when enacted, a right of action for injury resulting in death survived. If, therefore, the reasoning of the court in *Holton v. Daly* be accepted (that is, that repeals by implication are not favored, and that statutes seemingly repugnant should be so construed as, if possible, to give effect to both), a result ex-

actly opposite to that which was reached in *Holton v. Daly*, and which accords with the conclusions already stated, seems inevitable. In Kansas the two sections of statute were given effect on the same day. The court held that they were to be construed *in pari materia*. It will be seen, therefore, that the decisions which we have cited from that state do not conflict with the reasoning which we have adopted as the rule, that repeals by implication could not be applied. The authority of the Kansas case is weakened by the fact that Judge Brewer, who was a member of the court at the time the judgment in the *McCarthy Case* was pronounced, later, in the case of *Hulbert v. Topeka*, 34 Fed. Rep. 510, expressed grave doubts as to its correctness. The only American case which we have found which denies the existence of a right under the survival act, where both acts are in force,—the survival act being prior in point of enactment to Lord Campbell's act,—is the Rhode Island case of *Lubrano v. Atlantic Mills*, 19 R. I. 129, 34 L. R. A. 797; and this case is largely based on *Holton v. Daly*, which we have seen does not conflict in its reasoning with the views expressed herein. It will be seen that the courts have encountered great difficulty in construing these statutes, which difficulty has been aggravated by any attempt to depart from the letter of the statutes. Our conclusion is that the act of 1848 was not intended to repeal the survival act of 1846; that the amendment of 1885 to § 7397 is to be treated as though it had been a part of the statute from the first. Endlich, Interpretation of Statutes, § 294. We do not determine whether these actions can be joined, as the assignments of error do not raise the question.

2. Under statutes similar to our § 7397, it has been generally held that where the death was instantaneous no recovery could be had. *Tiffany, Death by Wrongful Act*, § 74, and cases cited; *The Corsair*, 145 U. S. 335, 36 L. ed. 727. And recovery cannot be had where the evidence fails to show whether or not the death was instantaneous. *Corcoran v. Boston & A. R. Co.* 133 Mass. 507; *Riley v. Connecticut River R. Co.* 135 Mass. 292. The evidence in this case was given by one Allen, who witnessed the collision, and by Dr. Sweetland, who witnessed the autopsy. Allen testified that the car in which decedent was riding and one of the other train were "telescoped." The witness testified that he first went into the window, and next went into one baggage car, before going to the telescoped car; that this took about three or four minutes; that when he got to the telescoped car somebody was alive there; that not to exceed a minute or two after this the car was afire. He did not know decedent, and knew nothing of the exact time of her death. It appears by the testimony that decedent, when taken out, was badly burned. Dr. Sweetland testifies that he was present at the post mortem, and described the condition of the body; that the legs and arms were completely burned away; but it is inferable that the vital parts of the body were not so disfigured but that it could

be seen whether any fatal injury had been received from the collision. He testified that in his opinion the death was caused from burning, and that death from burning cannot be instantaneous. We think this testimony presented a question of fact for the jury. *Nourse v. Packard*, 138 Mass. 307; *Pierce v. Cunard S. S. Co.* 153 Mass. 87. The judgment should be affirmed.

Hooker, J., dissenting:

The plaintiff's intestate lost her life through a collision and consequent burning of the car in which she was riding upon the defendant's railroad. The plaintiff recovered a judgment of \$1,110,—\$1,000 upon the first and \$110 upon the second count of the declaration. A verdict was rendered for the defendant upon the third count. The defendant has brought error. The questions to be discussed pertain to the construction to be given to two statutes of this state, viz., 3 How. Anno. Stat. § 7397, and 2 How. Anno. Stat. §§ 8313, 8314, the first of which, for convenience, we will call the "survival act," and the last two sections the "death act."

Section 7397 existed in 1846 but not in its present form; the words "for negligent injuries to the person" having been inserted by amendment in 1885. Sections 8313 and 8314 were enacted in 1848 (Laws 1848, p. 31) substantially in their present form, though a slight amendment not affecting this case was made in 1873. Act No. 94, Pub. Acts 1873. These several sections now read as follows:

"Sec. 7397. In addition to the actions which survive by the common law, the following shall also survive, that is to say: actions of replevin and trover; actions of assault and battery, false imprisonment, for goods taken and carried away, for negligent injuries to the person; and actions for damage done to real or personal estate."

"Sec. 8313. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

"Sec. 8314. Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and the amount recovered in every such action shall be distributed to the persons and in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered."

The plaintiff's declaration contained three

counts; the first and second being laid under § 7397, respectively, claiming damages for the injury to the person and property of the intestate. The last count is based upon §§ 8313 and 8314, and claims damages for causing the death of the plaintiff's intestate.

The defendant's counsel contend that there should have been no recovery under the first count, for two reasons: (1) Because the death was instantaneous, and therefore there was never a right of action in the intestate, and consequently none to survive; (2) because, when death results from a negligent act before judgment rendered in an action brought by the deceased, the survival act does not apply, and redress must be sought under the death act. It is contended by plaintiff's counsel that rights of action may exist under both statutes when the death is not instantaneous, and that they may be joined in one action. If this contention of the plaintiff's counsel be correct, there would seem no good reason for holding that the recovery of a judgment by the injured person should be a bar to an action under the death act for his subsequent death, as recovery in such case is permitted, not upon the injury sustained by the deceased, but upon the pecuniary injury to the survivors occasioned by his death. Yet we find the courts generally holding that such recovery is a bar to a subsequent action by the administrator, and we think the legislature intended that it should be. Had the intention been otherwise, it is probable that the act would have permitted each survivor to bring and prosecute his own action, for his own benefit, instead of requiring it to be brought by the personal representative, and permitting the proceeds of the litigation to be distributed among those entitled to the personal property of the decedent, which some of the provisions of the act seem to require; thereby giving portions to persons who confessedly were not injured, and upon whose behalf no recovery could be had, to the injury of those who suffered such injury as was recovered for. The greater number of the cases discussing the question deny the dual right of recovery (28 Am. L. Reg. N. S. 528, 576); and several cases sustain the proposition that, in case death results from the wrongful act before judgment, the death act, and not the survival act, must be relied upon, as contended here. The various cases in the different states arise on varying statutes, and are supported by different reasons; but, as already said, they generally concur in holding that there is a single remedy, and they are not so uniform in holding that death deprives the representatives of a right of action under the survival act, and confers a right to another action, for a different ground and measure of damages, upon one or several of their number, to the exclusion of some. If we are to sustain the contention that the death act is exclusive, it must be by holding that it repeals by implication so much of the survival act as before the enactment of the death act applied to and supported actions by representatives for rights of action which accrued to persons in-

jured through assaults and batteries, and that the amendment, whereby personal injuries caused by negligence were added, falls within the same rule, and was not intended to apply to cases where death resulted from the injury; thus ingrafting upon the statute an exception not expressed, and which clearly was not intended, when the first statute was passed. This means that there can be no survival of an action in the cases where death ultimately results from the wrong. It would be lost by death, not only where there are representatives to suffer by the death, and who may therefore recover for their pecuniary injury, but also where there is no pecuniary injury to anyone through death, in which case all right of action would be lost; and this rule would go so far as to put an end to pending suits, at whatever their stage before verdict, and notwithstanding the fact that large sums had been expended, which would be lost to the estate. The case of *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143, so holds. We are of the opinion that these two acts are to be construed together; that they were designed to enlarge, rather than to diminish, the rights of recovery, and, as held of the later act in *Merkle v. Bennington Twp.* 58 Mich. 158, 55 Am. Rep. 666, they are both remedial. We very much doubt if the death act was intended to prevent the survival of actions, though it is not so clear that it was intended to permit a recovery on both theories, or to allow an election of remedies, which the courts very generally deny. Indeed, we feel confident that such was not the intention.

There is one view of the law that might reconcile these two acts without doing violence to either, and give a definite and certain rule. It is, that where the person is injured, and lives after the transaction, a right of action accrues to him, which survives in case of his death before judgment, and that in such case the death act has no application. But, if the person is killed outright, no right of action could accrue to him, therefore none could survive, and consequently the death act would necessarily furnish the only relief. Some cogent reasons suggest themselves for this view, if we consider the rule at common law, and the nature of the statutes. At common law, rights of action growing out of torts did not survive, and there was no recovery allowed for causing death. Both were considered to be against public policy. That was the rule in Michigan until the legislature modified it by permitting survival in certain cases of tort. This did not thereby change the law as to recovery for causing death in any case, which we may assume to have been still considered against public policy. And, if a person was instantly killed, it will probably not be contended that the representatives would take a right of action under this act; for how could it be, when by reason of the simultaneous wrongful act and death no right of action could accrue to the deceased. But later an act was passed modifying that rule also. This was not a sweeping act. The matter was approached cautiously, and with evident reverence for the rule of public policy. The widow and next

of kin were recognized as sufferers by the death of a husband and relative, and it would have been easy to give to each a right of action for the loss or injury occasioned by death. But this was not done. The right of action was carefully limited to cases where a direct pecuniary injury could be shown. If it had stopped here, it might have existed in all such cases where death followed as a result, and whether a recovery had been had by the deceased or not, and notwithstanding the survival of his right of action if there had not been a recovery by him. But it did not stop there. It was limited to cases where the act, neglect, or default would have entitled the deceased to maintain an action and recover, but for the death. Manifestly, had death not been immediate, an action would have accrued which might have been maintained and recovery had by the deceased, if he should live long enough; and, if not, then by his representatives, under the survival act then existing. But, on the other hand, if death was instantaneous a right of action could not accrue to him, though it would have done so, as we have already seen, had he lived long enough to suffer pain or injury of any kind. Now let us look at the act. What cases are there in which the representatives may recover for death? Is it not in those cases where the act would have given to the deceased a right of action, had he not died simultaneously with the act, but which did not and could not on that account accrue to him? See *Tiffany, Death by Wrongful Act*, §§ 73-75, inclusive, and cases cited; 28 Am. L. Reg. N. S. 393, 394, and cases cited. Whatever may be indicated by these authorities as to actions by administrators where death was instantaneous, under the various statutes, it does not seem to be contended that a right of action could accrue to a man who was stricken instantly dead by the wrongful act. Is it not plain that the survival act was impotent to afford relief in such cases, and that the death act applied to such cases? Our attention has been called to no case where it has been held that the death act does not cover such a case. But, while this may account for the enactment of the death act, it does not necessarily follow that such act is not broad enough to cover cases where death was not immediate, but it seems quite as probable that the legislature should have intended this construction, as that it was designed to supplant the survival act in so important a class of cases as those based upon negligent injuries resulting in death; and it is not strange that defendants should not have raised and insisted upon the construction under discussion, i. e., that, when death has ensued after the lapse of time, recovery could only be had under the survival act, thereby subjecting them to a judgment for all the pain and suffering of the deceased. A majority of the courts that have considered these questions have found in these statutes (for they are usually associated in the statutes of the different states) that which precludes the double remedy, and which makes the recovery by the deceased a bar to a subsequent action under the death act.

The strongest arguments against the construction suggested are, first, that other courts have not usually discussed this theory, and have applied the remedy under the death act to cases when death was not immediate, which it must be admitted has been often done,—a practice which is clearly inconsistent with this view. Our attention has not been called to any case where the reasonableness of such a construction has been denied. On the other hand, it is said by Ross, Ch. J., in *Legg v. Britton*, 64 Vt. 652, that: "In Maine and some other states, it is held that the acts of those states, framed after Lord Campbell's act, give a right of ac-

tion only when instant death follows the injury." See *State v. Maine O. R. Co.* 80 Me. 490; *State v. Grand Trunk R. Co.* 61 Me. 114, 14 Am. Rep. 552.

It is possible that this construction is foreclosed by decisions heretofore made by this court, and it is unnecessary to decide the question, because the jury found a verdict for the defendant upon the count based upon this statute; but, to my mind, the foregoing are conclusive reasons for believing that it was not the intention of the legislature to give the double remedy. In my opinion, the judgment should be affirmed.

MINNESOTA SUPREME COURT.

Samuel D. PETERSON, *Respt.*,
v.

WESTERN UNION TELEGRAPH COMPANY, *Appt.*

(.....Minn.....)

- *1. Where the station agent of a telegraph company, acting within the scope of his employment, maliciously transmits a libelous message over the wires of said company to another of its station agents, addressed for delivery to a third person, which is done accordingly, the company is liable in punitive damages.
2. The verdict of the jury on behalf of plaintiff for the sum of \$2,000, held excessive, and that a new trial should be granted, unless the plaintiff consent to remit all of the same in excess of \$1,000.

(January 25, 1899.)

APPEAL by defendant from an order of the District Court for Brown County denying a motion for new trial after judgment in favor of plaintiff in an action brought to recover damages for the alleged publication of a libel. *Reversed subject to filing remittitur.*

The facts are stated in the opinion.

Messrs. Ferguson & Kneeland, for appellant:

The infliction of punitive or exemplary damages questionable at best rests in this jurisdiction on the theory that such damages are for punishment and example.

Hoffman v. Northern P. R. Co. 45 Minn. 53; *North v. Johnson*, 58 Minn. 212.

In this case what is there in the conduct of the defendant which ought to be punished and made an example "to deter it and others from committing similar wrongs?"

It is not just nor right nor politic nor expedient to go further after the principal has made full reparation for the consequences of his agent's act, and throw him upon the tender mercies of a jury to be further mulcted in indeterminate damages for a wrongful *animus* which he never had, which he had no part in, nor any reason to anticipate, and which he has never approved.

*Headnotes by BUCK, J.

NOTE.—For former decision in this case, see *Peterson v. Western U. Teleg. Co.* (Minn.) 40 L. R. A. 661.
43 L. R. A.

Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 37 L. ed. 97.

The master can be liable only for actual damages from a wrongful act of his servant unless he participated in or approved of the wrong.

Staples v. Schmidt, 18 R. 1. 224, 19 L. R. A. 824; *Ricketts v. Chesapeake & O. R. Co.* 33 W. Va. 433, 7 L. R. A. 354; *Downey v. Chesapeake & O. R. Co.* 28 W. Va. 732; *Talbott v. West Virginia, C. & P. R. Co.* 42 W. Va. 560; *Robinson v. Superior Rapid Transit R. Co.* 94 Wis. 345, 34 L. R. A. 205; *Hagen v. Providence & W. R. Co.* 3 R. I. 88, 62 Am. Dec. 377; *Cleghorn v. New York O. & H. R. R. Co.* 56 N. Y. 44, 15 Am. Rep. 375; *Murphy v. Central Park, N. & E. R. R. Co.* 16 Jones & S. 96; *Eviston v. Cramer*, 57 Wis. 570; *International & G. N. R. Co. v. Garcia*, 70 Tex. 207; *Dillingham v. Anthony*, 73 Tex. 47, 3 L. R. A. 634; *Gulf, W. T. & P. R. Co. v. Holzheuser* (Tex. Civ. App.) 45 S. W. 188; *Kiel v. Chartiers Valley Gas Co.* 131 Pa. 466; *Sullivan v. Oregon R. & Nav. Co.* 12 Or. 302, 53 Am. Rep. 364; *Ackerson v. Erie R. Co.* 32 N. J. L. 254; *Haines v. Schultz*, 50 N. J. L. 481; *Great Western R. Co. v. Miller*, 19 Mich. 305; *McCoy v. Philadelphia, W. & B. R. Co.* 5 Houst. (Del.) 599; *Mendelsohn v. Anaheim Lighter Co.* 40 Cal. 657; *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Foster v. Pitts*, 63 Ark. 387; *Kutner v. Fargo*, 20 Misc. 207; *Warner v. Southern P. Co.* 113 Cal. 105.

There can be no ratification without both knowledge of the fact to be ratified and the intention to ratify it.

Edwards v. London & N. W. R. Co. L. R. 5 C. P. 449.

The mere retention of a servant is not evidence of ratification.

Dillingham v. Anthony, 73 Tex. 47, 3 L. R. A. 634; *Gulf, W. T. & P. R. Co. v. Holzheuser* (Tex. Civ. App.) 45 S. W. 188; *Williams v. Pullman Palace Car Co.* 40 La. Ann. 87.

For those aggravations which may arise out of his wantonness and malice, the employer is not on the same footing with the agent.

Great Western R. Co. v. Miller, 19 Mich. 305; *Hagen v. Providence & W. R. Co.* 3 R. I. 88, 62 Am. Dec. 377.

When an outrageous verdict is rendered by

a jury it is the duty of the court to set it aside, no matter how many similar verdicts may have been returned in the case.

Peterson v. Western U. Teleg. Co. 65 Minn. 18, 33 L. R. A. 302; *Woodward v. Glidden*, 33 Minn. 108; *Dillon, Laws & Jurisprudence of England and America*, 130; *Sedgwick, Damages*, 520-528; *Pratt v. Pioneer Press Co.* 32 Minn. 217; *Bridge v. Oshkosh*, 71 Wis. 363; *McCarthy v. Niskern*, 22 Minn. 90; *Dennis v. Johnson*, 42 Minn. 301.

Mr. S. L. Pierce, for respondent:

In common-law actions the parties are entitled to trial of issues of fact by jury.

Judges may differ widely from the jurors, but there is no justification for disturbing the decision of a jury on matters left by the law to their determination.

Fabrigas v. Mostyn, 2 W. Bl. 929.

Courts will not disturb a third verdict when the only ground of complaint was excessive damage.

Meeks v. St. Paul, 64 Minn. 220.

Aside from the question of punitive damages, was not here something in the way of actual injury to the plaintiff of a serious and, indeed, irreparable character?

Williamson v. Freer, 43 L.J.C.P.N.S.161.

When the act of an agent is malicious or grossly negligent, evincing wanton indifference, the principal may, in the discretion of the jury, be punished, although the act of the agent may have been neither directed nor authorized by the principal, provided it was done under the authorized employment of the principal.

1 *Shearm. & Redf. Neg.* § 749; *Lucas v. Michigan C. R. Co.* 98 Mich. 1; *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 2 Am. Rep. 39; *Wood, Mast. & S.* § 323; *Francis v. Western U. Teleg. Co.* 58 Minn. 262, 25 L. R. A. 406.

The mere difference in opinion between judge and jury will not justify the judge in granting a new trial.

Pratt v. Pioneer Press Co. 32 Minn. 221.

The policy of the law is to bring litigation to an end within a reasonable time.

Clerk v. Udall, 2 Salk. 649; *Chambers v. Robinson*, 2 Strange, 692; *Shaw v. Boston & W. R. Corp.* 8 Gray, 45; *Wilcox v. Landberg*, 30 Minn. 93; *Harrigan v. Savannah, F. & W. R. Co.* 84 Ga. 793; *Gulf, C. & S. F. R. Co. v. Ellis*, 10 U. S. App. 645, 54 Fed. Rep. 481, 4 C. C. A. 454.

The more invulnerable a man's good reputation may be the more aggravating the libel and the heavier the damages.

Malloy v. Bennett, 15 Fed. Rep. 371; *Ferguson v. Evening Chronicle Pub. Co.* 72 Mo. App. 462; *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9; *Marble v. Chapin*, 132 Mass. 225.

Buck, J., delivered the opinion of the court:

Action for libel. Verdict for plaintiff for \$2,000 damages, motion for new trial on part of defendant, which was denied, and it appeals. The plaintiff was a state senator, whose home was at New Ulm, but, the senate being in session, and while the plaintiff was attending the same at St. Paul, the defendant, through its station agent, G. R. McHale, 43 L. R. A.

at New Ulm, sent to the plaintiff the following telegraphic message:

S. D. Peterson, care Windsor:

Slippery Sam:

Your name is pants.

Many Republicans.

This case has been before us on two former occasions. 65 Minn. 18, 33 L. R. A. 302, and 74 N. W. 1022, 40 L. R. A. 661. Upon the first appeal this court construed the message as susceptible of a libelous meaning on its face, but that the verdict of \$5,000 damages against the defendant was so excessive as to justify the conclusion that it was the result of passion and prejudice. Upon the second appeal the order of the trial court denying a new trial was reversed for errors of law occurring at the trial. The case has been tried four times, the verdicts each time varying in amount.

The more distinct and important errors assigned by the appellant are: First, that the plaintiff is not in any event entitled to recover, under the evidence in this case, anything more than actual damages, and not entitled to punitive damages or smart money; second, that the court erred in charging the jury that McHale, the agent of the defendant in receiving and transmitting the message in question, represented and stood in the place of the telegraph company, and the defendant is liable and responsible for his acts and conduct in receiving and transmitting the message to the same extent that McHale would have been personally responsible had he been the owner and operator of the telegraph line; third, that the damages awarded by the jury are excessive, and appear to have been given under the influence of passion and prejudice. Upon the first proposition we do not agree with the contention of counsel, unless his second proposition is sound as to the acts of the agent and want of liability of the company for his acts. The trial court charged the jury that, if they found from the evidence that the defendant or its agent maliciously published the libel as charged, it was their duty to return a verdict in favor of the plaintiff for such damages as he had sustained to his reputation by reason of the publication, and also gave as part of his charge the language used in the second assignment of error. This, of course, involves the question of the liability of the defendant for the act of the agent if he was actuated by malice or bad faith, and upon this question the jury found in favor of the plaintiff; that is, under this instruction the jury returned a verdict against the defendant for \$2,000. Of course, if the action had been against McHale personally for his malicious publication of the libel, and the jury had found him guilty, they could have awarded punitive, vindictive, or exemplary damages. It is clearly competent for a jury to find vindictive damages in an action for libel, where the publication was done maliciously. *Newell, Defamation, Slander & Libel*, 842; *Bergmann v. Jones*, 94 N. Y. 51. In the last case cited it is said that, when the falseness of the libel is proved, as a general rule it is

sufficient to warrant the jury in giving exemplary damages.

But the important question in the case at bar is this, Is the company itself liable for exemplary damages by reason of the act of the agent McHale, although it did not know, direct, or authorize it? The answer to this is reached by considering and determining the powers and duties of the agent, and whether he was acting within the scope of his employment. The defendant maintained a general telegraph office at New Ulm, and there McHale had the entire management of the business. Under this power and duty his business required him, as such agent, to examine writings, messages, and communications, and transmit them to persons to whom they were addressed. From the very nature of the business, his position required him to do this. The company cannot well act in the numerous telegraph stations throughout the country except through agents. While these branch offices in general are under the management and control of a superintendent, manager, or the corporation itself, yet this agent is almost universally recognized, as he must necessarily be, as the representative of the corporation itself. In the absence of the master the agent is the vice principal, superintending and controlling the business there transacted, and of course stands in the place of the master for the time being. It is right, therefore, that the responsibility and obligation of the master should flow with the duty conferred and imposed, where the representative is acting within the scope of his employment. That is the case at bar. McHale had control of the business at the New Ulm telegraph station. He alone saw the libelous message, and sending it was a matter incident to his business, and pertaining to the particular duty of his employment. He was acting in the capacity for which he was employed, and, having this power, he was acting within the scope of his authority. He did not perform the act for his own purpose, but for that of the master who employed him, and for the master's benefit. That he abused the authority is no defense in such case. The master had the choice of his agent, and for the abuse of that agent the master should answer to the citizen who became the victim of that abuse without his fault. One who employs another to do an act for his benefit, and who has the choice of the agent, ought to take the risk of injury to third persons by the manner in which he does the business. A telegraph corporation derives its legitimate corporate powers from the law, and that law should not be violated without a corresponding liability for torts committed under it. Station agents may be irresponsible pecuniarily, and if, for their malicious acts done in the scope of their employment, the corporation is not liable, the public would be at the mercy of an unscrupulous telegraph operator; and hence the public are greatly interested in such a question, and the liability for such wrongs should rest upon that body which by its acts creates the power and the opportunity for committing them. It would be a lamentable condition of the rights of the citizen if, under the guise of

exercising lawful corporate powers, the corporation could permit the citizen to be defamed by the false and malicious publication of its agent while acting as its duly-appointed representative. In Scott & Jarnagin's Law of Telegraphs (§ 138) it is said that "the company can only perform the duty of sending and receiving a message through the intervention of an agent; and if he may wilfully and corruptly interfere with commercial transactions, or malignantly expose family affairs, and not involve the company, such a ruling would stimulate the wicked, while at the same time good men would be convinced that their chances for indemnity rested alone upon the solvency of treacherous agents. We have seen no instance in the litigated cases where telegraph companies have claimed such immunity. . . . However, the authorities are numerous and highly respectable, and conclusive except where controlled by binding local decisions, which hold the former [company] liable for the wilful acts of the latter [agent], when done in the performance of duties assigned." In the same work it is said (§ 138a): "Aside from the statutory and common-law duty of good faith in the transmission of messages for the public, there is another sense in which telegraph companies may become responsible for mala fides and malicious use of its franchises. A libel is any false, malicious, and personal imputation, effected by any writings, pictures, or signs, tending to alter the party's situation in society or business for the worse; and a corporation may become responsible for its publication, even in punitive damages." Mr. Wood in his work on the Law of Master and Servant (§ 323) says that "it may be regarded as settled by the better class of cases that, whenever exemplary damages would be recoverable if the act had been done by the master himself, they are equally recoverable when the act was done by his servant"—and he cites the well-considered case of *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 2 Am. Rep. 39, where numerous authorities are collected supporting this view. It is true that this doctrine thus enunciated was applied in an action against a railroad corporation, but we perceive no distinction between it and a telegraph corporation. For "a telegraph company is liable *ex delicto* for an injury done by its agents or servants to third persons, for misfeasance as well as nonfeasance." Scott & Jarnagin, Law of Telegraphs, § 6. In Shearm. & Redf. Neg. 5th ed. pt. 2, chap. 9, [§ 141], this question is thoroughly discussed, and it is there said that "where the relation of master and servant exists, the master is responsible to third persons for the damage caused by the wrongful acts or omissions of his servants in the course of their employment as such. This liability . . . extends also to their wilful acts. . . . The principle which lies at the foundation of this rule has been differently stated in different judicial opinions, and the abstract justice of the rule itself has been occasionally questioned. But the soundness of the principle and the necessity of the rule, which we have inherited from the Roman law, have received new and

convincing illustrations in the immense development of modern corporations. If the rule of *respondent superior* were now to be abrogated, it would be almost impossible to carry on the present complex business of society. Every person having any pecuniary responsibility would shelter himself behind the forms of a corporation, which would, in such case, be free from all responsibility for the negligence and violence of its agents without direct evidence of authority for their acts while such evidence could be, in almost every instance, suppressed." This rule may frequently work a hardship, but when the master substitutes an agent or servant in his own place, and clothes him with power to act for the master's benefit in serving the public, he is not permitted to shelter himself behind the plea of nonliability for the act of the agent, and the rule of *respondent superior* should not be relaxed, whether the master is a corporation or an individual.

Upon the proposition that the verdict of the jury awarding the plaintiff \$2,000 is excessive, the court is in accord with the contention of the defendant. "The sole publication of the libel in this case by the defendant was in making it known to its own agent at St. Paul, and the damages of the plaintiff were estimated to be such as he sustained by reason of the publication to such agent. In view of the fact that such agent could not disclose the contents of the libel without becoming a criminal, and exposing himself to serious punishment, and that there is no evidence to justify the inference that the message ever reached the public except through the plaintiff, a verdict assessing his damages at \$5,200 is simply farcical. It can only be accounted for on the ground that it was the result of passion or prejudice." This is the language used by this court in disposing of this case on the first appeal. 65 Minn. 18, 33 L. R. A. 202. The same facts as ground for damages appear on this appeal, but the verdict is very much less. The criminal liability for divulging the contents of any telegraph message or despatch intrusted to him for transmission or delivery is found in Gen. Stat. 1894, § 6782, and is there made a misdemeanor, and punishable as such. This law also applies to all employees. If McHale had merely received the message, without any further act, neither he nor the company would have been liable, although he well knew its contents. The publicity consisted in sending it to another agent or employee. If it could possibly be presumed that other employees might have heard its contents in its transmission, the same presumption exists of silence and secrecy on their part because of their liability to punishment under the criminal law if they should divulge its contents. But it is not proved, nor can it be legally inferred, that others knew of its contents. The only person to whom its contents were divulged was the agent at St. Paul then under a penal obligation not to divulge the despatch except to deliver it to the plaintiff. The transmission of the despatch, its receipt by the St. Paul agent, and the mental distress of the plaintiff constituted the basis of his right to damages. Of 43 L. R. A.

course, plaintiff himself making the message public would not be ground for damages, even if so made in order to maintain his right to prosecute this action. Considering all these facts, we are of the opinion that the damages awarded are excessive; that the jury must have been actuated by passion, prejudice, partiality, or swayed by some improper influence. In such case the amount should be reduced or a new trial granted. See *Frederickson v. Johnson*, 60 Minn. 337.

The order of the District Court denying the defendant's motion for a new trial must be reversed, and a new trial granted, unless the respondent file in the office of the clerk of the district court where the trial was had a remittitur of the sum of \$1,000 within thirty days after the mandate of this court shall be filed in said district court. In case such remittitur is so filed, the plaintiff may recover judgment upon said verdict in his behalf in the sum of \$1,000, and the order of the lower court stand affirmed for that amount.

C. J. McCONVILLE, *Respt.*,

v.

City of ST. PAUL, *Appt.*

(.....Minn.....)

*In 1891 the city of St. Paul instituted proceedings for opening, widening, and extending East Third street therein, and made assessments on abutting property for such purpose. The improvement was partly made, and plaintiff, who owned several abutting lots, was assessed \$1,233.50 thereon, and compelled by judicial proceedings to pay the same to said city. His lots were not benefited by said grading, and the contemplated work and improvements of said street were abandoned by the city in June, 1893. This action was commenced in January, 1898. Held, that the finding of the trial court that the work on said street, and the projected improvement thereon, were never completed, and were wholly abandoned by the city, was justified by the evidence, and that plaintiff is entitled to recover from said city the amount so paid by him, as upon a failure of consideration.

(*County, J., dissents.*)

(January 27, 1899.)

APPEAL by defendant from an order of the District Court for Ramsey County denying a new trial after judgment in favor of plaintiff in an action brought to recover back the amount of a street improvement assessment which had been paid by plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. James E. Markham and Carl Taylor, for appellant:

The last work was done on East Third street in June, 1893, about four years and eight months prior to the commencement of this action.

This lapse of time is not sufficient to raise

*Headnote by RUCK, J.

NOTE.—As to the right to recover back payment of an assessment for a local improvement or tax, see *Phelps v. New York* (N. Y.) 2 L. R. A. 626, and *note*; see also *Budge v. Grand Forks* (N. D.) 10 L. R. A. 165; and *Kelley v. Rhodes* (Wyo.) 39 L. R. A. 594.

a presumption that the improvement has been abandoned.

State, Minnesota Transfer R. Co., v. Ramsey County Dist. Ct. 68 Minn. 242.

The plaintiff's remedy in this case is by mandamus to the board of public works to compel them to proceed with the improvement.

Messrs. Ambrose Tighe and John W. Lane, for respondent:

The respondent's remedy was not by mandamus to the board of public works.

It would have been a sufficient answer to any such demand for the board to have said that it could not proceed because, under the decision in *Hennessey v. St. Paul*, 44 Minn. 306, it was barred from entering on the property to be graded.

The measure of damages adopted by the court below was the right one.

Strickland v. Stillwater, 63 Minn. 43; *San Antonio v. Peters* (Tex. Civ. App.) 40 S. W. 827.

Buck, J., delivered the opinion of the court:

In January, 1891, the defendant instituted proceedings for opening, widening, and extending East Third street, in the city of St. Paul, from White Bear avenue to the eastern boundary line of said city, a distance of 1 mile, across section 35, township 29, range 22, in Ramsey county, in this state. This property was then owned by one David J. Hennessey, who opposed such proceedings. The board of public works of said city confirmed the proceedings, and Hennessey appealed to the district court. On the 16th day of June, 1891, the common council of the defendant duly established the grade of said East Third street from Earle street to White Bear avenue, a distance of $1\frac{1}{2}$ miles, and on September 22, 1891, established the grade of said East Third street from White Bear avenue to the east city limits. This last-described grade of one mile so ordered was on the land of Hennessey; the city having given a bond of indemnity to him, in order that it might proceed with the condemnation of said land, and grade the same. Prior to the spring of 1891 East Third street had been graded as far east as Earle street. In March, 1892, the contract for the improvement was let at the price of \$47,000, and an assessment levied to cover it and the attendant expenses. About \$21,000 of this assessment was levied on the Hennessey farm, and \$28,000 was divided among the lots fronting on the other mile and a half of street to be graded. The plaintiff owned fourteen lots, and the aggregate assessment on these was \$1,294.43. One of the lots was assessed \$201; 12, \$80.50 each; and 1, \$76.50. On August 24, 1892, the plaintiff paid this aggregate amount into the city treasury, and the city ever since has had, and still has, his money. The work, as a consideration for which it was paid, was begun and continued at intervals until June, 1893. In 1893 the defendant city council passed the following resolution: "Resolved, that all proceedings heretofore had for the opening, widening, and extension of East Third street from White Bear avenue to the east city limits

be, and the same are hereby, in all things annulled, and that all proceedings had for the condemnation of an easement for slopes along the line of East Third street from White Bear avenue to the east city limits be, and the same are, in all things annulled. Resolved further, that the corporation attorney be, and he is hereby, authorized to stipulate for judgment in the action pending in the United States circuit court, wherein David H. Hennessey is the complainant and the city of St. Paul and Thomas Keough and Daniel Donnelly are defendants, that judgment be entered that the condemnation proceedings heretofore had for the opening of Third street, across section 35, town 29 north, range 22 west, be declared null and void, and the condemnation proceedings had for the acquiring of an easement for slopes across said section on the property abutting on the line of East Third street be also declared null and void, and that the assessment made against said section for the grading of East Third street be set aside and declared null and void, and that the defendants in said suit have no right to enter or do any work upon said section under the contract heretofore entered into between the city of St. Paul and Thomas Keough and Daniel Donnelly; and the corporation attorney is also authorized to stipulate for proper judgments in the appeal cases of David J. Hennessey against the city of St. Paul from the confirmation of the assessments for the opening of East Third street, and also from the confirmation of the assessment for the acquiring of an easement for slopes along the line of East Third street." Upon the trial the defendant also admitted that prior to the 1st day of October, 1893, the contract for doing the work of grading on East Third street from Earle street to the east city limits was rescinded by the city. In its answer the defendant says (referring to Hennessey's objection to the assessment upon his land) that "thereafter such proceedings were had in this court that an order and judgment were entered in said cause so appealed to this court by said Hennessey, in all things annulling the assessment as made by said board of public works, in so far as it related to said real estate designated as section 35 aforesaid." The trial court found as a fact "that the defendant has, through its said contractors, done some work on said street east of said Clarence street, but has never completed said street east of said point so that it is capable of being traversed either by teams or foot passengers; that in June, 1893, the defendant ceased entirely work on said street, wholly abandoned said projected improvement, and has never completed the same east of said Clarence street; that the plaintiff's said property is situated between Bock and Kennard streets, which are to the east of Clarence street, and that the nearest of plaintiff's said lots to Clarence street is about $\frac{1}{2}$ mile east of said Clarence street; that between said Clarence street and the first of plaintiff's said lots next east thereof are two deep holes, and that access to plaintiff's property cannot be had over said Third street as the same has been left by the

defendant; that, had said improvement been completed as projected, access to plaintiff's said property from the center of St. Paul and to the east city limits would have been secured it therefrom, and said property would have been benefited thereby to the amount of the assessment imposed as aforesaid, to wit, in the sum of twelve hundred and thirty-three dollars and fifty cents (\$1,233.50); that the grading of said street to the extent actually done is not, and at no time has been, of any actual benefit whatsoever to the plaintiff's said property; that the allegations of the pleadings, save as hereinbefore found, are not sustained by the evidence." The court found as conclusion of law that plaintiff was entitled to recover from the defendant the sum of \$1,294.43, and legal interest from August 24, 1893. From an order denying a motion for a new trial, the defendant appeals.

The defendant contends that the evidence does not sustain the finding of the trial court that the improvement of East Third street was abandoned by it. We are of the opinion that this contention is not well founded. There is no claim made in defendant's answer, and none was made on the trial, or on the argument in this court, that defendant wishes, desires, or ever intends to grade, widen, or improve said Earle street, or the proposed street over the Hennessey land. In fact, no substantial proceedings were ever instituted by the defendant with a view to further carrying on the original proceedings instituted in January, 1891. It is true, the city council, after plaintiff had remonstrated with it on account of its delay in the matter, directed the board of public works to investigate the feasibility of completing the grading of East Third street, not from Clarence street to the east city limits, as contemplated by the original petition, but to White Bear avenue, which is a mile west of the east city limits, and even this proceeding was substantially abandoned; and the plaintiff, fearing that an action for his claim for the money so paid to the defendant would be barred by the statute of limitations, brought this action January 31, 1898. The evidence is quite conclusive that the plaintiff's lots have not been benefited by the grading, or any acts done under the proceedings instituted by the city for such purpose. The city, by judicial proceedings, compelled him to pay to it the full amount of the assessment; and with commendable forbearance, he waited nearly six years for the city to complete its work after obtaining his money in August, 1892, which it keeps without the slightest evidence of its intent to complete its work of grading and improving the street named. If it intends to complete this work, it should do so or say so. We do not approve of a great and wealthy city remaining passive, inactive, and its officers silent, upon such matters of public concern, for so long a period, to the great injury of one of its citizens, especially without signifying its intent to proceed with the projected improvement. He had a right to elect to have them act promptly, and determine whether they would abandon or not. *Mills, Em. Dom. § 312, 43 L. R. A.*

says that there should be no unreasonable delay in determining whether or not the proceedings shall be abandoned, and that the public must be held to a speedy and prompt termination of the proceedings. It is to be noted that this is not a case of attempting to condemn and appropriate land for city purposes where the city takes and keeps possession of the property, and has not paid the damages, and where possession would be evidence that it had not abandoned the undertaking. It is evident that the undertaking was an unwise one, and the expense entirely beyond the resulting benefits to all the property involved; and the delay of six years is prima facie evidence that the improvements were unnecessary, and doubtless justified the city in abandoning the work. *Lewis, in his work on Eminent Domain (§ 667), says: "In most of the cases which have arisen, the intention to abandon has been manifested by affirmative acts. But this intention may be manifested in other ways. Where a statute required the final order establishing a highway to be filed with the town clerk within ten days from its date, a failure to do so was held to constitute an abandonment of the proceedings. Where a motion to accept an award was made and lost in a county board, it was held to amount to a vote to abandon. The failure to pay the damages within a reasonable time after their final determination will itself constitute an abandonment of any right to take the property under the proceedings had. What will constitute a reasonable time must, of course, depend upon circumstances. Four years has been held to be an unreasonable delay, constituting an abandonment; and in the same case it is said that after one year, no offer to pay having been made, the assessment would become functus officio."*

We are of the opinion that the facts in the case fully justify and sustain the findings of the trial court that the defendant city had abandoned the grading of East Third street as contemplated in the proceedings under which the assessment was made and levied, and that, as the plaintiff has received no benefit or consideration for the money paid by him to the city by coercion of law, he can maintain this action to recover it back. *Valentine v. St. Paul, 34 Minn. 446.* This being so, it is not necessary for us to consider the question as to whether the plaintiff has a remedy by mandamus to compel the board of public works to proceed with the improvement. If he had such a remedy, it was not an exclusive one.

The appellant claims that the rule laid down by this court in the case of *Strickland v. Stillwater, 63 Minn. 43*, is not applicable to the case at bar, or that, if it is, it should not be adhered to. In that case the city adopted a general plan for grading parts of the several streets, which included that part of a street in front of Strickland's lots, and extending beyond the same in each direction. The assessment included her property, and all other property benefited by such grading, although not abutting on the improvement. Part of the contemplated grading was done, but none in front of her property, and the

street was graded nearly up to her property. The city abandoned doing any further work, although she had paid the full amount of her assessment for making the entire improvement; and she sued the city for the sum so assessed and paid, and recovered judgment for the full amount, upon the ground that her property had been assessed upon the basis of frontage, and, no grading having been done on the street in front of her abutting property, she was entitled to recover the whole sum paid by her as benefits. This court held that this was error, but that as her property was so assessed, and it having been done in pursuance of a general plan which included an assessment upon all property benefited by such improvement within the limits of such plan, she might have been benefited by such grading done in part, although none of it was done directly in front of her property, and, if so, her property was liable for the amount of such benefit, whatever it might be, and that whatever sum she was entitled to receive, if any, would be the difference between the actual benefits added to her property by the grading as an entirety, so far as done, and the sum which she was compelled to pay to said city of Stillwater. We think this rule a sound and equitable one, protecting the rights of the citizen, and imposing a duty upon the municipality to perform its obligations. The principle upon which that case rested is applicable to the one at bar; that case differing from this only in the fact that in the *Strickland Case* the plaintiff received some benefit from the partial performance of the improvement, and in this the plaintiff received none. The counsel for the appellant contends that, if the rule in the *Strickland Case* is to be adopted as the law of this state, some peculiar situations will result. Any such conditions can be easily avoided by municipal corporations fully, completely, and honestly performing their duties and obligations, and not sheltering their defaults behind the plea of nonaccountability. The doctrine in the *Strickland Case* is adhered to. Our conclusion is that the plaintiff is entitled to recover in this action from the defendant city the amount so paid it by him, with interest, as upon a failure of consideration.

Order affirmed.

Canty, J., dissenting:

I cannot concur. The majority assume that they are following *Strickland v. Stillwater*, 63 Minn. 43, but the facts in that case were wholly different. There it was not claimed that any money was squandered or spent foolishly. Every dollar expended returned a full dollar's benefit to the property holders, but the city in fact abandoned a part of the improvement district and a part of the improvement. That action was brought on the theory that the plaintiff's property was wholly without the limits of any assessment district which the city authorities were warranted in carving out for the purpose of assessing thereon the cost of the improvements as actually made. We held that the property was not outside such

an assessment district, but that as the assessment district was in fact changed by the abandonment of the improvements in a part of it, and the improvements also changed, the court or the jury must in this action make a new assessment to meet these new conditions, and determine the amount of benefit to plaintiff's property and award him the balance assessed against the property. Here the plaintiff is not outside of the assessment district, or on the edge of it, where his assessment should be lighter, but he is in the very midst of it; and it is not claimed that the change made in the district by the abandonment of the improvement of the street through the Hennessey tract before any improvement was made in that part of the street could in any event make the assessment against plaintiff's property any the less. But this action is brought upon the theory that when a special tax is levied on property specially benefited by an improvement, to defray the cost of making that improvement, and the money is spent in the improvement, but does not complete the same, and it turns out, in the light of subsequent events and subsequent experiences, that the improvement was an injudicious undertaking, the taxpayer can recover back from the city the money thus injudiciously spent in the abortive enterprise. On the same principle, if a general tax of, say five mills on the dollar, was levied to build a court-house, and the money was all spent in building a court-house on such a foolish plan that before it was completed it fell down and became a total wreck, any taxpayer who paid his part of the tax could immediately recover it back from the county. There is no difference in this respect between a special tax on property specially benefited and a general tax on all the property in the city or county. Each is levied by the same sovereign power. That power acts in its sovereign capacity, not in its private or contractual capacity, in levying such a tax, and therefore is not liable for the failure of the tax to bring any benefit to him who pays it. True, the special tax is levied on the supposition that the party paying it is benefited to an amount equal to the amount of the tax. But the question of whether he is or will be thus benefited is tried at the time the assessment is made, and cannot be subsequently reviewed in an action brought to recover back the tax after it is paid, merely because the improvement was injudiciously undertaken. Of course, where the assessment district and the improvements are changed after the tax is levied and collected, so that one taxpayer has paid more than his share, he may recover the excess. Such was the *Strickland Case*. But here he is allowed to recover back taxes collected and squandered in the construction of abortive improvements. A part of the tax so collected has not been expended, and I concede that plaintiff may recover back such part; but the tax was not collected with an implied warranty that it would bring to the taxpayer the benefit contemplated, and for the portion of it which has been spent he has, in my opinion, no claim against the city.

NEBRASKA SUPREME COURT.

NEW LINCOLN HOTEL COMPANY

v.

Stewart P. SHEARS *et al.*, Appts.

(.....Neb.....)

*A lease executed October 16, 1890, contained a provision that it should operate as a lien on all the personal property of the lessees at any time in or upon the demised premises, to secure payment of rent. The building leased was in process of erection for use as an hotel, and was not completed until January, 1891. The furniture was ordered for the hotel after the lease had been made, and, because of delays in finishing the building, was not placed in the hotel until December, 1890, and January, 1891. In January, 1895, there was rent unpaid, and the lessees' successors mortgaged the furniture to secure debts by them owing to other parties, who were aware of the above-noted provision in the lease. *Held*, that the mortgagees were entitled to the first lien upon the furniture mortgaged.

(January 10, 1899.)

APPEAL by a portion of the defendants from a judgment of the District Court for Lancaster County in favor of plaintiff in an action brought to foreclose a lien upon the furnishings of the hotel Lincoln. *Reversed*.

The facts are stated in the Commissioner's opinion.

Mr. J. H. Broady, for appellant John L. Carson:

If the lease gives the right to distrain by stipulation it is not a chattel mortgage. If it does not, still it is not good as a chattel mortgage, because the property was not in existence nor acquired until long afterwards.

Steele v. Ashenfelter, 40 Neb. 770; *Deeley v. Dwight*, 132 N. Y. 59, 18 L. R. A. 298; *Cole v. Kerr*, 19 Neb. 553; *Single v. Phelps*, 20 Wis. 398; *Winslow v. Merchants Ins. Co.* 4 Met. 306, 38 Am. Dec. 368.

It was void as to appellees, because no possession of the chattels was given to mortgagee, and it was not recorded.

Farmers & M. Bank v. Anthony, 39 Neb. 343.

Appellees are estopped from setting it up against appellants, who gave credit on the faith of apparent unencumbered ownership of the property.

Standard Paper Co. v. Guenther, 67 Wis. 101; *Patrick v. Paulson*, 34 Neb. 416; *Sykes v. Hannacalt*, 5 N. D. 335.

Equity courts deal in equitable titles, because law courts are inadequate.

Putnam v. Reynolds, 44 Mich. 113; *Crippen v. Jacobson*, 56 Mich. 386; *Noyes v. Brace*, 8 S. D. 190; *Stephens v. Perrine*, 143 N. Y. 476; *Willamette Casket Co. v. Cross Undertaking Co.* 12 Wash. 190.

Messrs. Ames & Pettis, for appellant First National Bank:

By omitting the power of sale by the use

*Headnote by RYAN, C.

NOTE.—As to the efficacy of a mortgage on chattels to be acquired as independent articles, and not as the increase or fruits of existing property, see note to *Deeley v. Dwight* (N. Y.) 18 L. R. A. 298.
43 L. R. A.

of the word "distrain," and by withholding the instrument from the chattel-mortgage record, the parties evidently attempted to revive by contract the obsolete process of "distrain," which has never been in use in this state, and which unless sanctioned is against public policy.

Cornell v. Lamb, 2 Cow. 652; *Bohm v. Dunphy*, 1 Mont. 333; *Dalglish v. Grandy*, 1 N. C. (Taylor & C.) 161; *Crocker v. Mann*, 3 Mo. 472, 26 Am. Dec. 684; *Wait, Appellant*, 7 Pick. 100, 19 Am. Dec. 262; *Lamphere v. Loice*, 3 Neb. 131.

If the lease could be treated as a mortgage it was never recorded in the county of the residence of the mortgagora.

Jones, Chattel Mortgages, §§ 256, 257, 258.

The right of distrain being of feudal origin is dependent upon the relation of landlord and tenant, and it is not found that that relation ever existed between the new hotel company and Stewart and Mary Shears.

Helser v. Pott, 3 Pa. St. 179.

Even where distrain for rent is preserved by statute there is no lien until actual seizure; the process runs only against the goods of the lessee, and is subject to a mortgage on them before seizure.

Woodside v. Adams, 40 N. J. L. 417.

A chattel mortgage does not convey the legal title, but merely creates a lien for the security of the mortgage debt.

Musser v. King, 40 Neb. 892; *Bedford v. Van Cott*, 42 Neb. 229; *Murray v. Loushman*, 47 Neb. 256.

A creditor attacking an unrecorded mortgage must prove that he is such in good faith.

Thompson v. Van Vechten, 27 N. Y. 568; *DeCoursey v. Collins*, 21 N. J. Eq. 357; *Willamette Casket Co. v. Cross Undertaking Co.* 12 Wash. 190; *W. W. Kimball Co. v. Kirby*, 4 S. D. 152.

Messrs. Field & Brown also for appellants.

Messrs. Pound & Burr, for appellee:

The lien was valid for the full rent for the whole term, and not simply for any portion that might become delinquent.

Wright v. Bircher, 72 Mo. 179, 37 Am. Rep. 433; *Ludlum v. Rothschild*, 41 Minn. 218.

The right to sell was included in the right to distrain.

2 Taylor, Land. & T. § 609.

The provisions of the lease created a lien upon all the personal property of the lessees that was placed in or upon the premises.

3 Pom. Eq. Jur. § 1237; *Flagg v. Mann*, 2 Sumn. 486; *Wagner v. Steffin*, 38 Neb. 392; *Merrill v. Ressler*, 37 Minn. 82; *Wisner v. Ocumpaugh*, 71 N. Y. 113; *Kuschell v. Campau*, 49 Mich. 34; *Fejavary v. Broesch*, 52 Iowa, 88; *Wright v. Bircher*, 72 Mo. 179, 37 Am. Rep. 433; *Butt v. Ellett*, 19 Wall. 544, 22 L. ed. 183; *Beall v. White*, 94 U. S. 382, 24 L. ed. 173; *Everman v. Robb*, 52 Miss. 653, 24 Am. Rep. 682; *Harris v. Jones*, 83 N. C. 317.

A chattel mortgage may be perfectly valid and may be foreclosed in equity without con-

taining a power of sale. The power of sale is merely a cumulative remedy.

Jones, Chatt. Mortg. §§ 778, 779; *Sparks v. Wilson*, 22 Neb. 112.

This is a mortgage on all personal property of known and designated persons located in a certain place particularly described. In these respects at least its validity should not be questioned.

Jones, Chatt. Mortg. §§ 54, 65, 86, 94-97; *Wiley v. Shars*, 21 Neb. 712; *Wagner v. Steffin*, 38 Neb. 392; *Love v. Putnam*, 41 Neb. 86; *Merrill v. Ressler*, 37 Minn. 82; *Wheeler v. Becker*, 68 Iowa, 723; *Louden v. Vinton*, 108 Mich. 313; *Veazie v. Somerby*, 5 Allen, 280; *Ackerman v. Hunsicker*, 85 N. Y. 43, 39 Am. Rep. 621; *Berry v. O'Connor*, 33 Minn. 29.

A partnership having a local abiding place may be said to reside there for the purpose of determining the proper place to file a chattel mortgage.

Hubbardston Lumber Co. v. Covert, 35 Mich. 254.

All the appellants took their chattel mortgages with actual knowledge of the claim to a lien under the lease.

Notice of the claim was equivalent to knowledge of the lien.

Gillespie v. Cooper, 36 Neb. 775; *Reed v. Gannon*, 50 N. Y. 345; *Preston v. Williams*, 81 Ill. 176; *George v. Kent*, 7 Allen, 18; *Ransom v. Schmela*, 13 Neb. 77; *Fitzgerald v. Andreus*, 15 Neb. 52; *Earle v. Burch*, 21 Neb. 702; *Farmers & M. Bank v. Anthony*, 39 Neb. 347; *Spaulding v. Johnson*, 48 Neb. 830; *Forrester v. Kearney Nat. Bank*, 49 Neb. 655; *Karst v. Gane*, 136 N. Y. 316.

Only those creditors who have availed themselves of legal process can question the validity of unrecorded mortgages.

Railsback v. Patton, 34 Neb. 490; *Wagner v. Steffin*, 38 Neb. 392; *Sherwin v. Gaghagen*, 39 Neb. 238; *Sanford v. Munford*, 31 Neb. 792; *Fuller v. Brownell*, 48 Neb. 145; *Sayre v. Hewes*, 32 N. J. Eq. 652; *Houk v. Condon*, 40 Ohio St. 569; *Gill v. Pinney*, 12 Ohio St. 38; *Grace v. Wade*, 45 Tex. 522; *Overstreet v. Manning*, 67 Tex. 657; *Ludlum v. Rothschild*, 41 Minn. 218; *Cameron v. Marvin*, 26 Kan. 612; *People's Sav. Bank v. Bates*, 120 U. S. 556, 30 L. ed. 754; *Jones, Chatt. Mortg.* §§ 245, 318.

An unrecorded chattel mortgage of which a subsequent mortgagee had notice before accepting his mortgage is valid as against the latter mortgage, although it was promptly recorded.

Neerman v. Caldwell, 50 Kan. 61; *Jones, Chatt. Mortg.* § 317.

To be a mortgagee in good faith under the statute one must be without notice of the prior encumbrance and the object of requiring a chattel mortgage to be filed or recorded is to give notice of its contents.

Ransom v. Schmela, 13 Neb. 73; *Gillespie v. Brown*, 16 Neb. 457; *Sanford v. Munford*, 31 Neb. 792.

Whenever parties by their contract intend to create a positive lien or charge either upon real or upon personal property, whether then owned by the assignor or contractor, or not, or if personal property whether it is

in esse or not, it attaches in equity as a lien or charge on the particular property as soon as the assignor or contractor acquires a title thereto against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice or in bankruptcy.

Mitchell v. Winslow, 2 Story, 630; *Jones, Chatt. Mortg.* § 173; *Wisner v. Ocumpaugh*, 71 N. Y. 113; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Wright v. Bircher*, 72 Mo. 179, 37 Am. Rep. 433, 5 Mo. App. 322; *Fejvary v. Broesch*, 52 Iowa, 88, 35 Am. Rep. 261; *Whiting v. Eichelberger*, 16 Iowa, 422; *McLean v. Klein*, 3 Dill. 113; *Webster v. Nichols*, 104 Ill. 160; *Everman v. Robb*, 52 Miss. 653, 24 Am. Rep. 682; *Ludlum v. Rothschild*, 41 Minn. 218; *American Cigar Co. v. Foster*, 36 Mich. 368; *Kuschell v. Campau*, 49 Mich. 34; *Curtis v. Wilcox*, 49 Mich. 425; *Buswell v. Marshall*, 51 Vt. 87; *Harris v. Jones*, 83 N. C. 317; *Driver v. Jenkins*, 30 Ark. 120; *Gafford v. Stearns*, 51 Ala. 434; *Beall v. White*, 94 U. S. 382, 24 L. ed. 173; *Butt v. Ellett*, 19 Wall. 544, 22 L. ed. 183.

A subsequent mortgagee with notice cannot question the validity of a prior unrecorded mortgage.

People's Sav. Bank v. Bates, 120 U. S. 556, 30 L. ed. 754; *Tolbert v. Horton*, 31 Minn. 518; *Neerman v. Caldwell*, 50 Kan. 61.

Messrs. Wharton & Baird also for appellee.

RYAN, C., filed the following opinion:

This action, for the foreclosure of an alleged lien by virtue of a provision in the lease hereinafter described, was successfully prosecuted in the district court of Lancaster county. The First National Bank of Lincoln and the personal representatives of John L. Carson have appealed from the decree, whereby the mortgage to the bank and Carson was found and decreed junior and subject to the lien of the New Lincoln Hotel Company, which has succeeded, by assignment, to the rights of the Lincoln Hotel Company, the original lessor. From the fact that briefs have been filed only on behalf of the aforesaid bank and the personal representatives of Carson as appellants, and of the New Lincoln Hotel Company and Jacob E. Markel as appellees, we assume that the controversy is between those parties alone, and hence shall content ourselves with quoting and describing such findings of the district court as affect the interests of these parties in this appeal. These findings were as follows: "(1) On the 16th day of October, 1890, the Lincoln Hotel Company, a corporation, by lease of that date, demised certain premises, to wit, the Hotel Lincoln, in the city of Lincoln, Nebraska, to Samuel Shears and Jacob E. Markel, for a term of ten years from the 1st day of December, 1890, to the 1st day of December, 1900. (2) The lease contained the following provisions, to wit: 'That upon the nonpayment of the whole or any part of the said rental at the time when the same as above is promised to be paid, or upon violation or nonfulfilment of any of the covenants of this lease, the said party of the first part may, at its election, either distrain for the

rent due and damages sustained, and shall have a lien upon all the personal property of the party of the second part at any time, in or upon the said premises, for the payment of rent, and for the security of each and every covenant herein contained, and the party of the first may also declare this lease at an end, and recover possession, as if the same were held by forcible detainer. The said party of the second part hereby waives any notice of such election or any demand of the possession of the said premises.' (3) On the 16th day of October, 1890, the building was in process of erection, and was not ready for occupancy as an hotel until after January 1, 1891. (4) By an oral agreement between the parties to said lease, rent did not commence until January 15, 1891, and none of the property of the lessees involved in this suit was placed in said building until after December 1, 1890. (5) In the latter part of October, 1890, Shears and Markel, the lessees, placed with Dewey and Stone, of Omaha, an order for furniture, amounting to over \$11,000 in value, for the Lincoln Hotel, and the same was placed therein by them, mainly, in the month of December, 1890. Said lessees, on the 28th of October, 1890, placed with the Union Porcelain Works, in Greenport, Long Island, an order for chinaware for said hotel, stamped 'The Lincoln,' which chinaware was delivered to said lessees at Brooklyn, New York, December 3, 1890, and thereafter placed by them in said hotel. On November 8, 1890, said lessees placed an order with Reed and Barton, of New York, and Taunton, Massachusetts, for silverware for the Hotel Lincoln; which, in value nearly \$1,600, was delivered to said lessees at Taunton, Massachusetts, and shipped from there to said lessees at Lincoln, December 20, 1890, and January 10, 13, 14, 1891, and was placed in said hotel on arrival at Lincoln. On November 8, 1890, said lessees placed with the John Van Range Company, of Cincinnati, Ohio, an order, in value over \$1,500, for ranges, boilers, and culinary utensils for the Hotel Lincoln, shipped November 26, 1890, from Cincinnati, and on arrival placed in said hotel, where all said personal property has since remained and now is." (9) The Lincoln Hotel Company, a corporation, said lessor, on or about the . . . day of April, 1893, sold its said hotel property to the plaintiff in this suit, and assigned its said lease to the plaintiff. (10) A copy of said lease and assignment was by the plaintiff filed in the office of the county clerk of Lancaster county, on the 24th day of January, 1895. (11) Rent to the amount of \$10,500, to wit, from the 1st day of December, 1893, to the 1st day of March, 1895, is due to plaintiff from defendants." Mary P. Shears and Stewart Shears had succeeded to the rights and liabilities of Samuel Shears and Jacob E. Markel before February 2, 1895, and on that day executed a chattel mortgage on all the personal property of the Lincoln Hotel to secure a note owing by them to John L. Carson, and another note owing by them to the First National Bank of Lincoln. The amounts of these notes are indicated in the conclusions of law hereinafter set forth. This

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mortgage was filed for record on the day of its execution. It was found by the court that the bank and Carson had actual notice of the provision by which the hotel sought to create a lien for rent before said lease was recorded.

Upon the facts found, there were the following conclusions of law: "First. The plaintiff is entitled to a valid and subsisting and first lien upon all the personal property of Shears and Markel, in the possession of Shears and Shears in the Hotel Lincoln, on the 1st day of March, 1895, for the sum of \$10,500, with interest at 7 per cent from said 1st day of March, 1895. Second. That the defendants the First National Bank and John L. Carson have a valid and subsisting and second lien upon said personal property contained in said hotel; the said bank for the sum of \$4,489.80, with interest at 10 per cent from February 14, 1896, and the said Carson for the sum of \$3,126.81, with 10 per cent from the 15th day of February, 1896. Third. That the defendants Hargreaves Bros. have a valid, subsisting, and third lien upon said property for the sum of \$1,053.19, with interest at the rate of 7 per cent per annum from August 23, 1895. Fourth. That said liens are due, unpaid, and plaintiff and said defendants are entitled to have said liens foreclosed, and said property sold according to law."

In accordance with the above findings and conclusions, the lien of the hotel company was declared paramount to that of the bank and the representatives of Carson, and the question which we feel called upon to determine is whether or not this adjustment of priorities was correct. The appellees insist that the provision of the lease quoted in the second finding of fact operated as though a lease had been made October 16, 1890, contemporaneously with which there had been executed a chattel mortgage, to secure payment of the rent, upon all the personal property of the lessee at any time in or upon the demised premises, and we shall accept this assumption as being correct. While this lease was of date October 16, 1890, it is evident, from the findings hereinbefore quoted, that not until afterwards was any of the personal property ordered or selected for use in the hotel. All of the property was sent upon orders placed in other cities than Lincoln, and the delivery in Lincoln was delayed by reason of the unfinished condition of the hotel building until December of 1890 and January of 1891.

The appellees insist that there is no party to the record who can question the validity of the provision for the reservation of a lien in the lease, because the bank and Carson were mortgagees with notice, and were not, therefore, mortgagees in good faith. We cannot see that the validity of the provision of the lease is affected by this consideration. Whether or not a chattel mortgage or its equivalent can be made so as to affect future-acquired property is a question entirely dependent upon general principles, independent of statute.

The case most directly in point for the appellees is *Wright v. Bircher*, 72 Mo. 179,

37 Am. Rep. 433. The scope of that opinion is accurately reflected in that portion of the syllabus which is as follows: "The proprietors of a hotel took a lease for a term of years upon an unfinished building to be used, when completed, as part of their hotel. The rent was payable monthly. The lease was to commence, or take effect on the first of the month after the completion of the building. It contained a stipulation that all fixtures, furniture, and other improvements should be bound for the rent. When the lease was signed the house was unfurnished, but before it took effect certain furniture and fixtures had been placed in the house. Held, that the stipulation created a lien, valid, at least, in equity; that this lien was for the full amount of the rent reserved, and not simply for any portion that might from time to time become delinquent; and that it had priority of a mortgage given after the lease took effect but before any rent became delinquent, to a person having knowledge of the existence of the stipulation." While we cannot approve the conclusion reached, there is in the opinion such a fair statement of the attitude of the courts with reference to the validity of a lien in the case stated, that we shall borrow the language of Henry, J.; premising, however, that we have examined the numerous cases cited by counsel in this case, and not noted in the opinion from which we quote, with the result that they serve but to increase the number of citations which might have been made in support of one or the other of two lines of cases. The language which we borrow is as follows: "One of the principal questions discussed by counsel relates to the validity of a sale or mortgage of goods and chattels not in *esse* at the date of the mortgage or sale. One might write a volume, if inclined, to review all of the adjudged cases on the subject. We are not so inclined, and deem it necessary only to state what we regard as the conclusion reached by the best-considered cases. It has been frequently and ably discussed, both in English and American courts, and highly respectable authorities might be cited in support of either of the opposite views urged by the respective counsel here. The earlier English and American authorities, we think, sanction the doctrine contended for by the counsel of Nannie M. Wright [the mortgagee]. *Jones v. Richardson*, 10 Met. 488; *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706; *Gardner v. McEwen*, 19 N. Y. 125; *Head v. Goodwin*, 37 Me. 187; *Barnard v. Eaton*, 2 Cush. 294; *Winslow v. Merchants Ins. Co.* 4 Met. 306, 38 Am. Dec. 368; *Codman v. Freeman*, 3 Cush. 306; *Otis v. Sill*, 8 Barb. 108; *Lunn v. Thornton*, 1 C. B. 379. The doctrine maintained in most of the cases was clearly stated in *Otis v. Sill*, and was substantially "that a grant of goods not in existence, or which do not belong to the grantor, at the time of the execution of the deed, is void, unless the grantor ratify the grant by some act done by him with that view, after he has acquired the goods; that an assignment of property to be acquired in future, if valid in equity, is only valid as a contract to assign when the property shall be acquired, 43 L. R. A.

and is not an assignment of the present interest in the property, and, if enforced in equity, can only be enforced as a right under the contract, and not as a trust attached to the property as against the creditors of the assignor or mortgagor; that the mortgage of such subsequently acquired property can only be regarded as a mere contract to give further mortgage on such property, binding on the mortgagor personally, and the only remedy of the mortgagee on such contract is as a general creditor."

The broadest contrary doctrine was announced by Mr. Justice Story in *Mitchell v. Winslow*, 2 Story, 630, in the following language: "It seems to me a clear result of all the authorities that wherever the parties, by their contract, intended to create a positive lien or charge, either upon real or upon personal property, . . . whether it is then in *esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy." This has been followed by this court in the case of *Page v. Gardner*, 20 Mo. 508; in New York, in the case of *Seymour v. Canandaigua & N. F. R. Co.* 25 Barb. 305, in which *Otis v. Sill*, 8 Barb. 108, was cited and distinctly disapproved; also in *Sillers v. Lester*, 48 Miss. 526; *Benjamin v. Elmira, J. & C. R. Co.* 49 Barb. 441; *Brett v. Carter*, 3 Cent. L. J. 286, 2 Low. Dec. 458; *Morrill v. Noyes*, 56 Me. 458, 96 Am. Dec. 486; and in England in *Langton v. Horton*, 1 Hare, 549; *Holroyd v. Marshall*, 9 Jur. N. S. 213; *Whitworth v. Gaugain*, 3 Hare, 416; *Douglas v. Russell*, 1 Myl. & K. 488. The opinion of the court in *Morrill v. Noyes*, delivered by Davis, J., is an able review of the authorities, and states the doctrine more clearly and precisely than any other case to which our attention has been called. It does not recognize the validity of mortgages of mere contingencies, or sales or mortgages of property which "the mortgagors might purchase if they should purchase any," but the sale or mortgage must relate to property then in contemplation of the parties to be purchased or acquired by the vendor or mortgagor. In line with the adjudicated cases in the class led by *Mitchell v. Winslow*, the supreme court of Missouri held the provisions of the lease operated to create a lien for the entire rent, and not for instalments as they fell due monthly, and gave that lien a precedence over the chattel mortgage made on the personal property after it had been placed in the hotel building.

By the above quotation having pointed out the conflict which exists, it remains now to indicate the group in which this court, by its opinions, has placed itself. In *Lanphere v. Lowe*, 3 Neb. 131, the judgment under consideration had been rendered by the district court over which Chief Justice Lake was presiding. The opinion of this court was therefore expressed by but two judges, for whom Gantt, J., said: "Can a valid charge be made upon a thing not in existence? I think it cannot. It is a very ancient rule of law

that a man cannot grant or charge that which he has not; and in *Jones v. Richardson*, 10 Met. 488, it is said that this 'is a maxim of law too plain to need illustration, and which is fully supported by all the authorities.' 4 Bacon, Abr. p. 514, Grants, D. 2; *Codman v. Freeman*, 3 Cush. 309; 2 Kent, Com. p. 703; *Heau v. Goodwin*, 37 Me. 187; *Robinson v. Macdonnell*, 5 Maule & S. 228; *Chymoweth v. Tenney*, 10 Wis. 400. This doctrine is applied to mortgages of goods which may be subsequently acquired by the mortgagee; it is equally applied to sales of personal property and rights of property. *Chesley v. Josselyn*, 7 Gray, 490; *Rice v. Stone*, 1 Allen, 569."

In *Cole v. Kerr*, 19 Neb. 553, it was held that a mortgage executed, delivered, and properly recorded, March 30, 1882, purporting to convey "40 acres of wheat, 30 acres of oats now growing, and 75 acres of corn to be planted, and 50 acres of broom-corn to be planted, tended, and delivered in Juniata," conveyed no title or lien upon the corn as against the levy of an execution of date November 25, 1882. The opinion of the court was delivered by Cobb, J., who said: "There is, to say the least of it, a great confusion of the authorities on the point being considered, but, after a careful examination of those cited on either side in this case, I have reached the conclusion that, as a question of law, the lien of a chattel mortgage of a crop of corn, not planted at the time of its execution and delivery, will not attach to the corn when it comes into existence until it is seized by the mortgagee; or until, in the language of a member of the court in the case of *Holroyd v. Marshall*, 10 H. L. Cas. 191, 'a new intervening act.' Until then it remains a mere license, and until acted upon it conveys neither a lien nor a right of property which the mortgagee can assert against a purchaser or execution creditor of the mortgagor. Presumptuous as it may seem to say so, I cannot agree to the proposition stated by Lord Hobart in the case cited by counsel for defendant in error, that the owner of the land, though he had not the future crop 'actually in view nor certain, yet he had it potentially.' While it is true, as he adds, that 'the land is the mother and root of all fruits,' the word 'potentially,' as defined by Craig, means 'in possibility, and not in act; not positively; in efficacy, not in actuality.' With this definition in view, it cannot be said that the mere ownership or possession of the soil carries with it the production of crops, potentially. Soil alone does not produce crops of corn in this degenerate age, if it ever did. It now requires, in addition to soil, seed and labor, both of man and beast; so that the proposition that a sale or mortgage of a crop of corn not yet planted carries with it a property in, or lien upon, such crop, to attach and come into efficacy without 'a new intervening act' upon the crops coming into existence, carries with it the proposition that a man may mortgage his labor to be performed.—something which I never heard contended for in this country, but which is a right which, un-43 L. R. A.

der the name of peonage, is recognized in our sister republic to the south of us. The true distinction, I think, is that indicated in 1 Shep. Touch. 241, in the enumeration of things which pass by grant, to wit: 'Leases for years, be they present or future, wardships of tenants *in capita*, or by knight's service, trees, oxen, horses, plate, household stuff, and the like. Also trees, grass, and corn growing and standing upon the ground, fruit upon the trees, wool upon the sheep's back, are grantable.' Doubtless the fruit on the trees, the grass in the meadow, and wool on the sheep's back may be granted without regard to the state of their growth or perfection; because, in the due course of time, nature, without the necessary assistance of new forces, will in the one case develop fruit, etc. But, as we have already seen, the mere soil, except with the assistance of other elements and forces, in the latitude of Nebraska, will not develop crops of corn."

In *Johnson v. Walker*, 23 Neb. 736, the case of *Cole v. Kerr*, 19 Neb. 553, was cited with approval as to the impossibility of mortgaging a crop of corn before it has been planted. In *Wagner v. Steffin*, 38 Neb. 392, there was under consideration the validity of a mortgage of date May 15, 1888, by the terms of which the mortgagee was to have a lien on all crops grown on certain premises. This mortgage was held valid, but there was no reference in the opinion to the actual or prospective condition of the corn when mortgaged, and in this respect we are not assisted by its date. The opinion was written by Post, J., and, as he makes no mention of the crop not being planted, it could hardly have been mortgaged before it was in *esse*; for we find that he, in *Steele v. Ashenfelter*, 40 Neb. 770, delivered the opinion of this court in which the doctrine of *Cole v. Kerr*, 19 Neb. 553, was recognized and enforced as to personal property attempted to be mortgaged before possession of it had been acquired. Many of the cases attempted to make a distinction between legal and equitable rights under a mortgage of the nature of that just referred to, but this distinction was not recognized in *Steele v. Ashenfelter*, 40 Neb. 770, which was an action by a receiver for the possession of property taken under an execution, and it was expressly held that the receiver had no rights which could be enforced by a court of equity.

From this review of cases, it is clear that in this action the clause in the lease whereby there was attempted to be provided a lien to become operative against personal property afterwards to be brought upon the premises, but which was not yet capable of description, because not segregated from stocks of goods of which it was a part, was void, as against the rights of appellants, hereinbefore designated.

As the rights of parties in this court cannot be determined upon the record as it stands, there will be no decree ordered or entered at this time, but *the judgment of the District Court will be reversed*, and the cause remanded for further proceedings.

TEXAS SUPREME COURT.

George W. BRACKENRIDGE, *Plff. in Err.*,
v.
CLARIDGE & PAYNE.

(91 Tex. 527.)

1. A person employing brokers to sell land is not liable to them for commissions, where he was acting for an undisclosed principal and his agency was disclosed after the brokers had brought persons to accept an option merely, but before a binding agreement was made.
2. The agent of an undisclosed principal cannot be held responsible for the subsequent dealings with his principal after his agency is disclosed.
3. A broker claiming commissions on a sale to a person who declines to take the property because of defective title has the

burden of proving the actual existence of the defect.

4. The opinion of an attorney that the title of land is defective is not evidence, as that is a question of law for the court.
5. A Confederate certificate properly located, surveyed, and returned with field notes, to the land office in Texas, confers a good title upon the holder.

(March 3, 1898.)

ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Bexar County in favor of plaintiffs in an action brought to recover commissions for the sale of real estate. *Reversed.*

The facts are stated in the opinion.

NOTE.—*Real-estate broker's commissions as affected by the negligence, fraud, or default of the principal, and a defective title.*

I. Default of principal in entering into or carrying out contract with purchaser.

- a. In general.
- b. Refusal to enter into written contract or to make the sale.
- c. Refusing to accept purchaser found.
- d. Where the contract is oral.
- e. When a binding contract exists.
- f. Principal's refusal to enforce contract, and release of purchaser.
- g. Refusing to execute deed or conveyance.
- h. Refusal of other parties to convey.
- i. Inability of principal to complete sale.
- j. Negligence of principal.
- k. Refusing to accept purchase money.
- l. Purchaser's pecuniary responsibility.
- m. Necessity of tender of performance by purchaser.
- n. Effect of stipulations in broker's contract.
- o. Principal's acts justified.
- p. Actions relating to, and damages therefor.

II. Default in carrying out contract with broker.

- a. Principal's interference with broker.
- b. Wrongful termination of agency.

III. Defective title.

- a. General doctrine.
- b. The question of notice.

IV. Misrepresentation and fraud of principal.

The question of performance by a real-estate broker of his contract to find a purchaser or effect an exchange of his principal's property will be found in *note* to *Lunney v. Healey* (Neb.) — L. R. A. —.

Real-estate broker's commissions as affected by his negligence, or fraud, or other acts or agreements on his part respecting the sale or exchange of real estate, will form the subject of *note* to *Feathers v. Canfield* (Mich.) — L. R. A. —.

I. Default of principal in entering into or carrying out contract with purchaser.

a. In general.

The general rule is that the principal must act in good faith towards the broker, and a 43 L. R. A.

breach of faith on his part will not bar the broker's right to commissions. *Davis v. Gassette*, 30 Ill. App. 41.

The principal cannot by his own act disregard the services performed by the broker and refuse payment of the latter's commissions. *Howe v. Werner*, 7 Colo. App. 530, 532; *Gottschalk v. Jennings*, 1 La. Ann. 5, 7, 45 Am. Dec. 70; *Gillet v. Corum*, 7 Kan. 158.

A broker or agent undertaking to sell property for another for a certain commission, who finds a purchaser able, ready and willing to purchase at the price, has earned and can recover his commission, though the sale is never completed, if the failure to complete the same is on the part of the principal without any fault of the broker or agent. *Doty v. Miller*, 43 Barb. 529; *Buckingham v. Harris*, 10 Colo. 455; *Monroe v. Snow*, 131 Ill. 128, 136.

And if a purchaser able, ready, and willing to complete the sale is found by the broker, and the sale is not consummated owing to the principal's fault, he cannot cut off the broker's right to commissions. *Swigart v. Hawley*, 40 Ill. App. 610, 611; *Monroe v. Snow*, 131 Ill. 128; *Birmingham Land & Loan Co. v. Thompson*, 86 Ala. 146; *Sayre v. Wilson*, 86 Ala. 151; *Chambers v. Seay*, 73 Ala. 372; *Henderson v. Vincent*, 84 Ala. 99; *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447; *McClave v. Paine*, 49 N. Y. 561, 10 Am. Rep. 431; *McFarland v. Lillard*, 2 Ind. App. 160; *Cheatham v. Yarbrough*, 90 Tenn. 77, 79; *Fraser v. Wyckoff*, 63 N. Y. 448; *Gilchrist v. Clarke*, 86 Tenn. 583, 585; *Parker v. Walker*, 86 Tenn. 569; *Schwartz v. Yearly*, 31 Md. 270; *Holder v. Starks*, 159 Mass. 503; *Cook v. Fiske*, 12 Gray, 491; *Desmond v. Stebbins*, 140 Mass. 349; *Witherell v. Murphy*, 147 Mass. 417; *Loud v. Hall*, 106 Mass. 404, 407; *McGavock v. Woodleaf*, 20 How. 221, 15 L. ed. 884; *Kock v. Emmerling*, 22 How. 69, 16 L. ed. 292; *Duclos v. Cunningham*, 102 N. Y. 678; *Edwards v. Goldsmith*, 16 Pa. 43; *Prickett v. Badger*, 1 C. B. N. S. 296, 26 L. J. C. P. N. S. 33, 3 Jur. N. S. 66; *Parmy v. Head*, 33 Ill. App. 134, 136; *McGuire v. Carlson*, 61 Ill. App. 295; *Walker v. Tirrell*, 101 Mass. 257, 3 Am. Rep. 352; *Fischer v. Bell*, 91 Ind. 243, 244; *Lane v. Albright*, 49 Ind. 279; *Hawley v. Smith*, 45 Ind. 183; *Jacobs v. Shenon*, 2 Idaho, 1002; *Platt v. Johr*, 9 Ind. App. 58; *Cook v. Welch*, 9 Allen, 350; *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Pate v. Marsh*, 65 Ill. App. 482, 483.

So, if the broker finds a purchaser, and does all that he has agreed to do, and the deal fails through owing to the act of his principal in re-

Messrs. Franklin & Cobbs, for plaintiff in error:

It must appear from plaintiffs' petition that they performed the contract alleged, by procuring and presenting a purchaser to defendant who was able, ready, and willing to buy the land, and who, in fact, made or offered to make a binding contract with the vendor to purchase, unless it appears that defendant refused to sell.

Runyon v. Wilkinson, G. & Co. 57 N. J. L. 420; *Mottingly v. Pennie*, 105 Cal. 514; *Kirkland v. Little*, 41 Tex. 456; *Mims v. Mitchell*, 1 Tex. 443; *Malone v. Craig*, 22 Tex. 609.

If plaintiffs recover they must do so upon the ground that they procured and presented to defendant purchasers who were able, ready, and willing to buy the land, and who in fact did enter into a binding contract to purchase. The allegations in regard to the

pudling the matter, and not by reason of the fault of the broker or the purchaser, the broker will be entitled to recover his commissions. *Harwood v. Diemer*, 41 Mo. App. 48.

The principal cannot avoid the contract by his voluntary act disabling himself from performance. *Phelan v. Gardner*, 43 Cal. 306, 311; *Schultz v. Griffin*, 5 Misc. 499, 500; *Moses v. Bierling*, 31 N. Y. 462; *Willes v. Smith*, 77 Wis. 81, 86; *Stewart v. Mathers*, 32 Wis. 344, 349; *Delaplaine v. Turnley*, 44 Wis. 31; *O'Connor v. Semple*, 57 Wis. 243; *Balley v. Chapman*, 41 Mo. 536, 538; *Nesbitt v. Helser*, 49 Mo. 383; *Woods v. Stephens*, 46 Mo. 555; *Buckingham v. Harris*, 10 Colo. 455; *Hayden v. Grillo*, 26 Mo. App. 289, 293; *Monroe v. Snow*, 131 Ill. 126; *Rees v. Spruance*, 45 Ill. 308, 310; *Bryan v. Abert*, 3 App. D. C. 186; *Corbel v. Beard*, 92 Iowa, 300; *Ward v. Cobb*, 148 Mass. 518.

Neither can he avoid the contract by his refusal, upon the ground that he has a better offer. *Thornton v. Moody* (Tex. Civ. App.) 24 S. W. 331.

And if a real-estate broker fully performs his contract with the landowner, he cannot be prevented from recovering his commission because the owner subsequently changes his mind about making a sale or trade of the property. *Nelderlander v. Starr*, 50 Kan. 770.

So, where a purchaser is found within the time specified, but delay in closing the sale is caused by the negligence, fault, or fraud of the seller, the agent who finds the purchaser is entitled to his commissions. *Ratts v. Shepherd*, 37 Kan. 20; *Fultz v. Wimer*, 34 Kan. 576.

And a broker's right to commission is not affected by the fact that the principal who has a good title takes steps to have it rejected by the purchaser's attorney. *Phelps v. Prusch*, 83 Cal. 626.

And the right to commissions continues notwithstanding the fact that the sale is prevented by the principal's attempt to change the terms of sale or impose additional ones. *Hildebrand v. Lillis*, 10 Colo. App. 522.

So, if the broker has found a purchaser of sufficient responsibility, willing to take the property upon the terms stated, the fact that either party has refused subsequently to carry out the contract does not affect the right to the commissions which have already accrued. *Seymour v. St. Luke's Hospital*, 28 App. Div. 110, 122; *Knapp v. Wallace*, 41 N. Y. 479; *Kalley v. Baker*, 132 N. Y. 1.

The principal cannot set up his own dereliction of duty as a reason for his nonfulfilment of the contract, and thus avoid payment of the 43 L. R. A.

absence of defendant are, in the manner stated, without legal significance, and not supported by any legitimate evidence, and this issue should have been withdrawn from the jury.

Willis v. Whitsitt, 67 Tex. 676; *Love v. Wyatt*, 19 Tex. 316.

It appears for the first time during the trial that the witness, Disney, was a partner with Claridge in the sale of the lands and entitled to a portion of the commissions. He was a necessary party to the suit.

Ship Channell Co. v. Bruly, 45 Tex. 8; *Stachely v. Peirce*, 28 Tex. 328; *Allison v. Shilling*, 27 Tex. 450, 86 Am. Dec. 622; *Hav-erick v. Maury*, 79 Tex. 439.

Before the jury could find for the plaintiff they must have found: (1) that defendant employed plaintiffs to find a purchaser or purchasers for the land at \$3.50 per acre: (2) that he agreed to pay plaintiffs 5 per

broker's commissions. *Cavender v. Waddingham*, 2 Mo. App. 551, 554.

And the broker's claim for commission is not dependent upon the fact that the principal represents himself to be the owner of the premises. *Lansberger v. Murray*, 6 Misc. 605.

Again, it has been held that the mere fact that the broker has declined to make his commissions dependent upon the performance of the contract by the purchaser is no excuse for the principal's refusal to perform the contract, where a purchaser is procured able and prepared to bind himself to the bargain. *Friend v. Jetter*, 19 Misc. 101, 103, *Affirming* 18 Misc. 368.

So, if it should be known to the principal that the agent who introduces the purchaser to him has by the usual arts of competition taken such purchaser out of the hands of a rival broker, such fact will not justify the principal in refusing to complete the contract in the absence of collusion. *Scott v. Lloyd*, 19 Colo. 401.

And it has been held that if the broker completes his part of the contract the fact that there is a defect in the quality or the condition of the land will not defeat his right to commissions. *Lockwood v. Halsey*, 41 Kan. 166.

It has also been held that if the principal refuses to answer in damages for the nonperformance of the contract on his part, the broker will still be entitled to his commissions on finding a purchaser ready, willing, and able to perform the contract. *Wright v. Brown*, 68 Mo. App. 577, 582; *Chipley v. Leathe*, 60 Mo. App. 20.

So, where the exchange of property is not completed by reason of the principal's fault, his agent is entitled to commission where he has complied with all the requirements of his contract. *Brown v. Wilson*, 98 Iowa, 316, 318.

Where the agent made a bargain he was authorized to make for real estate, and the purchaser was ready to carry out the same, and he informed his principal of it before it was put into writing, and the principal declined to be bound by it, and then named a higher price at which he would sell, and the broker then obtained an acceptance of her offer on condition that she would make a deed at once when she again declined to sell unless he could get a much larger sum, and the broker then put the agreement in writing, and delivered to the purchaser his original contract, and the purchaser accepted it, and was ready to perform his part of it, it was held the broker was entitled to the sum named in the contract as commission for the making of the sale, as the principal could not intentionally defeat the sale and thus deprive

cent upon the price for which the sale was to be made, to wit: \$3.50 per acre; (3) that plaintiffs did procure a purchaser who was ready, able, and willing to purchase the property; (4) that plaintiffs presented such purchasers to defendant; and, (5) that the proposed purchasers entered into a binding contract with defendant to purchase said land.

Conkling v. Krakauer, 70 Tex. 739; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 196; *Mattingly v. Pennie*, 105 Cal. 514.

Before plaintiffs may recover it must appear that the proposed purchasers did in fact enter into a contract to purchase, mutually binding upon themselves and the defendant. An option is not such a contract. The great preponderance of testimony shows that no contract of purchase was ever sought or made by the proposed purchasers.

him of his right to commissions. *Witherell v. Murphy*, 147 Mass. 417.

Yet the fault of the principal in not completing the sale must be averred and proved. *Hinds v. Henry*, 36 N. J. L. 328.

And if the broker proves that it was the principal's fault that the exchange of the property was not carried out he can recover his commissions. *Woolley v. Lowenstein*, 83 Hun. 155.

So, an act of protection, beyond the protection afforded by law such as the completion of the sale by the purchaser, is not within the broker's duty to perform. *Friend v. Jetter*, 19 Misc. 101, 103, Affirming 18 Misc. 368.

But where there was no special contract relating to the commission, and the only contract was for the sale of the property by the broker, and the sale was not effected between the parties owing to a misunderstanding or disagreement in reference to the form of the conveyance, the broker was held not entitled to his commissions, it not being shown that any act of capriciousness on the part of his principal existed which would render him liable to the broker for his commissions. *Garcelon v. Tibbetts*, 84 Me. 148, 150.

b. Refusal to enter into written contract, or to make the sale.

It is the general rule that the broker's right to commissions on a sale made by him will not be defeated by the fraudulent, capricious, or arbitrary refusal of the principal to comply with the agreement entered into with the purchaser and to make the same binding, or to complete the sale when there is no express stipulation to the contrary, and the sale made to a purchaser able, ready, and willing to purchase is within the broker's authority, and according to the terms named by the principal. *Hildebrand v. Lillis*, 10 Colo. App. 522; *Kock v. Emmerling*, 22 How. 69, 16 L. ed. 202; *Hyams v. Miller*, 71 Ga. 608, 618; *Love v. Owens*, 31 Mo. App. 501; *Monroe v. Snow*, 181 Ill. 126, 136; *Bailey v. Chapman*, 41 Mo. 537; *Sayre v. Wilson*, 86 Ala. 151; *Chambers v. Seay*, 73 Ala. 372; *Henderson v. Vincent*, 84 Ala. 99; *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447; *McClave v. Paine*, 40 N. Y. 561, 10 Am. Rep. 431; *Fiske v. Soule*, 87 Cal. 313, 321; *Warren v. Cram*, 71 Mo. App. 638; *Wright v. Brown*, 68 Mo. App. 577, 582; *Chipley v. Leathe*, 60 Mo. App. 20; *Jones v. Stevens*, 36 Neb. 849; *Greenwood v. Burton*, 27 Neb. 808; *Willis v. Smith*, 77 Wis. 81, 86; *Stewart v. Mather*, 32 Wis. 344; *Delaplaine v. Turnley*, 44 Wis. 31, 41; *O'Connor v. Sempie*, 57 Wis. 243; *Block v. Ryan*, 4 App. D. C. 283; 43 L. R. A.

Conkling v. Krakauer, 70 Tex. 735; *Kimberly v. Henderson*, 29 Md. 512; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 196; *Wilson v. Mason*, 158 Ill. 304; *Stitt v. Huidekoper*, 17 Wall. 393, 21 L. ed. 647; *Warvelle, Vendors*, p. 187; *Runyon v. Wilkinson, G. & Co.* 57 N. J. L. 420; *Mattingly v. Pennie*, 105 Cal. 514; *Parker v. Walker*, 86 Tenn. 566.

An agreement to purchase land provided a certain attorney says the title is good is not such an agreement as will constitute the party a "purchaser" in law, and entitle the broker to his commission.

Hammond v. Crawford, 35 U. S. App. 1, 36 Fed. Rep. 425, 14 C. C. A. 100; *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Gilchrist v. Clarke*, 86 Tenn. 583; *Agler v. Carpenter Place Land Co.* 51 Kan. 718.

Messrs. Clamp & Harris, Dan Lewis, and J. O. Terrell for defendants in error.

Bryan v. Abert, 3 App. D. C. 180; *Atkinson v. Pack*, 114 N. C. 597, 603; *Cavender v. Waddingham*, 2 Mo. App. 551; *Rice-Dwyer Real-Estate Co. v. Ruhman*, 68 Mo. App. 503, 506; *Hamlin v. Schulte*, 34 Minn. 534, 536; *Stillman v. Mitchell*, 2 Robt. 523, 537; *Holly v. Gosling*, 3 E. D. Smith, 262; *Chilton v. Butler*, 1 E. D. Smith, 150; *Doty v. Miller*, 43 Barb. 529; *Armstrong v. Wann*, 29 Minn. 126; *Jones v. Adler*, 34 Md. 440; *Rupp v. Sampson*, 16 Gray, 398; *Mooney v. Elder*, 56 N. Y. 238; *Lynch v. McKenna*, 58 How. Pr. 42; *Hinds v. Henry*, 36 N. J. L. 328, 332; *Felner v. Kobre*, 13 Misc. 400, 500; *Platt v. Kohler*, 65 Hun, 560; *Barnard v. Monnot*, 33 How. Pr. 440, 1 Abb. App. Dec. 108; *Forrester v. Price*, 6 Misc. 308; *Schultz v. Griffin*, 5 Misc. 499, 500; *Moses v. Bierling*, 31 N. Y. 462; *Fenn v. Ware*, 100 Ga. 563; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192, 196; *McGavock v. Woodlief*, 20 How. 221, 15 L. ed. 884; *Nelderlander v. Starr*, 50 Kan. 770; *Edwards v. Goldsmith*, 16 Pa. 43; *Hayden v. Grillo*, 35 Mo. App. 647, 654, 42 Mo. App. 1; *Huggins v. Hearne*, 74 Mo. App. 86, 87; *Bailey v. Chapman*, 41 Mo. 537; *Buckingham v. Harris*, 10 Colo. 455; *Fisk v. Henarie*, 13 Or. 156, 164; *Nesbitt v. Helsar*, 49 Mo. 383; *Woods v. Stephens*, 46 Mo. 555; *Cook v. Kroemke*, 4 Daly, 268, 269; *Beebe v. Ranger*, 3 Jones & S. 452, 453, 455; *Stewart v. Mather*, 32 Wis. 344, 349; *Davis v. Lawrence*, 52 Kan. 383; *Lockwood v. Halsey*, 41 Kan. 166; *Fultz v. Wimer*, 34 Kan. 576; *Ratts v. Shepherd*, 37 Kan. 20; *Wray v. Carpenter*, 16 Colo. 271; *Lawson v. Thompson*, 10 Utah, 462; *Lestrade v. Perrera*, 6 La. Ann. 398; *Phelan v. Gardner*, 43 Cal. 306, 311; *Tousey v. Etzel*, 9 Utah, 329; *Fraser v. Wyckoff*, 63 N. Y. 445, 448; *Knapp v. Wallace*, 41 N. Y. 477; *Martin v. Sillman*, 53 N. Y. 615; *Lloyd v. Matthews*, 51 N. Y. 124; *Hart v. Hoffman*, 44 How. Pr. 168.

So, the principal cannot deprive the broker of his commission by fraud or bad faith on his part toward the broker or agent. *Flower v. Davidson*, 44 Minn. 46.

And it has been said that if, from any failure of the owner to enter into a binding contract, the sale is not completed, the agent may recover his commissions. *Cawker v. Apple*, 15 Colo. 141; *Finnerty v. Fritz*, 5 Colo. 174.

Again it has been held that when the broker has effected a bargain and sale by a contract which is mutually obligatory on the vendor and vendee, he is entitled to his commission whether his employer chooses to comply with or enforce the contract or not. *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192.

So, the unexecuted refusal of the principal to

Gaines, Ch. J., delivered the opinion of the court:

The defendants in error sued the plaintiff in error to recover commissions as real-estate brokers for procuring at plaintiff in error's instance a purchaser for a tract of land. They alleged, in substance, that Brackenridge entered into a contract with them, in which, at his instance, they undertook to make a sale of a large tract of land in consideration of his promise to pay them a commission of 5 per cent upon the purchase money, and that they procured purchasers ready, willing, and able to buy the property, but that the purchase was not consummated on account of a defect in his title. There was evidence to show that the plaintiff in error employed Claridge to procure a sale of the land, and that Payne subsequently became the partner of Claridge, and actively

participated in the negotiations for the attempted sale. Claridge, who made the contract with Brackenridge, in his testimony states the latter's promise in this language: "That is, that if they brought him a buyer for the land that would pay him his price for it, he would pay me a commission." Claridge also testified that, at the time of making the contract, Brackenridge represented that he was the owner of the land. Subsequently, Claridge found Messrs. Beney & Freeman, of the state of Iowa, who, in connection with him, examined the land, with a view to negotiating for its purchase. After the examination, Claridge introduced the proposed purchasers to Brackenridge. The depositions of Beney & Freeman were read in evidence upon the trial in behalf of the plaintiffs, and their purpose in seeking the interview with Brackenridge is very

perform his part of the contract to which the other party is ready and willing to be bound will not preclude the broker from recovering his commission, where the party is procured by the broker in fulfillment of his agreement with his principal, although the transaction does not culminate in success, if such success is prevented solely by the principal's act, and the broker has performed all that was expected of him. *Friend v. Jetter*, 19 Misc. 101, 103, Affirming 18 Misc. 368; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 22 Am. Rep. 441; *Rockwell v. Hurst*, 36 N. Y. S. R. 735; *Burling v. Gunther*, 12 Daly, 6.

And the rule is applied in all cases where the refusal on the part of the principal to fulfill the agreement which the broker had power to make is without sufficient reason. *Hinds v. Henry*, 36 N. J. L. 328, 332; *De Cordova v. Bahn*, 74 Tex. 643, 645; *Kock v. Emmerling*, 22 How. 73, 16 L. ed. 293; *Harrell v. Zimbleman*, 68 Tex. 292; *O'Brien v. Gilleland*, 79 Tex. 602, 604.

Yet the broker must not have been guilty of any fraud or deception on his part. *Bach v. Emerich*, 3 Jones & S. 548, 551.

Again, in such cases the broker's compensation is regulated by the terms of the contract or by established usage, if there is no contract. *De Cordova v. Bahn*, 74 Tex. 643, 645; *Kock v. Emmerling*, 22 How. 73, 16 L. ed. 293; *Harrell v. Zimbleman*, 68 Tex. 292.

So, it has been held that he is entitled to the compensation agreed upon, or to the usual compensation or commission. *Bennett v. Egan*, 3 Misc. 421, 422.

If the testimony adduced on behalf of the broker shows that he produced a purchaser acceptable to the owner, able and willing to purchase on the terms offered by the owner, and that the failure to consummate the sale was due entirely to the failure of the owner to enter into a binding contract with such purchaser, the broker will still be entitled to his commissions. *Millett v. Barth*, 18 Colo. 112; *Woodall v. Foster*, 91 Tenn. 195, 197; *Cheatham v. Yarbrough*, 90 Tenn. 77.

And if the principal accepts the purchaser whose ability to perform the contract is unquestioned, but no written contract is entered into between them, and the purchaser fails to perform his part, the broker, in the absence of collusion between himself and the purchaser, will still be entitled to his commissions, as the mere fact of the purchaser changing his mind cannot in such a case affect the broker's right. *Heinrich v. Korn*, 4 Daly, 74.

It has been held that if the property is sold 43 L. R. A.

to a purchaser ready, able, and willing to take and pay for it, and any of the terms of such contract as to payment, abstract, or deed, are unsatisfactory to the principal, he should object to them on that ground, and not refuse absolutely to sell; and in such a case he will be held liable to commissions if he does so. *Weaver v. Snow*, 60 Ill. App. 624, 626; *Smith v. Keeler*, 51 Ill. App. 267, 151 Ill. 518.

It has been held that the broker's right to commission is not affected by the principal selling the property when the broker has found a purchaser ready and willing to complete the sale, and has the money ready on deposit waiting the principal's action, or by his refusal to complete the contract. *Sullivan v. Hampton* (Tex. Civ. App.) 32 S. W. 235; *Goss v. Broom*, 31 Minn. 484.

In the latter case the principal sold on the day following that on which the broker notified him of the sale to the purchaser, and the broker had performed his contract, although he had not received the purchase money, as by the construction of the contract the same was to be paid in cash only when the principal performed his obligation and conveyed the property.

The case of *Phelan v. Gardner*, 43 Cal. 306, 311, is also in the same line. In that case the purchaser found by the broker tendered performance of the written contract, and was refused upon the ground that the principal had sold to another.

The same principles will also be found in *Schultz v. Griffin*, 5 Misc. 499, 500; *Huggins v. Hearne*, 74 Mo. App. 86, 87; *Hayden v. Grillo*, 35 Mo. App. 665.

So, a real-estate broker's right to commissions is not affected or defeated if the sale is prevented by the principal's attempt to change the terms or impose additional ones. *Hildebrand v. Lillis*, 10 Colo. App. 522.

And if the principal is guilty of bad faith in varying the terms of the sale to the purchaser found by the broker, the latter will be entitled to his commissions. *Mears v. Stone*, 44 Ill. App. 444, 447.

Again, the fact that the principal changes his mind, and refuses to enter into a written contract with the purchaser found by the broker, will not defeat the broker's right to recover the compensation agreed upon or the usual commissions, in the absence of an express agreement to the contrary. *Levy v. Kottman*, 11 Misc. 372; *Bennett v. Egan*, 3 Misc. 421, 422; *Platt v. Kohler*, 65 Hun, 557, 560; *Feiner v. Kobre*, 13 Misc. 499, 500; *Davis v. Lawrence*, 52 Kan. 383; *Fultz v. Wilmer*, 34 Kan. 576; *Ratts v. Shepherd*, 37 Kan. 20; *Lockwood v. Halsey*, 41

clearly disclosed in their testimony. Beney, among other things, testified as follows: " . . . I first met Col. Brackenridge, at San Antonio National Bank, on August —, 1895. Was taken to the bank by Mr. Claridge, and there introduced, either by Mr. Claridge or L. N. Disney, of Houston. I went to the bank at the suggestion of Mr. Claridge, for the purpose of talking over with Col. Brackenridge the terms and conditions he would give us on an option of sixty days on the Lytle ranch, looking to a purchase of the same if title proved good. Col. Brackenridge refused to give an option on Lytle ranch for longer than thirty days; and on August 2, 1895, we concluded to accept his offer of option of \$3.75 per acre and privilege of thirty days in which to examine title. As to the agreement, it was principally oral. We received a receipt in writing from

defendant for draft of \$1,000 specifying that draft was for option of thirty days on land deeded by sheriff of Medina county to G. W. Brackenridge. The receipt was returned to the San Antonio National Bank, August 31, 1895, on surrender of the \$1,000 paid for option. As was stated in my answer to interrogatory sixth, the only writing was the receipt for the draft for \$1,000 stating that it was paid for option, and that \$9,000 additional was to be paid at the expiration of thirty days, and balance on or before five years. . . . Col. Brackenridge stated that the title to the Lytle land was vested in him, but said that the San Antonio National Bank was the direct owner of the lands, and signed the option receipt, 'San Antonio National Bank, by G. W. Brackenridge, President.' . . . We expected to raise the money from our own resources."

Kan. 166; *Nelderlander v. Starr*, 50 Kan. 770; *Lestrade v. Perrera*, 6 La. Ann. 398.

And the rule is the same in cases where the owner has for reasons of his own afterwards concluded not to sell upon the terms given to the broker. *Willson v. Dyer*, 12 Ind. App. 320; *McFarland v. Lillard*, 2 Ind. App. 160; *Barnett v. Glutling*, 3 Ind. App. 415; *Lockwood v. Rose*, 125 Ind. 588.

If a valid contract of exchange has been entered into between the principal and the party owning the property to be taken in exchange, the principal cannot avoid payment of a broker's commissions upon the ground that the title of the party to the property to be taken in exchange is defective, and for that reason the contract is not performed. *Kalley v. Baker*, 132 N. Y. 1.

In a case in which an intending purchaser wrote a broker stating that he would give a named sum for the property "and pay you a commission," and this offer was communicated by the broker to the owner of the property, and the parties were brought together, but the contract was never fulfilled owing to the defendant's evading the same by new excuses which were merely dilatory, it was held that the broker was still entitled to recover his commissions, as they could not be defeated by such conduct. *Auten v. Jacobus*, 20 Misc. 669, 21 Misc. 632.

And where the broker employed to sell upon certain commissions found a purchaser and entered into a written contract with him in his principal's name, advanced the purchaser money with which to bind the bargain, the check for which was subsequently handed to the principal who took the same and expressed no dissatisfaction with the contract except as to an unexpired lease upon the premises which he tried to buy out but failed, and upon the value of the premises increasing, refused to carry out the contract, assigning as his reason that he could not deed except subject to the lease, although the purchaser tendered the full amount of the purchase price and demanded a deed, it was held that the broker was entitled to his commissions. *Lawson v. Thompson*, 10 Utah, 462.

Where a broker was employed to sell real estate, and an option was given him, and such option was to expire at a given date, and the broker produced a party ready and willing to buy the property upon the terms specified by him, and the broker communicated that fact to the principal and arranged for a meeting of the parties to execute the contract before the time mentioned by the option expired, and the principal agreed to meet the purchaser and close the bargain on the day previous to the expiration 43 L. R. A.

of the option, but made default with the purchaser until after the date fixed in the option, it was held that the broker's right to commissions was not defeated by such act. *Vanderveer v. Suydam*, 83 Hun, 116, 118.

So, where the broker procured an offer to be made at the price named by his principal on stated terms of payment, which offer was accepted by the owner, the broker was held entitled to his commissions, even though there was a failure to consummate the sale because of the refusal of the owner to proceed further with the transaction upon the ground that he was dissatisfied with the terms of payment, and further that if this was the sole ground of objection assigned by the owner at the time of refusal other grounds of objection then known to him were waived and would not avail as a defense to an action for the commissions. *Fenn v. Ware*, 100 Ga. 563.

And, where the evidence showed that a complete sale of the property through the service of the broker was only prevented by the wrongful refusal of the principal to comply with the terms of the contract which he had authorized the brokers to make in his behalf, it was held the broker was still entitled to his commissions. *Rice-Dwyer Real Estate Co. v. Ruhlman*, 68 Mo. App. 503, 506.

Again, where it was not disputed that the broker made a contract of sale to one who for a long time afterwards was able, ready, and willing to take the property and pay the price, but was prevented from so doing by the principal's refusal to carry out the contract, although part payment of the purchase money was made with the intention of rendering the contract irrevocable, it was held that if such broker was authorized to make the sale as an agent employed by the principal, he was, under the circumstances, entitled to compensation, although the purchaser could not have been compelled to carry out his contract if he had chosen to set up the statute of frauds, as it was the principal's own fault that the contract was not consummated. *Holden v. Starks*, 159 Mass. 503.

Where, under a written authority to sell for a given sum, the broker within the time named in the contract made an agreement with the purchaser to sell for a larger sum than that mentioned by his principal, and gave the purchaser a given time to examine the title with liberty to withdraw if not satisfactory, and with a condition releasing him if the principal did not sign the agreement before a given time, from which contract the purchaser withdrew after the principal upon presentation of such

Freeman also testified: "I was introduced by either Mr. Claridge or Mr. Disney to Col. Brackenridge at the bank where we went, at the suggestion of Mr. Claridge, for the purpose of talking over the terms and conditions he would give us on an option of sixty days on the Lytle ranch, intending to purchase the same if title was good. Col. Brackenridge refused to give an option on Lytle ranch for a longer time than thirty days; and on August —, 1895, we decided to accept his offer of option of \$3.75 per acre and privilege of thirty days to look up title. The agreement was mainly oral. We received, in writing, from Col. Brackenridge, a receipt for draft of \$1,000 specifying that it was paid for option of thirty days on land deeded by sheriff of Medina county to George Brackenridge. This receipt, I suppose, was returned to the San Antonio National Bank by my partner,

upon the surrender of the \$1,000 paid for the option, and is now not under my control. The only writing was the receipt above mentioned. The contract was \$1,000 cash on the option, and \$9,000 to be paid in thirty days, and balance on or before five years at 6 per cent. All parties understood it to be an oral agreement. Col. Brackenridge said, in his opinion, the title was good. There was no other writing in the trade, except the option receipt referred to. The agreement to purchase made on the lands was subject to examination of title; that, if title proved to be defective, the negotiations were to cease. I do not know of my own knowledge whether there was any other writing in the transaction or not, as I did not return to Texas with my partner on August 31, 1895. Col. Brackenridge stated that the title to the land rested in himself, but that the San Antonio

contract had refused to sign it, it was held that the principal's refusal to ratify the agreement amounted to a refusal to sell the property at the price and on the terms agreed upon, and that as the broker had found a purchaser able and willing to purchase, he was entitled to recover his commission. *Nelson v. Lee*, 60 Cal. 535, 567.

In this case, however, there were two dissenting opinions to the effect that the principal was not bound by the acts of his agent inasmuch as he had not ratified the contract of sale made by the agent, which was conditional, giving the purchaser a right to withdraw if the contingency named therein did not happen.

Where the principal employed the broker to procure a purchaser at a given price, on stated terms and to pay him a commission, and the broker procured a purchaser willing, anxious, and able to take the land on the terms specified subject to the lease upon it, and the only reason for not consummating the sale was the refusal of the principal to complete because the broker would not accept a certain commission on the amount of the sale, and the fact that the principal had concluded to hold the property for a higher price, the broker was held entitled to his commissions in the same manner as if the sale had been completed, as the evidence showed that the broker named a certain percentage as commission which was tacitly acquiesced in by the principal, and was afterwards, during the negotiations, mentioned as the understood rate, and the broker had performed his part of the undertaking. *Buckingham v. Harris*, 10 Colo. 455.

In *Gorman v. Scholle*, 13 Daly, 516, the broker brought the parties together, and the principal and the purchaser agreed on the terms and conditions with a waiver by the principal of the stipulation for a cash sale. The principal declined to execute a written agreement until he had consulted counsel as to the effect of a lease on the premises, but accepted the purchaser subject only to such advice, and after consulting counsel he declined to enter into the contract except upon condition that the lessee might remove buildings, to which right the purchaser refused to accede, but offered to take it as it stood at the price. The broker recovered his commissions as the sale fell through for the sole reason that the defendant declined to sell except subject to the right to remove the building, as, if such right were a fact known to the defendant, and was not made a part of the terms upon which the broker was to procure a purchaser, and was not mentioned until after a purchaser was procured, the plaintiff's right was 43 L. R. A.

not affected thereby as the purchaser procured by him was ready to buy the lots on the terms fixed by the defendant when he authorized plaintiff to offer them.

Where the broker negotiated with the agent for the sale of property to a purchaser at a price to be paid on a certain date, the commissions to be paid by the purchaser, and details were arranged, and upon the day set for the completion of the sale the defendant was notified that the purchaser was ready and willing to complete upon the terms of the sale, but defendant declined to fulfil his contract, it was held that the broker could recover damages against the seller for nonperformance of the contract, and his claim therefor was allowed. *Atkinson v. Pack*, 114 N. C. 597, 603.

A similar case to *Atkinson v. Pack*, 114 N. C. 597, is that of *Cavender v. Waddington*, 2 Mo. App. 531. In that case the broker was also employed to purchase, but his commissions were to be paid by the vendors. He made the negotiations and procured a deed to be made to the purchaser according to the contract, and tendered the same and demanded the purchase money for the vendors, but the purchaser refused to comply with the contract, and the broker sued him to recover damages for the loss of commissions by reason of such refusal, and it was held they had a good cause of action.

In *Eichberg v. Ware*, 92 Ga. 508, the broker alleged that the principal accepted the purchaser's offer, and promised to bring the deeds for examination, but finally repudiated the sale and refused to complete. The court refused to disturb the verdict found for the plaintiff upon evidence which was irreconcilably conflicting.

But, in *Bennett v. Egan*, 3 Misc. 421, 423, where the parties had signed a memorandum to enter into a formal contract for the sale and purchase of the property, and a dispute arose as to the amount and terms of a mortgage upon the premises for part of the purchase money, and finally the vendor refused to do anything further in the matter, and broke off the negotiations, which were never renewed, it was held that the broker could not recover his commissions.

c. Refusing to accept purchaser found.

It has been held that the refusal of the principal to accept a purchaser found by the broker will not defeat the broker's right to commissions, where such purchaser is ready, able, and willing to purchase upon the principal's terms. *Weinstein v. Golding*, 17 Misc. 613; *Wright v. Brown*, 68 Mo. App. 577, 582; *Chipley v. Leathe*, 60 Mo. App. 20.

National Bank was the direct owner of the land, and signed the option receipt as follows: "San Antonio National Bank, by Geo. W. Brackenridge, President."

It is evident that during the negotiation for the option it was disclosed that Brackenridge was not acting for himself, but as the agent and trustee of the bank of which he was president. This is shown by the writing referred to in the testimony of Beney, and that of Freeman. That writing was introduced in evidence, and is as follows:

Received this 2d day of August, 1895, from Messrs. Bennie & Freeman, a sight draft on the Mount Ayr Bank, of Mount Ayr, Iowa, for one thousand dollars, in payment for an option of thirty days upon a certain tract of land described in deed from the sheriff of Medina county, to Geo. W. Brackenridge,

dated the 24th day of July, 1894, aggregating about eighteen thousand seven hundred and five acres, agreed to be sold to them, at three dollars and seventy-five cents per acre, upon the following terms: Nine thousand dollars additional, to be paid within thirty days, balance in notes of one thousand dollars each payable, in five years, with six per cent, interest semiannually. Notes or coupons on each note to be given, retaining the privilege to pay any or all notes at any time before maturity. If draft for one thousand dollars is not paid, this receipt and agreement to be void.

San Antonio Nat. Bank,
by G. W. Brackenridge, President."

The testimony further discloses that the attorney of the proposed purchasers advised that the title to a large part of the lands

So, the broker's right to commissions cannot be barred by the rejection of such a purchaser by his principal and by his refusal to carry out the sale. *Flood v. Leonard*, 44 Ill. App. 113.

And the fact that the principal refuses to accept such a purchaser found within a reasonable time, and either to consummate the sale, or pay the broker's stipulated commissions, shows a good cause of action, and entitles the broker to recover his commissions. *Spaulding v. Sattiel*, 18 Colo. 86.

Yet the refusal of the principal to accept the purchaser for any reason which would be sufficient if true will impose upon the broker the burden of disposing of it. *Greene v. Hollingshead*, 40 Ill. App. 105.

So, the fact that the principal refuses to comply with his agreement upon the ground that the name of the purchaser is not revealed to him, and that he has had no opportunity of exercising his judgment in the question of accepting such purchaser, does not do away with the necessity of the broker's showing a performance on his undertaking, in order to enable him to recover the price of his services. *Hayden v. Grillo*, 26 Mo. App. 289, 293.

See, upon the question of the principal's acceptance of the purchaser as affecting the question of the broker's performance of the contract, *note to Lunney v. Healey* (Neb.) — L. R. A. —.

d. Where the contract is oral.

Although the contract between the principal and the purchaser is merely oral if it is one that the purchaser, procured by the broker and with whom the principal negotiates, is ready and willing to carry out but for the default of the principal, the broker's right will not be affected by the inability or refusal of the principal to consummate the sale. *Mooney v. Elder*, 56 N. Y. 238, 240; *Levy v. Ruff*, 4 Misc. 180, affirming 3 Misc. 147; *Barnard v. Monnot*, 3 Keyes, 203; *Krahner v. Hellman*, 16 Daly, 132; *Kalley v. Baker*, 132 N. Y. 1; *Gilder v. Davis*, 137 N. Y. 506, 20 L. R. A. 398; *Parker v. Walker*, 86 Tenn. 566, 569.

And if the principal sees fit to let the contract rest in parol, he cannot on that account refuse to pay the broker's commissions if the sale is not fully consummated. *Potvin v. Curran*, 13 Neb. 302, 305.

It has been held that if the purchaser is able, and willing, and offers to complete an oral contract if the principal will make a conveyance, the latter cannot defeat the broker's right to commissions by refusing to complete the sale. *Hayden v. Grillo*, 35 Mo. App. 647, 654.
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And if the minds of the parties have met upon the terms given the principal by the broker, the fact that the principal, when a written contract is being prepared, insisted upon incorporating into it a new clause, a forfeiture clause, never before proposed to the purchaser or even suggested until after the negotiations for the purchase and after the terms had been verbally agreed upon, in consequence of which the sale falls through, the broker will still be entitled to his commissions. *Beebe v. Ranger*, 3 Jones & S. 453, 455.

The above holding is based upon the doctrine that the principal cannot thus take advantage of his own fault. *McFarland v. Lillard*, 2 Ind. App. 160.

In a case in which the contract of sale was not reduced to writing, nor followed by a conveyance of the premises to the proposed purchaser, but no objection was made by the principal to it or to the solvency of the purchaser, yet he refused to go on with the transaction solely upon the ground that the broker had not effected the sale within the time limited, for the reason that the purchaser required a reasonable time thereafter to examine the title to the property before paying for it and taking the conveyance, it was held that the broker had performed his contract and was entitled to his commissions. *Watson v. Brooks*, 8 Sawy. 316, 319.

So it has been held that where the purchaser introduced by the broker and accepted by his principal fails to perform his part of the contract, and the principal neglects to make a binding contract with such purchaser, and no collusion is shown between the broker and such purchaser, whose pecuniary ability to perform the contract cannot be questioned, the mere fact that the purchaser changes his mind does not affect the broker, and is no fault of his, and therefore he is entitled to recover his commissions. *Heinrich v. Korn*, 4 Daly, 74.

e. When a binding contract exists.

The broker can recover commissions if he finds a purchaser with whom his principal enters into a building contract for sale, and who is ready to purchase, even if the sale is never consummated owing to the refusal of the principal to fulfil the same. *Fraser v. Wyckoff*, 63 N. Y. 445, 448; *Knapp v. Wallace*, 41 N. Y. 477; *Martin v. Stillman*, 53 N. Y. 615; *Lloyd v. Matthews*, 51 N. Y. 124; *Goss v. Stevens*, 32 Minn. 472, 474; *Mooney v. Elder*, 56 N. Y. 238; *Delaplaine v. Turnley*, 44 Wis. 31; *Phelan v. Gardner*, 43 Cal. 306; *Neabitt v. Helser*, 49 Mo. 383; *Hamlin v. Schulte*, 34 Minn. 534, 536;

was bad, and that for that reason the proposed purchasers declined to take the land, and demanded the \$1,000 paid for the option, and that the money was refunded by the bank.

Do these facts show that Claridge & Payne had earned the commissions claimed by them for procuring a purchaser of the land? We understand the law to be established by the great weight of authority that where, under a contract like the present, the broker brings to the principal a customer who is ready, able, and willing to purchase the land upon the principal's terms, and no sale be effected, the broker is entitled to his commissions, provided the failure result from the fault of the principal. It is evident, also, both from the testimony of Beney, and from that of Freeman, that, when they were introduced to Brackenridge, they were then neither ready

nor willing to purchase. The willingness to purchase must appear by an offer to purchase, either express or implied. Of course, the offer may be, and we presume usually is, upon the condition, also either express or implied, that the title is perfect. A mere willingness existing in the mind of the customer, and not communicated to the principal, cannot affect the rights of the parties. What Beney & Freeman intended to do in this case — what they offered to do — was to procure an absolute right for a limited time of buying the land, provided they should determine to do so. They did not propose to purchase or to bind themselves to purchase upon any condition whatever. The writing signed by the bank through Brackenridge, as its president, fully evidences their proposal to take an option, and not to bind themselves to purchase. Though in the form of a receipt, this is a

Stillman v. Mitchell, 2 Robt. 523, 537; *Holly v. Gosling*, 3 E. D. Smith, 262; *Chilton v. Butler*, 1 E. D. Smith, 150; *Doty v. Miller*, 43 Barb. 529; *Armstrong v. Wann*, 29 Minn. 126; *Jones v. Adler*, 34 Md. 440; *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416; *Moses v. Bierling*, 31 N. Y. 462; *Barnard v. Monnot*, 3 Keyes, 203; *Lynch v. McKenna*, 58 How. Pr. 42; *Kock v. Emmerling*, 22 How. 69, 16 L. ed. 292; *Parker v. Walker*, 86 Tenn. 566, 569, 570; *Love v. Owens*, 31 Mo. App. 501; *Burke v. Cogswell*, 39 Minn. 344.

The principal cannot by his own act disavow the services performed by the broker in finding the purchaser with whom the principal consummates the sale, and then refuse to carry out the contract with the broker. *Howe v. Werner*, 7 Colo. App. 530, 532.

In a case in which the principal canceled the contract entered into with the purchaser found by the broker, and a quitclaim deed was executed by the purchaser, but subsequently the husband of such purchaser negotiated a sale to his father which finally resulted in the purchaser found by the broker and her husband obtaining and holding possession, the court held that the transaction was to be regarded as one, and was attributable to the broker's efforts, and that his right to commission was not affected thereby. *Burke v. Cogswell*, 39 Minn. 344.

The necessity of a binding contract of sale as affecting the question of performance of his contract by the broker will be found discussed in *note to Lunney v. Healey* (Neb.) — L. R. A.

1. Principal's refusal to enforce contract, and release of purchaser.

The prevailing doctrine upon the right of a real-estate broker to commissions where the principal refuses to enforce the contract against the purchaser and releases him therefrom, would seem to be that where the broker by his efforts has brought the parties together and procured a person ready and willing to take the premises as they had intended to do, and the meeting of the parties results in the execution of a contract under seal, he has performed all he is called upon to do, and it is no part of his duty to see that the terms of the contract are complied with, and therefore the subsequent inability of the party, and the rescission of the contract by the mutual consent of the parties in consequence of such inability, cannot be charged against the broker in the absence of an express agreement to the effect that he shall have no compensation unless the contract between the parties is fully 43 L. R. A.

performed. *Cromble v. Waldo*, 42 N. Y. S. R. 225.

The above rule is supported by the following cases: *Donohue v. Flanagan*, 28 N. Y. S. R. 757; *Cawker v. Apple*, 15 Colo. 141; *Finnerty v. Fritz*, 5 Colo. 174; *Crouse v. Rhodes*, 50 Ill. App. 120, 123; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192; *Rice-Dwyer Real Estate Co. v. Ruhlman*, 68 Mo. App. 503; *Love v. Owens*, 31 Mo. App. 501; *Parker v. Walker*, 86 Tenn. 566, 569, 570; *Watson v. Brooks*, 8 Sawy. 316, 319; *Wilson v. Mason*, 158 Ill. 304; *Coleman v. Meade*, 13 Bush, 358, 360; *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Hilpple v. Laird*, 189 Pa. 472; *McLaughlin v. Wheeler*, 1 S. D. 497.

And in such cases it has been held that the purchaser's ability to perform the contract is to be assumed unless the contrary appear, and when a contract in writing for the sale of the property at the price asked is signed by the owner and the purchaser, the broker has earned his commissions, and his right to them is in no way affected by the subsequent refusal of the purchaser to fulfil the contract. *Simonson v. Kissick*, 4 Daly, 143, 145.

In *Love v. Owens*, 31 Mo. App. 501, it is said that to permit the seller to escape his liability to the agent merely because he is willing to let the purchaser go, rather than bring a suit on a valid contract, would be to encourage injustice and open up the way for the purchaser and vendor to get off merely by one failing to comply voluntarily with his written contract and the other to enforce it, the one forfeiting merely his first payment, and the other pocketing it, leaving the agent without redress for the wrong done him.

And if the principal elects to release him rather than to incur expense, etc., of litigation he cannot in equity and justice make such election at the expense of the broker. *Parker v. Walker*, 86 Tenn. 566, 570.

In such a case it has been held that if the broker has brought the parties together, and his principal accepts the person procured as a purchaser, and enters into a written contract with him, and such contract is not carried out, the question of the failure to carry out such contract is a matter that concerns only the parties to it, the one in the right having a complete remedy against the other at fault, which he might prosecute or not as he pleases, and therefore where the contract is mutual the broker will still be entitled to his commissions. *Donohue v. Flanagan*, 28 N. Y. S. R. 757.

So, the rule was applied with equal force in a case where the principal kept the amount paid

valid and binding contract, expressing in writing the terms upon which the minds of the parties met, and is not subject to be added to or varied by parol evidence. It follows that, in our opinion, at the time the negotiation was entered into which resulted in this contract, the proposed purchasers had not determined to buy the lands upon the terms proposed by Brackenridge; and that, therefore, up to that period, the plaintiffs had not complied with their agreement, and had no cause of action against him.

Can Brackenridge be held liable by reason of what subsequently occurred? Claridge testified that, when Brackenridge employed him, the latter told him he was the owner of the land. Therefore, if that were true, and if Brackenridge was acting for the bank, he could either hold him or his undisclosed principal upon the contract. But, in order

to hold Brackenridge, he must either have brought to him a purchaser ready and willing to buy upon his terms, or Brackenridge must, in his own right, have agreed upon different terms, to which the parties would have acceded but for a defect in the title. When, however, before any liability accrued, the agency was disclosed, the parties entered into a contract with the bank as the owner of the land, Brackenridge could not, in our opinion, be held liable for any default of the bank upon that contract. It is settled that the contract for the option is that of the principal, and not that of the agent, and that parol evidence to the contrary is not admissible. *Heffron v. Pollard*, 73 Tex. 96. If Brackenridge's agency was not disclosed in the first instance, as claimed by Claridge, and if the title was imperfect, and for that reason alone Beney & Freeman declined to

buy the purchaser and refused to sue for the balance under a binding contract. *Ward v. Cobb*, 148 Mass. 518.

And the rule has also been held to apply where the principal has an option given him to terminate the contract if he chooses to do so, or to enforce performance of the contract by suit in equity. *Willes v. Smith*, 77 Wis. 81, 86.

A land agent or broker who procures a party with whom his principal is satisfied, and who enters into a written contract to buy, and is financially able to perform the condition of the contract, is entitled to his commission, although the principal has the option by the contract to declare a forfeiture thereof if the instalments are not paid, and declares the contract forfeited on account of the nonpayment of an instalment when it becomes due. *Betz v. Williams & White Land & Loan Co.* 46 Kan. 45.

So, it has been held that if after a purchaser is accepted and contracts to purchase upon the terms named by the principal, the latter refuses to perform the contract for the reason that the principal has made unfounded representations as to the character of the property, such fact will not excuse the principal from paying the broker the regular commissions. *Glentworth v. Luther*, 21 Barb. 145, 146.

And in a case in which such facts existed it was held that the circumstance that the broker procured another purchaser and claimed commissions for such finding did not affect his right to commissions on the first sale effected by him. *Bach v. Emerich*, 3 Jones & S. 548, 551.

And the fact that the purchaser refuses to consummate a sale evidenced by a valid enforceable contract will not affect the broker's rights when his default is not attributable to the broker. *Gilder v. Davis*, 137 N. Y. 504, 20 L. R. A. 398.

The broker's commissions were allowed in a case wherein he procured a purchaser who entered into a binding contract to purchase, but requested the principal (the seller) to release him from the same which the principal was seeking specifically to enforce. *Hipple v. Laird*, 189 Pa. 472.

In a case in which evidence was offered by the principal for the purpose of establishing the existence of a custom among real-estate agents in and about a certain city, not to accept or demand any commissions where the purchaser failed to come up to his contract, in which the evidence failed to establish any such custom, it was held the court properly disregarded such issue. *Love v. Owen*, 31 Mo. App. 501. 45 L. R. A.

In *Coleman v. Meade*, 13 Bush, 358, 368, the principal prepared a written proposition containing the terms upon which he would sell, and delivered it to the broker, who procured the proposed purchaser's acceptance of it in writing. It was held that by such acceptance the purchaser was bound by an executory contract which the principal might enforce against him if he so desired, and that there was a sufficient fulfilment of the broker's contract so as to entitle him to commissions.

And in an action in which the evidence showed that the broker brought the parties together, was the procuring cause of the sale, and a deed had been executed to the purchaser, it was held that the principal could not avail himself of the defense that the purchaser had not paid the consideration money in an action by the broker to recover his commissions. The court therefore reversed the judgment of the court below which found for the defendant. *Travis v. Graham*, 23 App. Div. 214.

So, a contract signed by both parties in these words, "This is to certify that I . . . [the defendant] sell to . . . [the purchaser] for the sum of \$17,000 the house (describing it) . . . and that I have received the sum of \$75 . . . 'the balance amounting to \$16,925 to be paid in thirty days,'"—was held sufficient to bind the purchaser specifically to perform the same in equity, and therefore the broker was entitled to his commissions although the purchaser subsequently refused to perform the contract. *Simonson v. Klissick*, 4 Daly, 143.

Where the broker, employed to procure a purchaser of a lease, procured one who agreed to buy, and who was accepted by the principal and with whom the principal entered into a written contract for the sale of the lease, but when the parties met to deliver the assignment of the lease and complete the sale such purchaser declined to take it on the ground that the lease contained certain covenants which did not suit him, the court held the broker entitled to commissions even though the contract was not carried out, as the parties mutually agreed upon the terms of the sale and executed a written contract embodying the same. *Rosenberg v. Smith*, 25 Misc. 774.

In a case in which real-estate brokers were employed to find a purchaser and they found one ready, able, and willing to purchase, and he entered into a contract which imposed no burdens, and gave no time, to which, so far as the record showed, the principal objected, nor such as were not usual in the community, the court held that the principal could not escape liability for commissions by declining to execute

purchase under their option, it may be that the bank was liable for the commissions. But we do not think that the agent of an undisclosed principal can be held responsible for the subsequent dealings with the principal after the agency is disclosed. The theory of the case of the plaintiffs is that the defendant contracted as if for himself; and upon this theory, in order for them to recover, they must have brought him a purchaser ready, willing, and able to purchase. This, as we have seen, they did not do.

But there is another question which arises upon the facts of this case. While a broker may recover commissions of his principal who holds himself out as having a good title when he has procured a purchaser, and a sale is not effected by reason of a defect in

the title, yet, in our opinion, the burden is upon him to show the defect. The theory of the recovery in such case is not that the broker has brought a party ready, able, and willing to buy, but that he would have been willing but for the fault of the principal in failing to make good his implied warranty that he would be able to make a good title to the property. Therefore, we think, in such a case it is incumbent upon the broker to show the want or defect of title. The principal may stipulate that he will exhibit a title satisfactory to the purchaser or to his counsel, but, in the absence of an express agreement to that effect, that obligation cannot be implied from the mere employment to procure a purchaser. We have not found the point expressly decided; but, in numer-

the contract, and releasing the purchaser from liability thereon, and canceling the same. *Crouse v. Rhodes*, 50 Ill. App. 120, 123, *Distinguishing Munson v. Jacques*, No. 4360, Ill. App.

So, in the case of *Greene v. Hollingshead*, 40 Ill. App. 105, the court affirmed the judgment in favor of the broker where the purchaser notified the principal that he could not carry out the contract, and the principal replied that it would be all right, as it was further shown that the contract was considered enforceable as the determination of the principal not to enforce the binding contract made between himself and the purchaser was wholly his own concern, and could not deprive the broker of his right to commissions.

In this case the broker, employed to find a purchaser at a certain price per acre, part in cash and part on time, was to have for his services all he could get in excess of that amount. He obtained an offer for a larger sum per acre including a section of land in another state, which land he agreed to take on account of his commission, and procured the purchaser's signature and seal to a contract reciting the terms of sale, the modes of payment, and the mortgage security to be given, took the same to his principal, who after making some objection to the security signed and sealed it without change and delivered it to the broker, who produced it to the purchaser.

But there was a special agreement as to payment of the balance of commissions when the transaction was completed and the deeds were executed, and the contract contained a proviso that in case of failure the broker waived all further claims, and the contract between the principal and purchaser was canceled by mutual consent without the broker being consulted, it was held that the broker could not recover his commissions as the contract was not performed, as the mere fact of the principal's default in not enforcing the contract by the purchaser was not such a default on his part as rendered him liable to the broker for commissions, as he was at liberty to enforce the contract or treat it as at an end as he chose. *Seymour v. St. Luke's Hospital*, 28 App. Div. 110, 122.

g. Refusing to execute deed or conveyance.

It has been held that so far as the right of the real-estate broker to recover commissions is concerned, it is not material whether the power conferred upon him by the contract is to sell, or merely to secure a purchaser, and that if he procures a purchaser, and the principal refuses to convey to him, he will still be liable 43 L. R. A.

to commissions. *Fiske v. Soule*, 87 Cal. 313, 321.

The general rule is that when a broker, who has undertaken to sell his principal's property on a commission, negotiates a sale which is satisfactory to his principal, it rests with the latter to make the deed and convey the property, and if he fails to do so the broker has done all he can do, and if the contract and sale are defeated by the failure of the principal, the broker will still be entitled to his commissions. *Carpenter v. Rynders*, 52 Mo. 278, 281; *Bailey v. Chapman*, 41 Mo. 536. To the same effect, *Felts v. Butcher*, 93 Iowa, 414; *Burns v. Oliphant*, 78 Iowa, 450; *Hague v. O'Conner*, 41 How. Pr. 287; *Heyn v. Phillips*, 37 Cal. 529; *Hyams v. Miller*, 71 Ga. 608, 618; *Frazer v. Wyckoff*, 63 N. Y. 445, 448; *Knapp v. Wallace*, 41 N. Y. 477; *Martin v. Stillman*, 53 N. Y. 615; *Lloyd v. Matthews*, 51 N. Y. 124.

So, the mere fact that the owner declines to convey or complete the sale, for the reason that he may get more by holding and raising his price, does not relieve him from his liability to pay his broker for services rendered in procuring a person able, ready, and willing to purchase at the terms given, the same as if he had completed the sale. *Buckingham v. Harris*, 10 Colo. 455.

And where the broker, authorized to sell at a stipulated price upon a given commission, finds a purchaser who agrees to take the property at the price, and pays a small sum down to bind the bargain, but upon applying to the principal for the deeds the latter refuses to convey, upon the ground of an increased value, and his withdrawal of them from the market, such refusal is no defense in an action for commissions. *Smith v. Fairchild*, 7 Colo. 510.

So, if a principal refuses to execute a deed pursuant to the terms of the sale made by his authorized agent, and notifies the agent that he will not execute such deed, neither the agent nor the purchaser is required to tender the purchase money before the agent can legally bring suit for his services in making a sale of such land. *Vaughan v. McCarthy*, 59 Minn. 109.

In a case in which the broker, engaged to sell under an oral agreement at a stated price, was also given an option to purchase himself at a larger price, and the evidence clearly showed that he procured the organization of a corporation which was ready and willing and offered to purchase the property at the option price mentioned to him, and that he performed the entire parol contract, he was held entitled to his commissions when by his principal's refusal to convey the land to such corporation he was forced, in order to keep his engagement with

ous cases in which it has been held that commissions could be recovered where the proposed purchaser was ready to make the purchase but for an infirmity in the title, the specific defect has been shown in the case. There is a line of cases which hold that where the broker has made, or has caused to be made, a binding contract with the purchaser, and the latter refuses to perform the agreement by reason of some supposed flaw in the title, the agent is entitled to his commissions without showing that the title is bad. *Parker v. Walker*, 86 Tenn. 566, and cases there cited. But these cases proceed upon the principle that, when the broker has procured a binding contract, he has performed his obligation; for, if the title is good, the principal may enforce the contract

of sale; if bad, the failure to consummate the transaction is attributable to his own fault. But when no written contract of sale has been procured, and the proposed purchaser declines to take the property on account of some supposed infirmity in the title, it is incumbent upon the broker, in order to recover, to show by competent evidence that the defect actually exists.

Did the defendants in error show that the title to the lands was defective? The evidence relied on is that of the attorney of the proposed purchaser, who testified that it was not good. His conclusion necessarily involved his opinion as to the law of the title. The opinion of counsel, however able and learned, is not evidence. The court must determine the law for itself. The facts stated

the purchasers, to fall back upon his option and take the land himself, and thus make himself the channel through which the title passed to the corporation. *Klemer v. Rice*, 88 Wis. 16, 20.

The general question of the necessity of a conveyance as constituting a performance of the broker's contract will be found in *note to Lunney v. Healey* (Neb.) — L. R. A. —.

h. Refusal of other parties to convey.

In a case in which the principal sought to escape liability for commissions for the reason that the sale fell through owing to the refusal of his wife to join in the conveyance, and that it was not shown that the purchaser was ready and willing to contract with him alone, and also upon the ground that he had no right to ratify an unauthorized contract on behalf of his wife, and there was a mutual understanding between the principal and the agent that the wife should join, and the executory contract made with the agent alone stipulated that the wife should join and be a party to a warranty deed in order to perfect the title, and that if she refused to do so the purchaser might refuse to complete, it was held that the terms of the employment were satisfied by the broker's finding a purchaser ready and willing to purchase, not merely on the terms agreed to as to price and security, but also upon the condition that the wife should be bound by the contract, and that in such a case if the purchaser was procured with whom the principal assumed to be prepared to sell, and made certain stipulations for himself, he could not object that he had no authority to make such terms as a means of depriving the broker of his commissions. *Hamlin v. Schulte*, 34 Minn. 534, 536; *Kock v. Emmerling*, 22 How. 69, 16 L. ed. 292.

And where the wife of the principal refused to join in a deed to the purchaser, who declined to take without a release of the wife's right of dower, for which reason the sale was not completed, the broker was held entitled to his commissions as he had performed his contract to find a purchaser for the property by succeeding in bringing the parties together and effecting an agreement for an exchange. *Clapp v. Hughes*, 1 Phila. 382.

1. Inability of principal to complete sale.

The general rule is that if the sale effected by the broker, which is in all things satisfactory, is not carried out owing to the inability of the principal to perform his part of the contract, the broker will still be entitled to his commissions, provided there is no stipulation to the contrary in the contract with his principal, 43 L. R. A.

and no fault on the broker's part. *Fraser v. Wyckoff*, 63 N. Y. 445, 448; *Knapp v. Wallace*, 41 N. Y. 477; *Martin v. Stillman*, 53 N. Y. 615; *Lloyd v. Matthews*, 51 N. Y. 124; *Hart v. Hoffman*, 40 How. Pr. 168; *Hamlin v. Schulte*, 34 Minn. 534, 536; *Stillman v. Mitchell*, 2 Robt. 523, 537; *Holly v. Gosling*, 3 E. D. Smith, 262; *Chilton v. Butler*, 1 E. D. Smith, 150; *Doty v. Miller*, 43 Barb. 529; *Armstrong v. Wann*, 29 Minn. 126; *Jones v. Adler*, 34 Md. 440; *Phelan v. Gardner*, 43 Cal. 306; *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416; *Moses v. Bierling*, 31 N. Y. 462; *Mooney v. Elder*, 56 N. Y. 238; *Barnard v. Monnot*, 3 Keyes, 203; *Lynch v. McKenna*, 58 How. Pr. 42; *Kock v. Emmerling*, 22 How. 69, 16 L. ed. 292; *Goss v. Stevens*, 32 Minn. 472, 474; *Delaplaine v. Turnley*, 44 Wis. 31; *Nesbitt v. Helser*, 49 Mo. 383; *Jones v. Stevens*, 30 Neb. 849; *McLaughlin v. Wheeler*, 1 S. D. 497.

If the trade falls through because of the principal's inability to comply with certain conditions the parties have agreed to, the broker will still be entitled to his commissions. *Hecht v. Hall*, 62 Ill. App. 100.

So, the fact that the principal finds himself unable to complete the sale according to the terms, because a mortgage upon the premises is not then due, does not deprive the broker of his right to agreed commissions. *Jones v. Henry*, 15 Misc. 151, 152.

And if the consummation of the sale falls through owing to the inability of the principal to procure a loan, the broker will still be entitled to his commissions, where he has not undertaken the business of negotiating such sale upon the condition that the commissions were not to be paid unless he did procure the loan, and was able to carry out the sale. *Hecht v. Hall*, 62 Ill. App. 100.

Again, the mere fact that an exchange as at first proposed is not carried out through the principal's inability to execute it, will not defeat the broker's right to commissions, where other property is substituted, and the deal is carried out all parties consenting. *Pollatschek v. Goodwin*, 17 Misc. 587, 590.

So, if the principal sells to a third person after he has extended the time for the purchaser introduced by his broker to decide upon the terms and before such extended period has expired, he cannot defeat the broker's right to commission. *Reed v. Reed*, 82 Pa. 420.

The case of *Goss v. Broom*, 31 Minn. 484, shows that if the broker has performed his part of the contract in every particular, and the principal, after notice that a purchaser has been found who is ready, able, and willing to carry out the same sells the property to another, the broker will still be entitled to his commissions.

without objection by the counsel who examined the title, that a large portion of the lands were located by virtue of certificates commonly known as "Confederate Certificates," do not show that the title to such lands is invalid. Such a certificate, properly located, surveyed, and returned with field notes to the land office, confers a good title upon the holder. *Von Rosenberg v. Cuellar*, 80 Tex. 249; *Smith v. McGaughey*, 87 Tex. 61. Whether those in question were properly or improperly located does not appear. We conclude that upon the trial the plain-

tiffs failed to make a case. It follows that the charge of the court, which is assigned as error, should not have been given. A charge which authorized a verdict for the plaintiff upon any phase of the testimony was necessarily erroneous. The assignment is good, though the reasons urged in its support may be untenable. *Clarendon Land Invest. Agency Co. v. McClelland Bros.* 86 Tex. 179, 22 L. R. A. 105.

The judgment is reversed, and the cause remanded.

In the cases of *Phelan v. Gardner*, 43 Cal. 308, 311; *Huggins v. Hearne*, 74 Mo. App. 86, 87; *Hayden v. Grillo*, 35 Mo. App. 655; and *Schultz v. Griffin*, 5 Misc. 499, 500,—the same principle is upheld. In the former case the purchaser tendered performance of his contract, but was refused upon the ground that the principal had already sold.

The subject of a sale by the principal as affecting the broker's rights will be found discussed in its various phases in *note to Lunney v. Healey* (Neb.) — L. R. A. —.

j. Negligence of principal.

The broker's commissions were allowed in the case of an exchange which went through owing to the fact that the principal refused to complete the sale, in which case the principal sought relief upon the ground of false representations as to taxes due, but as the tax bills were before him for examination pending the negotiations, and he neglected to examine them, the court held him liable. *Mason v. Hinds*, 47 N. Y. S. R. 163, 166.

So, in a case where the principal claimed that he limited the time within which the sale was to be made to a certain date, and the evidence showed that the sale to a purchaser procured by the broker was not completed by that date owing to the delay of the principal in closing the sale and that he was purposely negligent in doing so in order to escape commissions, the broker was held entitled to recover. *Ratts v. Shepherd*, 37 Kan. 20.

k. Refusing to accept purchase money.

It has been held that if the purchase money is not paid owing to the fault of the principal the broker will still be entitled to his commission. *Melvin v. Aldridge*, 81 Md. 650.

So, if the purchase money is tendered to the principal by the purchaser, and is refused, the principal cannot avail himself of the defense that the purchase money is not paid, in an action to recover commissions. *Fiske v. Soule*, 87 Cal. 313, 321.

l. Purchaser's pecuniary responsibility.

The question of the position of the purchaser considered in connection with the broker's performance of the contract will be found in *note to Lunney v. Healey* (Neb.) — L. R. A. —.

If a purchaser is introduced to the principal to whom he is satisfied to sell, and such purchaser is accepted by the principal, but subsequently the principal refuses to carry out the contract, and there is no proof of the purchaser's pecuniary responsibility, it will be assumed that he is solvent, and ready and willing to perform the contract, and the broker is entitled to recover his commissions, as there is a meeting of the minds of the parties to the contract of sale and purchase. *Krahner v. Hellman*, 16 Daly, 132.

And in such a case, in the absence of evidence 43 L. R. A.

to the contrary, the purchaser's pecuniary ability to perform the contract he offered to make will be presumed. *Hart v. Hoffman*, 44 How. Pr. 168; *Buckingham v. Harris*, 10 Colo. 455; *Goss v. Broom*, 31 Minn. 484.

So, if the broker finds and produces a purchaser willing to purchase on the precise terms, and the principal declines to execute a contract of sale or to sell the property, without assigning any reason for so doing, it is incumbent upon the principal to prove on the trial that the person so introduced as a purchaser was not able pecuniarily to pay the price he agreed, or was willing to contract, to give, and until such facts are shown the purchaser will be presumed to be solvent and able to pay what he expressed his willingness to pay. *Cook v. Kroemeke*, 4 Daly, 268, 269; *Hart v. Hoffman*, 44 How. Pr. 168.

And in order to escape responsibility for commissions in finding a purchaser upon the ground of nonpayment of the balance of the purchase money by the purchaser, and a rescission of the contract on that ground, the principal must prove that he returned, or offered to return, the amount paid him on account of the purchase money under the contract. *Wilson v. Sturgis*, 71 Cal. 226; *Henderson v. Hicks*, 58 Cal. 364; *Bohall v. Diller*, 41 Cal. 535; *Morrison v. Loda*, 39 Cal. 381; *Miller v. Steen*, 30 Cal. 402, 80 Am. Dec. 124.

Yet the principal cannot escape liability for commissions upon a sale made to a purchaser, accepted by him, with whom a valid contract of sale is entered into by canceling the contract or releasing the purchaser therefrom, where the purchaser is able to perform his bargain, and would do so if not released. *Foster v. Wynn*, 51 Ill. App. 401, 402.

If, however, the preponderance of the evidence fails to show that the purchaser furnished by the broker was able to carry out the trade a verdict in favor of the broker's commissions will be set aside and a new trial granted. *Leahy v. Hair*, 33 Ill. App. 461.

m. Necessity of tender of performance by purchaser.

With reference to the necessity of a tender or offer to perform the contract on the part of the purchaser found by the broker, in order to entitle the broker to succeed in an action for his commissions, it has been held that after the principal has repudiated the contract made by the agent a tender of performance thereof on the part of the purchaser is not necessary. *Harwood v. Dlemer*, 41 Mo. App. 48.

And in such a case it has also been held that it is not necessary for the purchaser, who is ready, able, and willing to complete the contract in every respect, to tender the amount of the purchase money before the broker brings an action to recover his commissions where the principal refuses to execute the conveyance to the purchaser found by the broker. *Vaughan v. McCarthy*, 59 Minn. 199.

In *Millett v. Barth*, 18 Colo. 112, the principal refused to consummate the sale made by their brokers who had sold the property according to the terms of their contract, and the purchase money was tendered to the principal, yet the brokers recovered their commissions, although by the terms in the original contract for sale the sale was to be for cash.

And in a case where the sale was to be negotiated within a specified period, in which the brokers found a purchaser ready, willing, and able to purchase within the time specified, the principal was held bound to pay the commissions, where the purchaser tendered a check the day before the last day specified in the broker's contract, but the same was refused by the principal, and such purchaser on the following day made every effort to pay the amount in cash free from all limitations, and his efforts to make such payment were not successful owing to his failure to secure a personal interview with the principal, who in the meantime sold the property to another, as the principal's act in making such sale was a waiver of the tender of the first payment required to be made by such purchaser. *Oullahan v. Baldwin*, 100 Cal. 648, 655.

n. Effect of stipulations in broker's contract.

The mere fact that the contract between the principal and the broker contains a stipulation that the commissions are to be paid out of the purchase price cannot be taken advantage of by the principal in an action to recover commissions where the consummation of the sale has been prevented by the fault or refusal of the principal. *Cheatham v. Yarbrough*, 90 Tenn. 77, 79.

o. Principal's acts justified.

In some cases the acts of refusal on the principal's part have been held justifiable on account of the action of the broker, and in such cases the principal will not be held liable for commissions, as, where the broker refused to disclose the name of the intending purchaser to his principal, it was held that the latter had a right to assume a private speculation of the property on the part of the broker himself, and might therefore refuse to close the transaction without liability for commissions. *Hayden v. Grillo*, 35 Mo. App. 647, 654.

So, where an executory contract of sale was entered into between the principal and the proposed purchaser, and the principal was aware that the execution of such contract involved the perpetration of a fraud upon a third person, and therefore refused to consummate the contract, it was held that the broker could not recover commissions. *Zittle v. Schlesinger*, 46 Neb. 844.

p. Actions relating to, and damages therefor.

A petition by a real-estate broker in an action to recover commissions, which alleges in substance that the broker was engaged in the business of buying and selling on commission, and that on a given date the defendant requested him to purchase certain property at a certain price, and agreed to pay a specified commission therefor, and that the broker, in pursuance of such employment and agreement, purchased the property at the agreed price and was ready, willing, and able to deed, or cause to be deeded, to him the property, and that defendant, after plaintiff had procured the property to him, refused to take it, and also to pay the commissions, correctly states a cause of action in proof of which the verdict in the plain-

tiff's (broker's) favor will not be set aside. *Ackerman v. Bryan*, 33 Neb. 515.

In an action by brokers to recover commissions on a sale of real estate it is not error to instruct the jury that, if they believe from the evidence that the brokers were engaged in business as real-estate agents or brokers, and were requested or authorized by the principal to sell or find a purchaser for the property at a given price, and such authority was not limited, and was not revoked, and that pursuant thereto they did find a purchaser willing and able to buy on the terms proposed by the principal, and that the principal, on being notified that such purchaser was found and was ready to close the bargain on the terms, refused to carry out the contract, the brokers have earned their commissions and are entitled to recover. *Monroe v. Snow*, 131 Ill. 126.

So, it is not error to instruct the jury in such a case that if the principal rejects the purchaser, and the broker claims his commissions, the broker must show that the person furnished by him to make the purchase was willing to accept the offer precisely as made by the principal, and that he was an eligible purchaser, and such an one as the principal was bound in good faith, as between himself and the broker, to accept, and that when the broker in good faith has produced a purchaser who is acceptable to the owner, and able and willing to purchase on the terms satisfactory to the owner or as offered by the owner, he has performed his duty, and if from any failure of the owner to enter into a binding contract the sale is not completed the agent may recover his commissions. *Buckingham v. Harris*, 10 Colo. 455; *Finnerty v. Fritz*, 5 Colo. 174; *Smith v. Fairchild*, 7 Colo. 510.

And in an action by a real-estate broker for commissions the question whether the principal wilfully broke off the trade which the broker had worked up, and which the proposed purchaser was ready, able, and willing to carry out, is a subject to be finally determined by the jury. *Swigart v. Hawley*, 40 Ill. App. 610, 611.

So, it has been held that if the sale is not consummated owing to the refusal of the principal to keep appointments with the purchaser found by the broker, the burden is upon the principal to prove the reason why he did not keep such appointments. *Cook v. Kroemeke*, 4 Daly, 268, 269.

In some cases the question has been raised whether in actions against the principal on account of his failure to carry out his contract with his broker, the broker is entitled to recover his commissions, or whether he is only entitled to damages as for a breach of contract. Upon this question it has been held that if there is a breach of contract between the broker and the principal on the part of the latter, the broker's action is for damages against his principal, and not for commissions. *Metzen v. Wyatt*, 41 Ill. App. 487.

It has also been held that the measure of damages in an action by a broker against a party to the contract to recover damages for breach thereof where the other party to such contract is ready, able, and willing to carry it into effect, and where there is no just cause shown for refusing to carry out the same, is such sum as will compensate the broker for the loss sustained by the breach of the contract; and in a case where, by the refusal to carry out the contract, the broker has lost his right to commissions from the other party to the contract, the amount of such commissions is a proper amount of damages. *Atkinson v. Pack*, 114 N. C. 597, 603.

In *Prickett v. Badger*, 1 C. B. N. S. 296, 26

L. J. P. C. N. S. 33, 3 Jur. N. S. 66, it was held that a broker employed to sell at an agreed price, for an agreed commission, who succeeds in finding a purchaser at such price, is entitled to recover a reasonable remuneration for his work and labor, where his principal declines to sell, and rescinds his authority; and he is not bound to resort to a special action for the wrongful withdrawal of the authority.

II. *Default in carrying out contract with broker.*

a. *Principal's interference with broker.*

The general question of the right of the principal to interfere with or sell the subject-matter of the contract with the broker, and his liability for commissions in such cases, will be found discussed in *note* to *Lunney v. Healey* (Neb.) — L. R. A., and *Hoadley v. Savings Bank of Danbury* (Conn.) — L. R. A. —.

It may be stated generally that if the broker performs his part of the contract by doing all that he is required to do, and is prevented from or deprived of the opportunity of consummating the sale by the act of the principal, he is still entitled to his commission, as the principal cannot wrongfully interfere with the broker in his performance of the contract. *Fischer v. Bell*, 91 Ind. 243, 244; *Lane v. Albright*, 49 Ind. 279; *Hawley v. Smith*, 45 Ind. 183; *Chilton v. Butler*, 1 E. D. Smith, 150, 151; *Doonan v. Ives*, 73 Ga. 295, 301; *Hartley v. Anderson*, 150 Pa. 391; *Keys v. Johnson*, 68 Pa. 42; *Howe v. Werner*, 7 Colo. App. 530, 532; *Reynolds v. Tompkins*, 23 W. Va. 229, 235; *Williams v. Bishop*, 11 Colo. App. 378; *Clifford v. Meyer*, 6 Ind. App. 633; *Wilson v. Dyer*, 12 Ind. App. 320; *Lynch v. McKenna*, 58 How. Pr. 42, 45; *Woolley v. Loew*, 80 Hun, 294, 295; *Carroll v. Pettit*, 67 Hun, 418; *Larow v. Bozarth*, 68 Mo. App. 406, 411; *Jacobs v. Shenon*, 2 Idaho, 1002; *Briggs v. Rowe*, 1 Abb. App. Dec. 189, 195; *Satterthwaite v. Vreeland*, 3 Hun, 152; *Levy v. Kottman*, 11 Misc. 372; *Bennett v. Egan*, 3 Misc. 421; *Henderson v. Vincent*, 84 Ala. 99; *Byrd v. Frost* (Tex. Civ. App.) 29 S. W. 46, to the same effect.

So, the broker's right to commissions is not affected by the fact that the principal takes the matter out of his hands and deprives him of the benefit of the deal, with a knowledge that in so doing he is acquiring to himself the benefit of the broker's services, and is preventing the fulfillment of the contract by the broker. *Carroll v. Pettit*, 67 Hun, 418. To the same effect *Wilson v. Sturgis*, 71 Cal. 226, 229; *Phelan v. Gardner*, 43 Cal. 306; *Blood v. Shannon*, 29 Cal. 393.

The broker is entitled to be protected against any unfairness or fraud, and the owner, where there is a general employment to sell, cannot avail himself of the services of the broker in finding a purchaser, and then, by taking the negotiations into his own hands and reducing his price, effect a sale and refuse payment of commissions. *Briggs v. Rowe*, 1 Abb. App. Dec. 189, 195; *Heaton v. Edwards*, 90 Mich. 500; *Lane v. Albright*, 49 Ind. 275, 279; *Henderson v. Vincent*, 84 Ala. 99.

And when a broker is employed to sell real estate, and brings the property to the notice of the purchaser, and opens negotiations with him, the owner cannot step in and complete the sale and escape liability for commissions. *Glascock v. Vanfleet*, 100 Tenn. 603; *Royster v. Mageveney*, 9 Lea, 148; *Arrington v. Cary*, 5 Baxt. 609.

Where by the terms of the agreement between the principal and the broker the latter was to have eight months in which to find a 43 L. R. A.

purchaser for the land in question, and under which the principal agreed to send any purchaser who might come to him to the broker, and as a remuneration for the services the broker was to receive all he might sell the property for over and above a certain price, under which agreement the broker advertised the property and continued to do so for some months, and the principal without his knowledge or consent sold the same, in an action by the broker to recover the amount claimed to be due to him under such a sale, it was held that the contract between the principal and the broker was supported by a sufficient consideration, and that by the terms mentioned therein the broker had exclusive authority to sell, and that the principal could not deprive him of his rights under the contract by a sale, especially where the broker was fulfilling the contract, and was endeavoring to negotiate a sale with a purchaser at the time. *Stringfellow v. Powers*, 4 Tex. Civ. App. 199.

And the same rule applies to a sale by the principal, even upon modified terms. *Doonan v. Ives*, 73 Ga. 295, 301.

As to the effect of a sale by the principal upon modified terms, see *note* to *Lunney v. Healey* (Neb.) and *Hoadley v. Savings Bank of Danbury* (Conn.) — L. R. A. —.

Again, a principal who has knowingly interfered between the agent and his client, while the client has the purchase under advisement and the negotiation is still incomplete, and who has induced the client to purchase directly from himself, cannot successfully resist the agent's claim for commissions upon the ground that the latter had not in the first instance introduced him to the prospective purchaser. *Williams v. Bishop*, 11 Colo. App. 378.

And the fact that the deed is made to a party other than the purchaser found by the broker will not defeat his right to commissions when the act is done with intent to defeat commissions. *Bogart v. McWilliams* (Tex. Civ. App.) 31 S. W. 434.

In a case where it was shown that the principal agreed that if the broker would within one year from a certain time find a cash purchaser for his property for more than a given sum he would give the broker all the purchase money over that sum, and that within the year the broker produced a purchaser who would pay considerably more for the property, but to whom the broker had stated the terms to be partly on time, and that such purchaser in case he could not purchase the property partly on time, was willing and able to pay cash therefor, and that the purchaser did not make the purchase for cash at that price, for the reason that the principal interfered and entered into independent negotiations with him and finally himself sold the property to the purchaser, partly on time at a still further advanced price, it was held that the broker had performed his contract and was entitled to recover according to the terms thereof. *Larow v. Bozarth*, 68 Mo. App. 406, 411.

And the principal cannot complete the sale to a purchaser found by the broker for the purpose of evading payment of commissions. *Geary v. Pollock*, 16 App. Div. 321; *Lane v. Albright*, 49 Ind. 275, 279.

Again, the owner of property employing a broker to effect a sale cannot effect such sale at a small reduction from the price at which he was authorized to find a purchaser, nor make immaterial changes in the terms of the sale, if the purpose of the reduction is merely to save the commissions agreed to be paid to the agent. *Cook v. Forst*, 116 Ala. 395.

So, if the broker is the efficient cause or agent

In procuring the contract between the parties, the fact that he is not consulted in making the final contract with the purchaser respecting its consummation will not defeat his right to commissions, especially where it is shown that the final negotiations with such purchaser, and the completion of the bargain, are made by the principal himself for the purpose of avoiding the payment of commissions, and in bad faith for the purpose of defrauding the broker. *Woolley v. Loew*, 80 Hun, 294, 295.

And a principal cannot deprive his agent of his compensation by selling at a different price, or by switching the buyer from one agent to another with whom he might be more friendly, and thus open the way for the perpetuation of the rankest injustice. *Wright v. Brown*, 68 Mo. App. 577; *Hayden v. Grillo*, 35 Mo. App. 654.

So, the principal cannot impose conditions other than, and in addition to, the conditions named in the contract under such circumstances as to prevent the broker from receiving his commissions. *Gaty v. Foster*, 18 Mo. App. 639, 644.

If the performance of the contract by the broker is prevented by the act of his principal, the broker may recover in damages such sum as would fully compensate him for the injury which he has sustained by reason of the nonperformance of the contract. *Lane v. Albright*, 40 Ind. 275, 279.

And if the principal prevents a performance by the broker, the latter may recover his commissions without proving a strict performance of the contract. *Fraser v. Wyckoff*, 63 N. Y. 445, 448; *Young v. Hunter*, 6 N. Y. 203.

If a sale with the purchaser is declared off by the principal, or by other brokers or agents engaged by the principal for the purpose of depriving the broker of his commissions, he will still be entitled to them where by his exertions a trade has been effected between his principal and an intending purchaser. *Blaydes v. Adams*, 35 Mo. App. 526.

And in such a case the burden of proof is upon the plaintiff to show the authority existing in such other agents to determine the bargain. *Ibid.*

Where a contract existed between real-estate agents and their principals relating to the platting of land as an addition to a city, and the sale thereof, and all the expenses leading up to such sale were to be borne by the brokers, who as their compensation were to receive half the profits arising from the transaction over and above a certain amount, and the brokers continued the performance of such contract, and upon the land increasing greatly in its value the principal sought to revoke the agency, and refused to permit the continuing partner of the firm of brokers who had bought out the interest of his partner in the business which included the transaction in question to carry out the contract of sale, or indeed to perform the contract, it was held that the principal could not thereby escape liability for damages resulting as the proximate cause of such breach of contract. *Durkee v. Gunn*, 41 Kan. 496.

An interference by the principal with the broker by the removal of a sign board put upon the property by the broker has been held to be an unreasonable interference with the efforts of such broker to consummate a sale of the property. *Green v. Wright*, 36 Mo. App. 298.

The sale of the property by the principal while the contract is in force puts it out of the power of the broker to perform his part of it, and is a breach of the agreement for which he will be entitled to recover damages. *Green v. Cole*, 127 Mo. 587.
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In this case the written proposition between the parties allowed the broker two years in which to make the sale, and the evidence tended to prove that he did perform some service under the contract in having the land prepared for sale, and therefore under such circumstances, and without any other cause, the principal had no right to revoke the authority given to the broker.

So, a broker was held entitled to recover, although the lot was sold, where his principal, having employed him as agent to sell, concealed the fact that the property was sold, and continued the agency, and the customer was procured and presented by the agent in good faith. *Blester v. Evans*, 59 Ill. App. 181. To the same effect, *Phelan v. Gardner*, 43 Cal. 306, 311; *Schultz v. Griffin*, 5 Misc. 499, 500.

In a case in which the broker was to have as commissions upon the sale of real estate all that he could obtain above a certain price, and he obtained a purchaser at a figure over and above what his principal had mentioned as the selling price, and subsequently the party who had made the contract with such broker and who claimed an interest in the land notified the purchaser that it could be purchased from the owner at a less price than that mentioned by the broker, and in consequence of such statement the purchaser refused to consummate such sale, it was held that the broker could still recover the amount which the sale would have produced to him as commissions under such contract, as no duty was imposed upon such a party to furnish the purchaser with information which would defeat the sale. *Taylor v. Cox* (Tex.) 16 S. W. 1063, 1064.

But where the broker was given the exclusive privilege for six months from a given date, subject to be revoked by a notice of thirty days, to sell for a given sum upon a given commission, and alleged that his inability to effect the sale was brought about by his principal's action in breaking the market and thus depriving him of the opportunity to earn his commissions, and the testimony showed that a committee of three persons proposed to the broker to hire the property for six months with a right to buy at a given price at the end of that period, but did not show what the conversation between the broker and the committee was, but the broker testified that he went to one of the principals and stated to him in the presence of the others that the committee told him that they had been offered the property at a less sum, and that one of them admitted that he had stated that the property was in the broker's hands at a given sum, but that they would accept a less sum for it, but the evidence did not show that there was any market for the property at either of the prices mentioned,—the court held that before the jury were justified in finding that the remarks made prejudiced the agent there must be some evidence tending to show that he probably had or could have found a market at the price at which the property was given to him, and that the remark reached the market or any intending purchaser, but that the jury ought not to find that there was a market thus ruined in the absence of evidence tending to show it, and in the presence of evidence tending strongly to show that there was no such market. *Barkley v. Olcott*, 52 Hun, 452.

So, the mere fact that the principal after signing the contract wrote to the purchaser informing him of an agreement for commissions which were outrageous, in consequence of which the purchaser refused to proceed further, was held not to constitute such an unlawful interference with the broker as would render the principal liable for commissions upon such in-

complete sale, as such letter attached no terms or conditions to the sale, and it was right to inform the purchaser of the fact. *Smith v. Nicoll*, 91 Hun, 173, 174.

b. Wrongful termination of agency.

The general question of the revocation of the broker's authority will be found in a future note, and only the phase of it which touches upon the wrongful revocation of his agency will be found treated of in this section.

It may be stated as a general doctrine of the law governing the question of the revocation of a real-estate broker's agency that such agency cannot be revoked in bad faith as a device for escaping payment of commissions. *Carroll v. Pettit*, 67 Hun, 418; *Ware v. Dos Passos*, 4 App. Div. 32, 35; *McKnight v. Thayer*, 48 N. Y. S. R. 620, 622; *Ames v. McNally*, 6 Misc. 93, 94; *Stedman v. Richardson*, 100 Ky. 79; *Lipe v. Ludewick*, 14 Ill. App. 372, 375; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 22 Am. Rep. 441; *Smith v. Anderson*, 2 Idaho, 495; *Schuster v. Martin*, 45 Ill. App. 481; *Lapsley v. Holridge*, 71 Ill. App. 652; *McConaughy v. Mahannah*, 28 Ill. App. 169; *Wilson v. Dyer*, 12 Ind. App. 820; *Doonan v. Ives*, 73 Ga. 295, 301; *Geery v. Pollock*, 16 App. Div. 321; *Cook v. Forst*, 116 Ala. 395; *Woolley v. Loew*, 80 Hun, 294, 295; *Gillett v. Corum*, 7 Kan. 156; *Gottschalk v. Jennings*, 1 La. Ann. 5, 7, 45 Am. Dec. 70; *Prickett v. Badger*, 1 C. B. N. S. 296, 26 L. J. C. P. N. S. 33, 3 Jur. N. S. 66; *Henderson v. Vincent*, 84 Ala. 99.

If there is a fraud on the part of the principal in the revocation of the broker's authority, and he avails himself of the information procured by the broker, the latter will still be entitled to his commissions. *Beale v. Creswell*, 8 Md. 196, 201.

The principal cannot withdraw the property from the broker's hands where the latter's acts or services have inured to the principal's benefit without paying the broker's compensation. *Gottschalk v. Jennings*, 1 La. Ann. 5, 7, 45 Am. Dec. 70.

And it has been held that if the broker places the matter before his principal in such a manner that success is practically certain and immediate, the revocation by the principal of the broker's authority and the termination of the agency before the completion of the sale will not deprive the broker of his commissions. *Blumenthal v. Goodall*, 89 Cal. 251.

So, the principal cannot arbitrarily cut off the agent's authority in the midst of what would be a successful agency, and then, although taking advantage of the agent's services, refuse him compensation. *Knox v. Parker*, 2 Wash. 34, 37.

And the principal cannot where he has knowledge that the broker is negotiating with the proposed purchaser cancel his authority and effect the sale himself, and thereby avoid payment of the broker's commission. *Heaton v. Edwards*, 90 Mich. 500; *Lane v. Albright*, 49 Ind. 275, 279.

Again, it has been held that the principal cannot make such a withdrawal where the broker's introduction or disclosure is the foundation for the sale. *Keener v. Harrod*, 2 Md. 63, 56 Am. Rep. 706, 708; *Wilkinson v. Martin*, 8 Car. & P. 1; *Re Gibson*, 3 Pa. Dist. R. 147, 148.

So, after negotiations begun through a broker's intervention have virtually culminated in a sale, the broker cannot be discharged so as to deprive him of his commissions. *Livezy v. Miller*, 61 Md. 336, 343.

And if, in the midst of negotiations instituted by the broker which are plainly and evidently

approaching success, the principal should revoke the authority of the broker with a view of concluding a bargain without his aid and avoiding the payment of commissions about to be earned, it may well be said that the due performance of his obligation by the broker was purposely terminated by the principal. *Carroll v. Pettit*, 67 Hun, 418; *Ames v. McNally*, 6 Misc. 93, 94.

In the last-mentioned case the principal withdrew the property after the broker had found a purchaser, stating at the time that he did not know that he cared to sell, but sold the same within three days to the same purchaser without any appreciable effort at a less price.

In a case in which brokers claimed commissions for making a trade of real estate under a promise of a certain commission or compensation in case the same was effected, in which the brokers claimed they brought about the sale, but the facts showed that the principals had changed their propositions and the same appeared to have been done in order to dispense with the brokers' services, and no notice was given to them of the fact, it was held the brokers were still entitled to their commissions. *Bash v. Hill*, 62 Ill. 216; *Lane v. Albright*, 49 Ind. 275, 279.

So, if the agency is allowed to run for a considerable period, and the broker has expended labor and large sums of money, and the same is suddenly revoked by the principal at a time when the broker is accomplishing his purpose, it has been held that he can recover for his time, labor, and expense on a *quantum meruit*. *Jaekel v. Caldwell*, 156 Pa. 266, 276.

And the broker will be entitled to recover his expenses and the value of his services in a case where he is employed for a definite period and the principal revokes his authority without cause within such period. *Glover v. Henderson*, 120 Mo. 367, 376; *Ehrlich v. Aetna L. Ins. Co.* 88 Mo. 249; *Kirk v. Hartman*, 63 Pa. 97; *Durkee v. Gunn*, 41 Kan. 496; *Vincent v. Woodland Oil Co.* 165 Pa. 402, 410.

If there is a special contract by which the broker has the exclusive right to sell for a given period, and is to have all over a given amount by way of commissions, he cannot be deprived of his commissions by a sale by his principal at a price below that at which the broker could have sold, as such an agency is not revocable at the pleasure of the principal. *Stringfellow v. Powers*, 4 Tex. Civ. App. 199.

So, where all the expenses leading up to the sale were to be borne by the brokers, who were to have half of the profits over a certain amount, the principal's revocation of authority after the brokers had acted in the matter was held not to bar their right to commissions. *Durkee v. Gunn*, 41 Kan. 496. In this case the authority was originally given to a firm of brokers, and after a dissolution by the retirement of a partner the principal sought to revoke the authority.

If the consent of the brokers to a contract accepting a less sum in lieu of the full commissions due to them under a contract for the sale of property is obtained through fraud exercised by the principal, it may be rescinded by the broker provided such rescission is made promptly upon discovering the facts which entitled them to rescind, coupled with an offer to restore to the principal the amount so received by the broker. *Dobinson v. McDonald*, 92 Cal. 33, 37.

And in cases in which the property has been withdrawn, and a sale subsequently made, the question should be submitted to the jury as to whether or not the property was withdrawn, and if it was withdrawn whether the withdrawal was in good faith or in order to defraud

the broker of his commissions,—especially where from the facts the jury might find that such a withdrawal under the circumstances was nothing more than an expedient for cheating the broker of his commissions. *Ames v. McNally*, 6 Misc. 93, 94.

It has, however, been held that if it does not appear that the broker has got anyone to the point of buying, or that there is a material certainty that any one of the persons with whom he has been negotiating has finally entered into a contract of purchase, the termination of the broker's agency will not deprive him of anything he has acquired; and that, even if it should appear that the owner may have fancied that he could effect a sale with the party who has been in negotiation with the broker, and that he might by such means avoid the payment of commissions, yet if it is uncertain that he could effect a sale, and there is no one standing ready to buy, the principal cannot in such a case be chargeable with legal fraud, especially where it is shown that the broker had the property in hand for a long period of time, and the principal's evidence tends to show that the agency was not abruptly and arbitrarily terminated, whatever may be thought of the propriety or the fairness of the principal's conduct in taking the property away from the agent, when he has informed him that he had parties in view whom he hoped to bring to an acceptance of the offer. *Slater v. Holt*, 10 N. Y. S. R. 257, 261.

And it is in all cases a question for the jury to decide whether the revocation of the broker's authority was made in good faith, or was a mere subterfuge to relieve the principal from payment of commissions. *Kelly v. Marshall*, 172 Pa. 396, 399.

In a case in which the broker was employed to effect an exchange of property and the negotiations failed, and the principal notified the broker that he withdrew his offer, and the other party placed his property in the hands of other brokers, and subsequently the same parties were brought together under other influences, and a trade was consummated upon the terms first proposed by the party introduced by the broker, it was held that the fact that the principal accepted such terms after revocation of the broker's authority was not of itself such evidence of bad faith as would entitle the broker to recover,—especially where the evidence showed that when the first negotiations were ended neither of the parties intended or expected to renew them. *Uphoff v. Ulrich*, 2 Ill. App. 399, 401.

Upon the general question of a sale by the principal after withdrawal or termination of the agency as affecting the broker's performance of his contract, see *note to Hoadley v. Savings Bank of Danbury (Conn.)* — L. R. A. —

III. Defective title.

a. General doctrine.

In general it may be stated that if the broker has acted in good faith, performed his contract, and done all that he was bound to do, and the sale with the purchaser procured by the broker is not carried out, or falls through, owing to the defective title of the principal, the vendor, the broker will still be entitled to his commission in the absence of evidence showing that the broker had knowledge of such defect, or of a stipulation to the contrary in the contract between the principal and the broker. *Smith v. Mooney*, 14 N. Y. Week. Dig. 237; *Sullivan v. Hampton (Tex. Civ. App.)* 32 S. W. 235; *Conkling v. Krakauer*, 70 Tex. 735; *Goodridge v. Holdaday*, 18 Ill. App. 363, 365; *Hart v. Hopson*, 52 43 L. R. A.

Mo. App. 177, 193; *Doty v. Miller*, 43 Barb. 529, 530; *Glentworth v. Luther*, 21 Barb. 145; *Holly v. Gosling*, 3 E. D. Smith, 262; *Fiske v. Soule*, 37 Cal. 313, 321; *Smith v. Schiele*, 93 Cal. 144, 149; *Middleton v. Flindia*, 25 Cal. 76, 81; *Gonzales v. Board*, 57 Cal. 225; *Phelps v. Prusch*, 83 Cal. 626, 628; *Birmingham Land & Loan Co. v. Thompson*, 86 Ala. 146; *Knapp v. Wallace*, 41 N. Y. 477; *Stange v. Gosse*, 110 Mich. 153; *Block v. Ryan*, 4 App. D. C. 283; *Parker v. Walker*, 56 Tenn. 566; *Kyle v. Rippey*, 20 Or. 447, 453; *Gilder v. Davis*, 137 N. Y. 504, 20 L. R. A. 398; *Roberts v. Kimmons*, 65 Miss. 332, 334; *Kock v. Emmerling*, 22 How. 69, 16 L. ed. 292; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 22 Am. Rep. 441; *Christensen v. Wooley*, 41 Mo. App. 53; *Collins v. Fowler*, 8 Mo. App. 588; *Love v. Owens*, 31 Mo. App. 501; *Hynes v. Brettelle*, 70 Mo. App. 344; *Barber v. Hildebrand*, 42 Neb. 400; *McLaughlin v. Wheeler*, 1 S. D. 407; *Jarvis v. Schaefer*, 105 N. Y. 289, 292, 293; *Lockwood v. Halsey*, 41 Kan. 166; *Cheatman v. Yarbrough*, 90 Tenn. 77, 79; *McGavock v. Woodlief*, 20 How. 221, 15 L. ed. 884; *Fraser v. Wyckoff*, 63 N. Y. 448; *Cook v. Fiske*, 12 Gray. 493; *Gilchrist v. Clarke*, 86 Tenn. 583, 585; *Parker v. Walker*, 86 Tenn. 566; *Hamlin v. Schulta*, 34 Minn. 534, 536; *Stillman v. Mitchell*, 2 Robt. 523, 537; *Chilton v. Butler*, 1 E. D. Smith, 150; *Armstrong v. Wann*, 29 Minn. 126; *Jones v. Adler*, 34 Md. 440; *Phelan v. Gardner*, 43 Cal. 306; *Rupp v. Sampson*, 16 Gray. 398, 77 Am. Dec. 416; *Moses v. Bierling*, 31 N. Y. 462; *Mooney v. Elder*, 56 N. Y. 238; *Barnard v. Monnot*, 3 Keyes, 203; *Lynch v. McKenna*, 58 How. Pr. 42; *Parmly v. Head*, 38 Ill. App. 134, 136; *Monroe v. Snow*, 131 Ill. 126, 136; *Buckingham v. Harris*, 10 Colo. 455; *Watson v. Brooks*, 8 Sawy. 316, 319, 320; *Tousey v. Etzel*, 9 Utah, 329; *Halsey v. Monterlo*, 92 Va. 581, 583; *Martin v. Stillman*, 53 N. Y. 615; *Lloyd v. Matthews*, 51 N. Y. 124.

And if the purchaser procured is accepted by the principal, and the sale is not consummated by the principal's inability to make a good title, the broker's right to commissions is not dependent upon the question of the purchaser's ability to perform the contract. *Davis v. Morgan*, 96 Ga. 518, 520.

The rule has also been stated as follows; when a proposed purchaser agrees to buy, and nothing is said about the title, he has a right to believe he will get a good title, and the inducement to buy is that the purchaser may acquire a good and indefeasible title, and if after investigation a defect in the title is discovered the purchaser has a right to repudiate the contract without incurring any liability on account thereof, and the repudiation of such a contract by the purchaser will not excuse the principal from his obligation to pay the broker's commissions. *Birmingham Land & Loan Co. v. Thompson*, 86 Ala. 146; *Flinn v. Barber*, 64 Ala. 193; *Cullum v. Branch Bank*, 4 Ala. 28, 37 Am. Dec. 725.

And if within a reasonable time the broker has done all that he was bound to do under his contract to find a purchaser, he is entitled to his commissions, and his right to compensation does not depend upon the validity or invalidity of his principal's title, and is not affected by the purchaser's refusal to accept the same and complete the sale solely on that ground. *Gonzales v. Broad*, 57 Cal. 224.

And the fact that the seller's title to the property proves defective, and therefore the contract to purchase is not carried out, will not defeat the broker's right to recover his commissions from the purchaser who employed him to find a seller, when the seller was introduced in good faith by the broker, and a valid written

contract of sale and purchase was entered into between the parties. *Knapp v. Wallace*, 41 N. Y. 477.

It has also been held that the rule is the same where the sale falls through owing to an encumbrance upon the property. *Birmingham Land & Loan Co. v. Thompson*, 86 Ala. 146.

So, it has been stated that if the broker does not know of defects in the title at the time he enters into the contract, or at the time he performs the work, he has the right to assume that the title to the property he deals with is free from infirmity, and in such a case he will be entitled to recover his commissions. *Berg v. San Antonio Street R. Co. (Tex. Civ. App.)* 43 S. W. 929; *Gibson v. Gray (Tex. Civ. App.)* 43 S. W. 922; *Gauthier v. West*, 45 Minn. 192; *Birmingham Land & Loan Co. v. Thompson*, 86 Ala. 146; *Sweeney v. Tennille Oil & Gas Co.* 150 Pa. 103; *Phelps v. Prusch*, 83 Cal. 620; *Peet v. Sherwood*, 43 Minn. 447.

And in the case of an employment of an agent to find a purchaser of real estate where nothing is said or understood between them as to the title, it has been held that the implication of the law is between the principal and the agent as between owner and purchaser, that the owner has an intent to convey a good title, and it is no defense to the agent's claim for commissions that his agreement provided that the purchaser should get a good title, either in general terms, or that certain particular encumbrances should be removed. *McLaughlin v. Wheeler*, 1 S. D. 497; *Birmingham Land & Loan Co. v. Thompson*, 86 Ala. 146.

So, the fact that the contract contains a condition that the title shall be made clear and satisfactory to the purchaser has been held to be but an expression of what is implied by law, in the absence of an agreement that the purchaser will take the risk of the title, and will not bar the broker's right to commission if the title proves defective. *Roberts v. Kimmons*, 65 Miss. 332, 334.

And if the owner refuses or declines to take any steps to remove the defect or cloud, or to produce to the purchaser evidence that the title is not in fact faulty, the agent is entitled to his commissions the same as if he had consummated the sale. *Gerhart v. Peck*, 42 Mo. App. 644, 651; *Carpenter v. Rynders*, 52 Mo. 278; *Budd v. Zoller*, 52 Mo. 238; *Nesbitt v. Hesler*, 49 Mo. 383; *Love v. Owens*, 31 Mo. App. 501; *Holly v. Gosling*, 3 E. D. Smith, 263; *Christensen v. Wooley*, 41 Mo. App. 53.

The fact that the principal's title is good, bad, or indifferent will not affect the broker's right to commission upon an exchange where the party procured by him has a good title and such party is produced to his principal and offers to make a binding contract. *Moskowitz v. Hornberger*, 20 Misc. 558, *Affirming* 19 Misc. 429.

The rule is supported by the doctrine that there is no breach on the purchaser's part in declining to take a defective title as he is entitled to a merchantable one, a marketable title, such a one as will bring in the market as high a price with as without objection. *Parmly v. Head*, 33 Ill. App. 134; *Parker v. Porter*, 11 Ill. App. 605; *Brown v. Cannon*, 10 Ill. 174.

The rule is also founded upon the theory that the principal, as the owner of land, impliedly warrants that he has a marketable title thereto for the purposes desired, and impliedly contracts that he has the ability and can confer a perfect title. *Middleton v. Thompson*, 163 Pa. 112, 120; *Berg v. San Antonio Street R. Co. (Tex. Civ. App.)* 43 S. W. 929; *Gauthier v. West*, 45 Minn. 192, 193; *Birmingham Land & 43 L. R. A.*

Loan Co. v. Thompson, 86 Ala. 146; *Sweeney v. Tennille Oil & Gas Co.* 130 Pa. 193; *Phelps v. Prusch*, 83 Cal. 626; *Peet v. Sherwood*, 43 Minn. 447; *Hamlin v. Schulte*, 34 Minn. 534; *Gerhart v. Peck*, 42 Mo. App. 644, 651.

The rule also arises from the fact that the broker is not a guarantor of his principal's title. *Clapp v. Hughes*, 1 Phila. 382; *Hart v. Hopson*, 52 Mo. App. 177, 193; *Barber v. Hildebrand*, 42 Neb. 400.

And that the broker is not responsible for the condition of his principal's title. *Kyle v. Rippey*, 20 Or. 447.

And that it is the duty of the principal seeking to sell his real estate to look to his title, and that it is no part of the duty of the broker to do this for him. *Christensen v. Wooley*, 41 Mo. App. 53.

The agent, upon his agreement to negotiate a sale, assumes no obligation or responsibility in reference to the title, unless it is made a part of his duty to have the title examined before attempting to effect a sale, and his right to commission is not dependent upon the contingency of the principal's title being good. *Gerhart v. Peck*, 42 Mo. App. 644, 651; *Roberts v. Kimmons*, 65 Miss. 332, 334.

So, it is no part of the broker's duty to make representations as to the title for the reason that he has nothing to do with it, in the absence of evidence showing any violation of trust or duty on his part. *Hart v. Hopson*, 52 Mo. App. 177, 193.

And it has been held that the broker has nothing to do with the title or ownership of the property, and that even his knowledge as to the title or the equitable estate of another therein is of no consequence, and if the principal wishes to make any stipulations respecting the same they should be made in the contract between himself and the broker. *Martin v. Ede*, 103 Cal. 157.

But see *infra*, III. b.

So, the fact that at the time the written contract was entered into between the principal and the agent for compensation for services rendered in procuring a purchaser, the principal had only a possessory title, and afterwards procured a full title, was held not to bar his right to recover. *Campbell v. Thomas*, 87 Cal. 428.

Again, it has been stated that the question of the delivery of the possession, the examination of the title, and the form of the conveyance with its covenants, are matters which require conference and time for completion, and are for the determination of the owner, and do not pertain to the duties, and are not within the authority, of a real-estate broker. *McCullough v. Hitchcock*, 71 Conn. 401.

So, if the contract of sale is made without any stipulation as to the examination of the title, the right of the purchaser to examine it is implied and if upon such examination it appears that there is a substantial defect in the title he may decline to proceed and yet the broker will be entitled to his commissions. *Watson v. Brooks*, 8 Sawy. 316, 319, 320.

Upon the above stated doctrine it was held that where the broker procured a purchaser within the time specified, and the principal refused to complete the transaction upon the assumption that such purchaser was not entitled to examine the state of the title before paying the purchase money and taking the conveyance, unless he could do so within the time limited for making the contract, such refusal on behalf of the principal was wrongful, and constituted a default on his part which entitled the broker to recover his commissions. *Ibid.*

Where a principal accepted the purchaser in-

troduced by the broker, and entered into a binding contract with him which was not carried out owing to a defect in the title, it was held that the principal could not avail himself of the fact that such purchaser insisted upon the insertion of a clause in the contract referring the question of title to the opinion of counsel, and made his position conclusive upon that question, especially where such condition was agreed to and adopted by the principal as satisfactory to him, and the purchaser was accepted with such modifications of the original terms, and especially as there was no suggestion that such counsel did not act in perfect good faith, or that he did not reach a true and just conclusion, or that the title was not in fact imperfect. *Goodridge v. Holladay*, 18 Ill. App. 363, 366.

So, it has been held that if the defects shown by the abstract of title are only apparent, and are merely some cloud on the title which could be easily removed, it is the principal's duty to have such cause removed, so that the sale may not fall through on that account, and his neglect in this respect will not bar the broker's right to commissions. *Kyle v. Rippey*, 20 Or. 447.

And in a case in which there was a defect in the principal's title, and the sale was not completed for two years after the time fixed by the contract, the broker was still held entitled to commissions as there had been no abandonment of the transaction. *Michaels v. Gahren*, 9 App. Div. 495.

Again if the principal represents that he owns and has a good title to real estate, and employs an agent to sell the same he cannot in the absence of an agreement to that effect deny to the agent compensation for his services in making a sale which is afterwards defeated because the title proved defective. *Roberts v. Kimmons*, 65 Miss. 332, 334; *Middleton v. Findla*, 25 Cal. 76, 81; *Knapp v. Wallace*, 41 N. Y. 477; *Doty v. Miller*, 43 Barb. 529; *Holly v. Gosling*, 3 E. D. Smith, 262; *Hamlin v. Schulte*, 34 Minn. 534; *Kock v. Emmerling*, 22 How. 69, 16 L. ed. 202; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 22 Am. Rep. 441.

Where the principal asserted his title to be good and that his attorneys had so advised him, and there was nothing to show that the broker undertook to pass upon the question of title, or that his right to compensation for services could be denied, it was held that the broker's right to commissions was not affected by any question of title arising between the principal and the purchaser in consequence of which the contract was not performed. *Conkling v. Krakauer*, 70 Tex. 735.

So, in a case in which the purchaser was ready and willing, and even anxious, to buy, but the principal was unable or unwilling to give a perfect title, and while the money was on deposit awaiting the action on the principal's part he sold the land to another, where the evidence proved that the principal had represented to the broker and to a person who desired to purchase that his title was perfect, but investigation and evidence showed it was not, and the evidence failed to show that the broker was employed to procure a purchaser to take the property regardless of title, it was held that the broker was entitled to his commissions upon the sale, which was never consummated. *Sullivan v. Hampton* (Tex. Civ. App.) 32 S. W. 235.

And where it was admitted that a purchaser was found willing to purchase at the price, and that a written contract was entered into with the principal, who guaranteed the title to be free and unencumbered, and it subsequently appeared that there was a mortgage upon the property, and the purchaser then refused to

purchase, it was held that such fact was not a defense to the broker's right to commissions, as he was not employed to effect a binding contract for the purchase of the property, and did not act as agent in executing the contract, as the contract was signed by the principal himself, whose failure to consummate a binding contract could not militate against the broker's rights, as the broker's duties were performed and his commission earned on finding a purchaser ready and willing to purchase, the duty of effecting a binding contract then devolving upon the principal, whose duty it was to incorporate therein such performance as would make it binding notwithstanding the existence of the mortgage. *Heintz v. Boehmer*, 4 Ohio N. P. 226.

Again, it has been held that the fact that there is a written agreement to sell signed by the principal, and his tender to the purchasers of a deed with general warranty, precludes any pretense that he intended to sell less than a perfect title, or that he expected the broker to find a purchaser who would be willing to take a title such as his might actually be. *Conkling v. Krakauer*, 70 Tex. 735.

So, the mere fact that the contract, procured by the broker with the purchaser, provides that the title to the principal's properties, and the legality of the same, shall be satisfactory to the purchaser's attorneys, is not a recognition that an adverse contingency, such as a defect in title, might arise sufficient to defeat the broker's right to commissions. *Berg v. San Antonio Street R. Co.* (Tex. Civ. App.) 43 S. W. 929.

It has also been held that if the principal enters into an agreement with the purchaser with a condition attached that the deposit made by the purchaser is to be returned if the title should not prove good, the mere fact that such deposit is returned to the purchaser without the knowledge or consent of the principal, owing to a defect in the title, will not affect the broker's right to commission,—especially where the principal, for the purpose of defeating the sale, leads the purchaser to believe the title is bad so as to deprive the broker of his commissions. *Phelps v. Prusch*, 83 Cal. 626.

And the mere fact that the contract between the broker and his principal contains a stipulation that the commissions are to be paid out of the purchase price will not prevent the broker from recovering the same when the sale is prevented by reason of the defective title of his principal. *Cneatham v. Yarbrough*, 90 Tenn. 77, 79, 80.

So, under a contract to pay commissions upon a sale of real estate, when the property is transferred to the purchaser by deed, the principal cannot escape liability for commissions where the completion of the sale is prevented by a flaw in his title, especially where the purchaser produced stands ready and willing to complete the purchase upon a perfect title. *Gauthier v. West*, 45 Minn. 192, 193.

And if the broker agrees to wait for payment of his commissions until the sale is completed, there is still an implied contract that the principal has the ability and can confer upon the purchaser a perfect title to the property. *Berg v. San Antonio Street R. Co.* (Tex. Civ. App.) 43 S. W. 929.

In *Cawker v. Apple*, 15 Colo. 141, the broker was held entitled to his commissions upon a sale of property where it turned out, that the title to the whole was not in his principal, and where the principal refused to execute a conveyance of the contract unless he received pay for the land owned by another.

So, it has been held that if the principal has no perfect title in the property, but has merely secured an option to purchase, and such fact is known to the broker at the time of his employment, it will not affect the broker's right to commissions in the absence of a provision in the contract to that effect between the principal and the broker, as it is the principal's fault if he does not guard himself against any defects that may arise in the title to the property which he seeks to purchase. *Martin v. Ede*, 103 Cal. 157.

In an action against a broker to recover moneys in his hands, in which he made a counterclaim for commissions, and alleged that the noncompletion of the sale was caused by the delay of the principal in procuring a deed to complete his title to the land, an instruction to the jury which directed them that the question as to what would be a reasonable time for procuring a deed, was to be determined by the opinion of men of "ordinary skill and prudence" was held to be erroneous, for the reason that the principal was required to exercise reasonable diligence in his efforts to obtain a deed, and was entitled to the time required in the exercise of such diligence, and the determination of such question of time and of facts as to the acts to be done, and the time required to do such acts, were subjects of consideration which must be shown by proper evidence upon which the jury should determine the question; although the opinion of a party familiar with such business based upon evidence showing what was necessary to be done might be competent, yet in such a case the jury could not be guided by the independent opinion of men "of skill and prudence" not based upon the facts established by the evidence. *Dent v. Powell*, 80 Iowa, 456.

And in the absence of specific instructions to the contrary the principal's employment of a broker is sufficient authority to the latter to make representations and negotiations upon the basis that the former's title to the property is good, and the mere fact that a real-estate broker, in effecting a sale, makes representations respecting the title to the purchaser, as a matter of opinion, and not on the strength of the personal knowledge of such broker, will not defeat his commissions on a resale of the property to the purchaser under the first sale, even though the purchaser on such second sale refuses to carry out his contract on the ground of a defect in title. *Christensen v. Wooley*, 41 Mo. App. 53.

In a case in which the principal objected to the claim on the ground that the agent or broker had no authority to make a stipulation that "full briefs of title and searches with opinion of counsel will be required," and to make a memorandum of an acceptance upon the same for the opinion of a specified counsel, the court held that this was within the implied authority of the broker, as the broker had an authority to stipulate that the title should be marketable in the opinion of counsel, and therefore the broker's right to commissions was not affected thereby. *Middleton v. Thompson*, 163 Pa. 112, 120.

So, even if it be a fact that the legal title to the property was not in the party employing the broker, but in his wife, it would not follow that the broker could not recover in an action against such party, where there is evidence that the party represented himself as owner, and as such put the property in the hands of the broker to sell or exchange, knowing at the time that the plaintiff was a broker, and that he expected a commission, especially where such party stated that it was all right; that he always paid a commission and expected to pay it, and 43 L. R. A.

the evidence did not conclusively show that he was acting on behalf of his wife, and that he so stated, or that he assumed to act in any other than an individual capacity. *Jarvis v. Schaefer*, 105 N. Y. 289, 292, 293. To the same effect, *Clapp v. Hughes*, 1 Phila. 382.

In *Stange v. Gosse*, 110 Mich. 153, the principal and his wife had executed an option for the sale of real estate for a certain sum within a given time, by the terms of which a certain amount was paid down and the balance at a future date. Under this contract the party to whom it was executed was to receive a certain percentage from the amount for his services. The option was assigned to the plaintiff, and a contract was entered into between the principal and his wife and the plaintiff, by which the principal was to sell at a certain price, and an abstract was to be furnished showing a good and perfect title. The title proved defective. In an action to recover the amount paid and the commissions, it was held that the agent was entitled to recover as the failure to consummate the sale by proving a good title was the fault of the principal himself and not of the broker.

Where a written contract was entered into between the parties, and was drawn up by the broker at the instance of his principal, but the same was never consummated owing to the purchaser's rejection of the title and refusal to complete, and the principal alleged that the failure to complete was due to negligence and the careless manner in which the contract was drawn up by the broker, it was held that in the absence of evidence warranting the imputation to the broker of fraud or deceit, or of culpable acts of negligence in the drawing up of such contract, the principal could not escape payment of commissions. *Brown v. Helmuth*, 50 N. Y. S. R. 524.

The broker was held entitled to recover his commissions under a contract by which he was employed to find a purchaser for his principal's property, and found one who accepted the terms, provided "the titles and franchises are to be subject to proper examination and approval," where the evidence showed that the sale was never consummated owing to a defect in the title to the property which was leased to his principals. *Sweeney v. Tenmile Oil & Gas Co.* 130 Pa. 193.

In *Hart v. Hopson*, 52 Mo. App. 177, 193, a broker was employed to procure a contract from a third party of his interest in certain real estate at a fixed compensation to be paid when the contract was obtained, but the sale was never consummated for the reason that the title was valueless. The broker was held entitled to his commission, as he acted in ignorance of the fact, and performed his contract so far as he was bound to.

It has also been held that the mere fact that the title to partnership real estate is vested in one of the partners will not affect the agent's right to commissions where the proceeds of the sale are treated by them as partnership assets distributable according to their interests in such real estate. *Copp v. Longstreet*, 5 Colo. App. 282.

In an action by a real-estate broker to recover commissions, when the defense turns upon the question whether the title is good or bad, it has been held that such a question is one of law, and that an attorney who is a witness is not to state his opinion on such question of law, but must state the fact as to the title if he knows what the facts are, and it is for the court to state to the jury whether the title is good, if the facts are found as claimed. *Leahy v. Hair*, 33 Ill. App. 461, 464.

In a case where an action was brought to re-

cover commissions, and where the facts showed that the defendant was an agent to sell lands for a principal, and that he agreed with the plaintiff to pay him a certain commission if he would find a purchaser ready, able, and willing to purchase, and the plaintiff found such a purchaser and then the defendant discovered that the land was not the property of his principal, and that there was therefore a mutual mistake which he claimed avoided the contract to pay commissions, the plaintiff was nevertheless held entitled to his commissions as he was in no way responsible for the mistake. *Barthell v. Peter*, 88 Wis. 316.

But if the broker's right to receive commissions from a purchaser is made dependent upon the title to the property being satisfactory he cannot recover when the title proves defective and the purchaser withdraws from the transaction in consequence. *Bab v. Hirschbels*, 35 N. Y. S. R. 580, Reversing 33 N. Y. S. R. 423.

Where the record did not show that the principal's title was not good, and the examination of the title showed that there was a good possessory title, although a quitclaim deed was necessary to make it a good record title, it was held that a good title did not necessarily mean a perfect record title, and that under a report of persons who examined the title, in order to entitle the broker to recover he must show that the title was not good without a quitclaim deed, and that such fact prevented the completion of the sale, before he can recover commission from his principal upon the ground that the sale fell through owing to defective title. *Block v. Ryan*, 4 App. D. C. 288.

In the above case the broker was employed to find a purchaser. He found one, and the contract was signed by both parties and was confirmed by his principal, and a deposit was paid. The contract provided that the title was to be good or the money was to be refunded, and was to be completed by a certain date, or in default the deposit was to be forfeited. The title was found to be a "good possessory title," although in order to make it a good record title a quitclaim deed was necessary, and this the principal offered to make provided the purchaser made an extra cash payment which could be deducted from the balance, and this the purchaser refused to do and the matter fell through. It was held that the broker was not entitled to his commissions.

And if the broker merely procures a party to make an offer which his principal accepts, without any binding agreement between the parties, and such party refuses to consummate the sale on the ground of a real or supposed defect in the title, the broker cannot claim his commissions as the proposed purchaser has not committed himself to a purchase. *Blankenship v. Ryerson*, 50 Ala. 426.

So, it has been held that the broker will not be entitled to recover his commission where his principal employs him to sell the estate for an agreed price, and states the source of his title, how he holds the same, and that he can give a warranty deed of the same, and the broker finds one desirous of purchasing, but does not require him to enter into a legal contract, and sends him to the principal, who makes an oral agreement with him as to the terms of the purchase, and the purchaser takes time to examine the title, with which he is dissatisfied and declines to purchase, as the contract being oral is not binding, and the parties are not brought together so as to entitle the broker to his compensation, the principal not being in fault as he made a disclosure of his title and did all he could to complete the sale. *Tombs v. Alexander*, 101 Mass. 255, 256, 3 Am. Rep. 349. 43 L. R. A.

In a case in which bonded land was given to a broker for sale under an agreement whereby the bondholder was first to make a given sum out of the sale, giving the broker all above that sum for compensation, the broker's right to commission was denied where the sale for an amount in excess of the land was never consummated, by reason of the purchaser's objecting to the title. *Seattle Land Co. v. Day*, 2 Wash. 451.

So, where an agreement was entered into between the purchaser procured by the broker and the principal, who thought he had a title, under which the purchaser was to take the property at a certain price down, and give his acceptance for the balance of the purchase money, and the principal was to execute a quitclaim deed, but the title was not examined, and the deeds were to be deposited as an escrow to be delivered up on the title proving good, otherwise there was to be no sale, and the sale was not complete as the principal's title proved to be bad. It was held that the broker was not entitled to recover his commissions as there was no failure on the part of the principal to abide by the offer or agreement to sell, and the negotiations failed because the purchasers availed themselves of the privilege which they had stipulated for to recede from the propositions to purchase upon a specified contingency which happened without the fault of the principal. *Condict v. Cowdrey*, 139 N. Y. 273, 280.

The court distinguished the above case from the cases of *Duclos v. Cunningham*, 102 N. Y. 678; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 22 Am. Rep. 441; *Knapp v. Wallace*, 41 N. Y. 477; and *Barnard v. Monnot*, 1 Abb. App. Dec. 110,—as it was not a case in which the owner refused to consummate the sale after the broker had found a purchaser upon the terms originally proposed, or where the principal had been unable to give the stipulated title on account of some defect in it either known at the time the contract was executed or subsequently discovered. *Condict v. Cowdrey*, 139 N. Y. 273, 280.

And the same conclusion was also reached in the case of *Budd v. Zoller*, 52 Mo. 238, wherein the broker was employed, not only to enter into negotiations, but to examine the title to the property and see if it was good, and whether the deal could be carried out upon the title, as it was his duty in such a case first to examine into the title. This case is distinguishable from that of *Christensen v. Wooley*, 41 Mo. App. 53, as in that case there was no claim that the principal agreed to have the title examined before offering the property for sale, the broker's right to commissions being allowed in that case.

If the principal refuses to convey to the purchaser or to carry out the contract owing to a defect in his title, or owing to circumstances which lead him reasonably and honestly to doubt his title to a certain portion of the property, his action in so doing cannot be said to be capricious or arbitrary, and the broker will therefore not be entitled to recover his commissions under a contract relieving the principal from payment of commissions if "for any reason" the sale should not be fully consummated. *Flower v. Davidson*, 44 Minn. 46.

b. The question of notice.

The general rule as stated in the preceding section, and as indicated by the authorities cited therein, will not, however, hold in cases where the broker has notice of the defective title of his principal; thus—

In *Hynes v. Brettelle*, 70 Mo. App. 344, where the question of the agent's right to commissions turned upon the question whether or not he

had notice of the imperfect condition of the title to the property at the time he made the sale for his principal, the court held that if at the time he made the contract of sale he had no knowledge or information that a certain claim existed against the title, he was entitled to his commissions, as it was not his fault that the sale was not completed, but the fault of his principal in failing to disclose to him the true condition of his title, and the mere fact that he told the purchaser that she was not compelled to accept an imperfect title after he had discovered the defect, would not deprive him of his right to commissions.

And in a case in which a broker was employed to sell property for which he knew his principals had no title, except under a contract to purchase, and the broker found a purchaser who refused to carry out the contract upon the ground that the principal had only a title under the contract to purchase, but no other defect of title was shown, the broker's claim for commissions was disallowed, the sale proving abortive through no fault of the principal. *Hoyt v. Shipherd*, 70 Ill. 309, 311. See, however, *Martin v. Ede*, 103 Cal. 157; and *Cawker v. Apple*, 15 Colo. 141, Ill. a. *supra*.

So, if the broker has knowledge at the time he undertakes to procure a purchaser that some of the vendors are under age and can only make a title to the property and vest the same in a purchaser under an order obtained from the court, even though the broker may be erroneously informed that such an order has been provided for, yet he will not be entitled to commissions where the purchaser objects to take the title under such an order, and insists upon a foreclosure and to taking the title under a sale. *Folsom v. Lewis*, 14 Misc. 605.

In the above case the court pointed out that the sale did not fall through owing to the inability or unwillingness of the owner to give a title, and the broker knew at the outset the source from which the title was offered, and it was for him before offering a purchaser to ascertain that the latter would take such title.

Yet, where the purchaser found by the broker had knowledge at the time he entered into the contract that proceedings affecting the title were pending in the probate court, it was held that the fact was not sufficient to defeat the broker's right to commissions, especially where the purchaser was ready and willing to complete the contract, and was accepted by and contracted with the principal. *Lemon v. Lloyd*, 46 Mo. App. 452.

And where there is no evidence whatever as to notice or knowledge on the part of the broker of any defect in the title, when he undertakes to sell the property, it is error for the court to charge the jury that, if the broker has notice or knowledge of any infirmity in the title of the principal to the property to be sold when he undertakes the sale or when he finds a purchaser he cannot recover. *Davis v. Morgan*, 96 Ga. 518, 520.

IV. Misrepresentation and fraud of principal.

The principal cannot relieve himself from liability to the broker for commissions by any fraud or misrepresentation toward him.

It has been held that if the principal voluntarily sells to the purchaser found by the broker for a less sum than that given by him to the broker as the selling price he commits a fraud upon the broker. *Rees v. Spruance*, 45 Ill. 308, 310.

And in any dealing with the purchaser procured by the broker the principal must show that he acted in good faith, and if bad faith in-
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tervenes the broker's claim for commissions will be sustained. *McKnight v. Thayer*, 48 N. Y. S. R. 620.

So, any false representation or affirmation of any matter which is material as an existing fact distinguished from mere opinion, or any intention or promise made as an inducement to lead the broker to enter into an agreement relinquishing his full rights to commission and to accept a less sum, is such a fraud as will authorize a rescission of such contract. *Dobinson v. McDonald*, 92 Cal. 33, 37.

And under a contract whereby the broker had a specified time in which to sell the property at a certain commission if he procured a customer, or if the principal sold within twelve months, a false statement made by a principal to the broker to the effect that he had not sold the property, whereby he induced him to take a certain sum and surrender the agreement, was held not to relieve the principal from the payment of the commissions due to the broker. *Ibid*.

In *Geery v. Pollock*, 16 App. Div. 321, 323, where the brokers proved their employment by the principal to bring about a sale to him of certain premises; that their efforts in that direction procured an offer and a sale; and that the sale was made by the principal directly for the purpose of evading the payment of the commissions to the brokers and securing them for himself,—it was held that under such circumstances the brokers were entitled to recover.

Where the principal informed the broker he had sold the property, asked what his charge was, and was told that as he, the broker, had not sold the property he had no charge unless he had advertised it which he had not done, but that the principal might give him what he chose, and the principal made a payment which the broker said was satisfactory, but the plaintiff's evidence showed that he furnished the information which induced the purchaser to purchase the property, it was held proper to submit the question to the jury whether the failure of the principal to inform the plaintiff of the name of the party to whom he sold the house, considering all the circumstances under which it occurred, was such a concealment of the material fact by the principal as would entitle the plaintiff to avoid the settlement made, and into which he had been entrapped by the defendant. *Newhall v. Pierce*, 115 Mass. 457.

So, the principal and the purchaser cannot by any arrangement between them disappoint the broker's right to commission, when the broker has brought about an introduction of the purchaser, and the negotiations result in a sale to him. *Vreeland v. Vetterlein*, 33 N. J. L. 247, 249.

In *Randrup v. Schroeder*, 22 Misc. 365, a new trial was ordered. Upon such trial new evidence was introduced which showed that the husband of the defendant told the plaintiff broker after the introduction of the purchaser that if any one of the houses was sold to that individual commissions would be paid to him upon such sale. In this case the original intention was that the houses which were placed in the plaintiff's hands should be sold in a certain order, but this order was waived. The court held that as the plaintiff had exerted his influence upon such purchaser with respect to all the houses, and as there was to be implied from the promise a ratification or adoption of the act of such broker in endeavoring to induce a sale of the properties in an order other than that originally intended, that the broker was the procuring cause of the sale of one of such houses, and was entitled to his commissions, although the title of the same was taken in the

name of a nominal purchaser, for the purpose of defrauding him of his commissions.

Upon the first trial of the above case in support of a claim for commissions, the broker called the purchaser of record as a witness who testified that the purchaser originally found by the broker with whom a sale was not consummated had told him that the title on a subsequent sale was taken in his name in order that both parties to the transaction might defraud the broker of his commissions. It was held that while such evidence might have supported a finding of an admission by the party who made it that the broker was entitled to a commission it did not serve as evidence of the defendant's admission of the fact. *Randrup v. Schroeder*, 21 Misc. 52.

If the broker's power to effect a sale is uncertain, and no one is ready to purchase, whatever may be thought of the property or fairness of the principal's actions in taking the matter out of the broker's hands after the latter has informed him that he has parties in view who he thinks will accept the offer and with whom he hopes to conclude a bargain, the principal is not chargeable with legal fraud in revoking the agency and concluding a sale himself, especially when the facts show that the broker has had the property in his hands for a long time, and that the principal's action is not arbitrary. *Slater v. Holt*, 10 N. Y. S. R. 257, 261.

In *Hannan v. Moran*, 71 Mich. 261, the purchase fell through owing to a misrepresentation on the part of the principal that a certain sewer privilege existed which in point of fact did not exist, and a bargain with a subsequent purchaser also fell through by reason of the principal backing out of his offer owing to his wife having an interest in the property which he had not mentioned or disclosed. The court upheld the broker's claim for commission.

The mere fact, however, that the brokers in their claim for commissions allege fraud on the part of the principal, but do not establish the same, will not defeat their claim for commissions which are earned under their contract as their claim for commission is not dependent thereon. *Anderson v. Wedeking*, 102 Iowa, 446.

But if negotiations for an exchange are declared off with the purchaser found by the broker, and the principal notifies the broker that he withdraws his offer, and the other party then places the property in the hands of another broker, and a deal is subsequently made between

the same parties under other influences upon the terms of the first one, the mere fact that the parties finally treat upon the same terms is not of itself evidence of such bad faith on the principal's part as will render him liable for the broker's commissions, especially where the evidence shows that the parties did not intend or expect to renew them. *Uphoff v. Ulrich*, 2 Ill. App. 399, 401.

In *Cohen v. Hershfield*, 16 Daly, 96, the broker was employed to find a purchaser and found one in the person of the defendant, who he claimed conspired with one to cheat and defraud him out of his commissions by concealing the fact that she had become such purchaser through the efforts and instrumentality of the broker, and falsely and fraudulently with intent to deceive induced the principal to pay such commissions to the other party and brought action against the defendant to recover damages. The court, however, refused the broker's claim and dismissed such action.

In a case where the broker found a party ready, willing, and able to purchase at the price and upon the terms mentioned by the principal, provided the monthly rentals were equal to those represented to him by the broker, and the broker obtained his information respecting such rentals from his principal, who stated that they amounted to a given sum, whereas in point of fact they were much less, and the purchaser thereupon refused to complete, it was held that the broker could not recover his commissions. *Curtiss v. Mott*, 90 Hun, 439. In this case, however, Justice O'Brien dissented. The court also questioned whether the broker might not have an action to recover damages occasioned by the misrepresentations of his principal which prevented the performance of his contract, but as the question was not directly raised did not pass an opinion thereon.

In a case in which the contract or agreement between the principal and the purchaser had been abrogated and a new one entered into, which entirely disregarded the broker's claim for commissions, it was held that a charge that the whole question was one of fraud, and that unless the principal made the consequent contract of sale with the dishonest and corrupt purpose of preventing the broker from getting his commissions due under the original contract, he could not recover, was erroneous. *Bishop v. Averill*, 17 Wash. 209.

E. W.

TEXAS COURT OF CRIMINAL APPEALS.

Charles GUSTAFSON, Appt.,

v.

STATE of Texas.

(.....Tex.....)

1. The exclusion of residents of the state who are not taxpayers, but who are willing to pay the license tax, from fishing in the public waters of the state as taxpayers are allowed to do, is in violation of Const. art. 1, § 3, which guarantees equal rights, and prohibits exclusive, separate public emoluments or privileges, except in consideration of public services.

NOTE.—As to equal rights in respect to taking oysters or fish from public waters, see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. on page 582; also *Bittenhaus v. Johnston* (Wis.) 32 L. R. A. 380; and *State v. Higgins* (S. C.) 38 L. R. A. 561. 43 L. R. A.

2. A statute authorizing the granting of a license for taking oysters in public waters is altogether invalid when it limits the privilege to taxpayers, and cannot be enforced to the extent of requiring a license from those within its benefits and privileges.

(December 21, 1898.)*

APPEAL by defendant from a judgment of the District Court for Galveston County convicting him of taking oysters from the public beds of the state without having first procured a license. *Reversed*.

The facts are stated in the opinion.

*A decision was reached and an opinion handed down in this case on May 4, 1898, affirming the judgment below. A rehearing was subsequently granted and the present opinion handed down, which supersedes the other and makes its publication of no value. [Ed.]

Messrs. Byron Johnson and Marsene Johnson for appellant.

Messrs. Spencer & Kincaid, for the State:

None of the appellants had offered to pay the license fee or taken any steps to procure a license, and hence the question as to whether the restriction of such license to "a resident taxpayer of the state of Texas" is constitutional or not does not arise in the case.

Curry v. State, 28 Tex. App. 477.

The public reefs and oyster beds of the state are the property of the state, and the state owns them just as it owns its public lands, and the legislature of the state may dispose of the right to take oysters from the reefs and beds of the state to whomsoever it pleases.

State v. Harrub, 95 Ala. 176, 15 L. R. A. 761, 4 Inters. Com. Rep. 99.

The license fee required in this case is not an occupation tax.

Tiedeman, Pol. Power, p. 279; 13 Am. & Eng. Enc. Law, pp. 532, 533.

Messrs. W. W. Walling and Mann **Trice** also for the State.

Henderson, J., delivered the opinion of the court:

Appellant was convicted of a violation of the fish and oyster law, and his punishment assessed at a fine of \$15. The case was affirmed at the Austin term, 1898, and now comes before us on motion for rehearing. The decision was predicated on the proposition that the statute making this a penal offense had not been repealed. Appellant, however, insists that we overlooked the constitutional question raised by him, and now urges the same. He claims that the statute is violative of that provision of § 3 of article 1 of our Bill of Rights which reads as follows: "All free men when they form a social compact have equal rights, and no man or set of men is entitled to exclusive separate public emoluments or privileges, but in consideration of public services." The clause of the statute which he contends is in violation of this provision of the Constitution is that portion which limits the right to pursue the business of catching oysters in the public waters of the state to all citizens of the United States, resident in the state of Texas, who are taxpayers; thus inhibiting all citizens of the United States who may be residents of the state of Texas, but who are not taxpayers, from taking oysters in waters controlled or owned by the state. We are referred to articles 520k and 529l, Penal Code 1895. Article 520k is as follows: "It shall be unlawful for any person to catch or take oysters from the public beds and reefs for sale who is not a bona fide citizen of the United States and a resident and taxpayer of the state. Any person offending against this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than \$10 nor more than \$250." Article 529l reads: "It shall be unlawful for any person to gather oysters with tongs or otherwise from the public beds and reefs of this state for sale without a license from 43 L. R. A.

the fish and oyster commissioner or his deputy for each and every pair of tongs that shall be used on his boat, and for such license he must pay to the fish and oyster commissioner or his deputy the sum of \$5 for each pair of tongs; and any person shall be entitled to hold such license who is a citizen of the United States and a resident and taxpayer of the state of Texas. Such license shall be good from day of issuance until April 30th next; such license shall be signed by the fish and oyster commissioner or his deputy, and stamped with the seal of his office, and shall state the name of applicant and date of issuance; provided, that any person holding such license in his own name may take or catch oysters from any boat. Anyone offending against this article shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than \$10, nor more than \$250, and each day shall constitute a separate offense." So it will be seen that the statutes on the subject are as claimed by him; that is, that persons who are not taxpayers, although they may be citizens of the United States, and residents in the state of Texas, cannot procure a license to take oysters within the waters of the state, although they may be able to purchase a license, and make tender of the amount to the proper authority. The question then is, Does the fact that such persons are prohibited from procuring a license, while all other persons, citizens of the United States, and residents within the state of Texas, and taxpayers, can procure a license, to take oysters, render the statute in question violative of the Constitution of the state, above quoted. We can find no case in which the question as here presented has been adjudicated. We do find a number of cases in which the question of proprietary rights and common rights in fisheries has been discussed. In all the cases, so far as we are advised, it is held that navigable rivers, and contiguous portions of the sea embraced within the territory belonging to the state, are the property of the state, that they belong to all the citizens thereof, and that every citizen has a right in common with every other citizen to take fish in such waters. See *Collins v. Benbury*, 25 N. C. (3 Ired. L.) 277, 38 Am. Dec. 722; *Carson v. Blazer*, 2 Binney, 475, 4 Am. Dec. 463; *Chalker v. Dickinson*, 1 Conn. 382, 6 Am. Dec. 250; *Lay v. King*, 5 Day, 72; *Peck v. Lockwood*, 5 Day, 22. The last-cited case was a case involving the right to take shell-fish on land claimed by plaintiff. The facts were that plaintiff owned a tract of land fronting on the river, where the tide ebbed and flowed. At low tide the *locus in quo* was dry land, but, when the tide was in, it was covered by the flow of the sea. Plaintiff claimed proprietary rights in the *locus in quo*, and defendant justified on the ground that at high water it was a part of the river or sea, and was open, for the purposes of fishing, to all the citizens of the state. The court discussed a number of common-law authorities on the subject, and from them deduced the following: "That the right to

fish on the soil of another, when overflowed with the tide from the sea or arm of the sea, is a common right; and everyone may fish in the sea, of common right, though it flows on the soil of another." As stated, however, there is no controversy upon this point: that is, that the *locus in quo* in this case was the property of the state. Nor is it controverted that the state may properly regulate the use of all its property, but it is insisted that in granting privileges to use its public domain, whether of land or water, it must do so under the operation of the fundamental principle upon which our government is established,—that is, equality. Our Constitution provides (§ 3, art. 1): "All free men when they form a social compact have equal rights, and no man or set of men is entitled to exclusive separate public emoluments or privileges, but in consideration of public services." Section 26 provides: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." Mr. Cooley says on this subject (Cooley, Const. Lim. p. 485): "Equality of rights, privileges, and capacities unquestionably should be the aim of the law; and if special privileges are granted, or special burdens or restrictions imposed in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government. The state, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious, and discrimination against persons or classes is still more so." But it is contended here that the right to take the oysters in the public waters of the state is a privilege which the state can bestow as it pleases; that it can lease or let its public domain on whatever terms it sees fit. We cannot assent to this proposition. It might be so in a kingly government, but not in a free government, in which all are equal before the law. And right here, it occurs to us, is where the provisions of our Constitution above quoted come into operation. The state has no right to discriminate against any citizen or class of citizens as to the enjoyment of its public domain. The state has no more right to authorize one class of its citizens, to the exclusion of another class, to use or rent this character of property, than it would have to authorize one class of its citizens, to the exclusion of another class of its citizens, to rent or use its public lands. We do not believe it would be seriously contended that the state could authorize only taxpayers to rent its public domain of lands, to the exclusion of another class of its citizens, who were not taxpayers. This would not only be a discrimination, but discrimination in favor of the rich as against the poor; and this, as we understand it, was exactly what our Constitution intended to guard against. If the state could authorize its citizens who were

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taxpayers to fish, and inhibit its citizens who were not taxpayers from fishing, in its public waters, it could equally authorize its citizens who were not taxpayers to fish in such waters to the exclusion of those who were taxpayers. In this connection, we would observe that we think the law on this subject, as passed by the legislature, intended to apply to persons who paid taxes on property. If this be the true construction, then a great number of our citizens would be deprived of the power to procure a license to take oysters in the public waters of the state, no matter how willing they might be to pay the license tax and comply with the law in other respects. But it is said that our Constitution authorizes a poll tax. But if one who pays a poll tax be considered a taxpayer, under the provisions of this law, we find that the legislature has eliminated certain citizens from the payment of the poll tax: that is, it has exempted persons over a certain age from the payment of a poll tax. And the defendant in one of these cases offered to prove that he was exempt, under the provisions of the statute, from the payment of the poll tax, and that, not being even a poll-tax payer, under the law he was debarred the right of procuring a license. This illustrates the fact that if it be conceded that a poll-tax payer is a taxpayer, in contemplation of this law, still it operates against a class of our citizens. It may be said, however, that the law may be unconstitutional in part, but operative as to those who are not excluded from its benefits and privileges. To this we reply that we do not believe that the act is so framed as to be separated, and a part held to be constitutional. The fact that it is class legislation qualifies the act, or that provision of it authorizing the granting of a license, and so renders it unconstitutional and void. *Pullman Palace Car Co. v. State*, 64 Tex. 274; *Ex parte Jones*, 38 Tex. Crim. Rep. —, 43 S. W. 513.

We hold that the waters of the state, as well as all its domain of public lands, are equally open to all of its citizens upon the same terms and conditions, and that the attempt of the legislature to prohibit residents of the state who are not taxpayers, but who are willing to pay the license tax, from fishing in the public waters of the state, is violative of those provisions of the Constitution before mentioned. We therefore hold that the act in question levying the license tax is null and void.

The motion for rehearing is granted, and the judgment is reversed, and the prosecution ordered dismissed.

Hurt, P. J.:

Owing to bad health, I have not given the subject discussed in this opinion that investigation necessary for me to form an opinion. I therefore express no opinion upon the question upon which the judgment was reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

Christine HEKKING, *Plff. in Err.*,

v.

Henry PFAFF, Jr.

(91 Fed. Rep. 60.)

1. A Federal court in which a suit is brought upon the decree of a court in a state other than that in which it is sitting may inquire into the jurisdiction of that court to render the decree for the purpose of determining its validity.
2. A personal judgment for alimony cannot be rendered in a divorce suit against a defendant over whom the court has acquired no jurisdiction.
3. The acceptance by a defendant in a divorce suit over whom no jurisdiction was obtained of the decree, and his remarrying, do not estop him from disputing the validity of a subsequent *ex parte* proceeding in the divorce suit by which the judgment is opened and a decree for alimony entered against him.

(December 29, 1898.)

ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment in favor of defendant in an action brought to enforce payment of alimony. *Affirmed.*

The facts are stated in the opinion.

Before *Colt*, Circuit Judge, and *Webb* and *Aldrich*, District Judges.

Messrs. Charles H. Winsor and David F. Kimball for plaintiff in error.

Messrs. Jabez Fox, Edwin B. Hale, and Gerard Bennett for defendant in error.

Aldrich, District Judge, delivered the opinion of the court:

The parties to this case were married in December, 1889, at the city of Stuttgart, in the Kingdom of Wurtemberg, Germany. Henry Pfaff, Jr., the husband, who is the defendant here, was then, and is now, a citizen of Massachusetts. The wife's maiden name was Christine Hekking, and it is not claimed that she was either a citizen or resident of South Dakota at the time of her marriage, but according to her present claim she subsequently became a resident of that state, and was a resident in good faith for more than ninety days prior to bringing her proceeding in such state for a divorce. The husband was never a citizen of South Dakota, and it does not appear that he ever resided or had property there. The wife's divorce proceedings were begun in South Dakota in December, 1892. After alleging residence, and her causes, she prayed for a divorce and for alimony. The proceeding was advanced upon the theory that the husband was not in South Dakota, and that his residence was unknown. A summons was issued, and an officer made return that the defendant could not be found.

NOTE.—As to validity of divorce obtained on publication or service out of the state, where the defendant did not appear, see *note* to *Butler v. Washington* (La.) 19 L. R. A. 814; also *Atherton v. Atherton* (N. Y.) 40 L. R. A. 291. 43 L. R. A.

Thereupon the judge, reciting the fact that the defendant husband could not be found within the state after due diligence, that he was not a resident of said state, and that his residence was unknown, ordered that the summons be served by publication in the *Sioux Valley News*, that a copy of the summons be deposited in the postoffice directed to the defendant at Hotel zur Krone, Cassel, Germany, where it was ascertained he last was, and another copy directed to him at the city of Boston, in care of his father, at 330 Walnut avenue. It does not appear from the record that the defendant's property was attached in the state of South Dakota, and it is not claimed that the defendant had actual notice of the proceeding against him, or that he appeared therein by counsel or otherwise. It does, however, appear that the cause came on for trial in April, 1893, the husband not appearing, and, upon evidence that the order of notice had been complied with, the state court assumed jurisdiction of the cause, adjudged the bonds of matrimony between the parties dissolved, and that the plaintiff have leave to resume her maiden name. The prayer for alimony was not passed upon at this time, and there was no express reservation of that question for future consideration. In March, 1896,—nearly three years later,—upon motion of the plaintiff's attorney, leave was granted to amend the complaint, and add material allegations as to the plaintiff's lack of means of support and the defendant husband's income and ability to afford relief. There was no notice of this motion, and none in the cause other than that originally given. The defendant did not appear, and there is no evidence that he had knowledge of this proceeding. On the contrary, the fact appears from the pleadings here that he had no knowledge of the motion to amend, or of the alimony proceedings and judgment, until this suit was commenced, in July, 1896. It appears that, as the cause progressed *ex parte* in the South Dakota court, the decree of April, 1893, was "opened so as to allow plaintiff, as a part of said decree, an allowance for alimony and support from defendant to plaintiff," and in June, 1896, it was ordered and adjudged, after hearing allegations and proofs, that the plaintiff be allowed the sum of \$25,000, to be immediately paid by the defendant to her or her attorneys, and that this order or judgment be a part of the original judgment, and take effect from the date thereof. So much for a statement of a history of the South Dakota proceedings as disclosed by the record.

The case before us is based upon the money-demand feature of the South Dakota judgment, and the question is whether such judgment is binding upon the defendant, and should be upheld and enforced *extra territorium*. Before coming to the precise question upon which the plaintiff makes her chief contention, we may refer generally to the well-settled doctrine that the Federal constitutional provision that full faith and

credit shall be given in each state to the records, acts, and judicial proceedings of the courts and magistrates of every other state does not preclude inquiry into the jurisdiction of the court in which the judgment is rendered (*Simmons v. Saul*, 138 U. S. 439, 448, 34 L. ed. 1054, 1059); and, though the Federal courts are not foreign tribunals in the sense of their relations to the courts of the various states (*Pennoyer v. Neff*, 95 U. S. 714, 732, 24 L. ed. 565, 572), they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and bound to no greater measure of faith and credit than is required between the courts of the different states.

The question of jurisdiction being thus open to us, and it appearing from the records of the South Dakota court that no personal service was made upon the defendant, we must treat the judgment, so far as it relates to a recovery of the \$25,000, or, in other words, the money part of the judgment, as not binding upon the defendant, unless the feature urged by the plaintiff, which we shall consider further on, excepts this judgment from the general rule in respect to judgments *in personam*. Indeed, counsel for the plaintiff makes no serious contention to the contrary of this doctrine as a general rule of law, for he says in the concluding paragraph of his brief: "Had he [the defendant] not married in this case, I would not be here presenting it, for I believe it [the judgment] would have been worthless outside the state limits of South Dakota." In view of this statement of counsel, and the well-settled doctrine to which we have referred we do not feel called upon to discuss further the general question as to the validity of such judgments or decrees; and it may be further observed that no point is presented which calls for consideration of the question of the power of states to regulate and determine the civil status of its own citizens or residents towards the citizens or residents of other states; and there is no question here as to the power of a state to regulate the causes and the procedure upon which the marital relations between a resident of such state and a resident of another state shall be dissolved. Such questions, if ever material to the validity of such judgments and decrees, are rendered immaterial here in respect to the pecuniary feature of this judgment by the absence of personal service,—an original, fundamental, and, as a general rule, an indispensable, essential of judgments *in personam*.

We now come to the question on which the plaintiff principally relies. The defendant subsequently knowing of the original *ex parte* divorce proceeding in South Dakota, and the original decree of dissolution, and in reliance thereon, married again. Such marriage was prior to the proceeding which resulted in the decree for alimony, and the point taken is that, the defendant having recognized the original decree for divorce, and acted upon it, he ratified and made good all defects in the procedure, if there were any, and that he is not only estopped by his conduct from questioning the validity of the

original judgment, but the subsequent proceeding and judgment for alimony, which it is claimed were incident thereto. The case before us was a jury-waived case, and was tried in the circuit court by a judge upon issues to the court. The question of estoppel by conduct is one of mixed law and fact, and the general finding was that the judgment on which the action is based is void, and upon such general finding judgment was ordered for the defendant. We infer from the record and the opinion of the circuit court, which is annexed thereto, that the general finding involved, in the first instance, a finding and decision of the question of estoppel against the plaintiff. The record is incomplete, in that no bill of exceptions is disclosed, and the assignment of errors is general, and directed, first, against the decision of the circuit court that the subsequent marriage did not operate as a waiver, ratification, or an estoppel, and, second, against the general finding that the South Dakota judgment is void. General exceptions do not, ordinarily, lie, in jury-waived cases, to general findings upon mixed questions of law and fact, but are limited to specific rulings in respect to controverted points of law involved therein. We are inclined, however, in this case, to take the view most favorable to the plaintiff, and treat the first error assigned as directed against the holding, involved in the opinion of the circuit court, that the second marriage did not operate as an estoppel or ratification in respect to subsequent proceedings in the South Dakota court; and, as the pleadings indicate that both parties intended to raise this question for decision, we are disposed to consider it. This must not be accepted, however, as an indication that cases will be considered in the future without specific exceptions to rulings, and a distinct assignment of errors, but rather as an admonition that they will not. We do not think it necessary to consider and determine the correctness or incorrectness of the probable rule, sometimes questioned, that in divorce proceedings the questions of alimony and support are open until finally considered and passed upon, and that such questions are then treated as incidents of the original judgment or decree, for the reason, as it seems to us, that, if this were assumed to be strictly true, the case logically and necessarily turns upon another view. The doctrine of estoppel is an equitable doctrine; that is to say, equitable in the sense that the law holds it would be unjust, unfair, and inequitable to allow a party to take a position, and hold it, in respect to matters within his knowledge, while another party acts in reliance thereon, and then change to another and different position, to the prejudice of the one who has so acted and relied. So a rule of law has resulted which enjoins a party, under certain circumstances, from denying that which he has once asserted and acted upon as true. It may be that the defendant, having acted upon the divorce decree in South Dakota, would be estopped in a proceeding in respect to the decree of divorce from setting up its invalidity. It may be that he would be estopped from questioning the validity of the proceeding so far as

what had been done at the time of his second marriage in reliance thereon. But these are questions which we need not determine, for the validity of the decree dissolving the marriage is not in question. Admittedly, the motion to open the original decree in South Dakota and the actual proceeding for alimony, which resulted in an allowance and a judgment for \$25,000, were subsequent to the defendant's second marriage, and according to the record here he had no knowledge of such proceedings until this suit was brought on the South Dakota judgment. So, in order to hold according to the contention of the plaintiff, we must, by force of a supposed abstract theory or rule of law which makes things subsequent incident to, and a part of, the prior original transaction, adjudge the defendant estopped, not only from denying conditions of which he had no knowledge, but conditions not in existence. As we understand it, estoppel by conduct applies to conditions known to the party who is to be estopped, and perhaps operates upon incidents and conditions naturally and necessarily flowing therefrom; but a rule that such estoppel should operate upon conditions not known, and especially upon things not in esse, or upon conditions resulting, as in this case, from subsequent affirmative procedure, investigation, and proofs, would give a scope

and effect to estoppel by conduct beyond that disclosed in any decision brought to our attention, and would be against equity, contrary to principle, and dangerous to all interests. The doctrine of estoppel by conduct as now understood and administered, is sometimes characterized as a harsh doctrine in practical operation. However that may be, we do not think we should be expected to unwarrantably enlarge its scope in favor of a plaintiff who, knowing the defendant to be absent and in Europe, and while his whereabouts were unknown, precipitates divorce proceedings in a distant state remote from that of the defendant husband, under circumstances which force the presumption that such forum was sought for the reason that the law of the state was more favorable to her than that of the state of her husband's residence, and so favorable to parties seeking a divorce as to be generally accepted as against public policy and morality. We do not think the defendant is estopped from denying the validity of the South Dakota proceedings subsequent to his second marriage, and, aside from the question of estoppel, the decree and judgment for alimony are void for want of notice to the defendant, and consequently of jurisdiction.

The judgment of the Circuit Court is affirmed, with costs of this court.

CONNECTICUT SUPREME COURT OF ERRORS.

STATE of Connecticut

v.

John H. BRADNECK, *Appt.*

(69 Conn. 212.)

1. The record and judgment of dismissal in a divorce proceeding for adultery is not admissible in a subsequent criminal prosecution for nonsupport of wife in defense of which the same acts of adultery are sought to be set up.
2. Error in admitting a judgment as evidence in another suit is not relieved by the court's statement to the jury that the judgment is not conclusive but merits serious consideration.
3. Statements by a man when stopped on his way from the room of a married woman at night are not admissible as part of the *res gestæ* upon the question of the woman's adultery.
4. One who pleads adultery of his wife to a criminal charge of nonsupport cannot be held to the answers given on cross-examination by a witness for the state to the effect that witness never had said that he had been criminally intimate with defendant's wife, but may introduce evidence to contradict him.

(May 25, 1897.)

NOTE.—As to admissibility of judgment in other action in which parties are not the same, see also *Tierney v. Phoenix Ins. Co.* (N. D.) 36 L. R. A. 700; *Carlisle v. Killebrew* (Ala.) 6 L. R. A. 617; *Brown v. Bradlee* (Mass.) 15 L. R. A. 509; and *Re Kirby* (S. D.) 39 L. R. A. 856, 859.

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APPEAL by defendant from a judgment of the Criminal Court of Common Pleas for New Haven County convicting him of refusing and neglecting to support his wife. *Reversed.*

The facts are stated in the opinion.

Mr. F. W. Chase, for appellant:

Circumstances so intimately interwoven as the guilty act of a man running from the house of another, and while so running and at the time of being caught by an officer of the law, making statements explanatory of his acts, certainly was admissible evidence.

Enos v. Tuttle, 3 Conn. 250; *Wooden v. Cowles*, 11 Conn. 300; *Comins v. Comins*, 21 Conn. 418; *Sears v. Hayt*, 37 Conn. 407; *Douglas v. Chapin*, 26 Conn. 92; *Spencer v. New York & N. E. R. Co.* 62 Conn. 248.

Defendant could have proved that Donegan made statements which would have conclusively shown that he had been in the sleeping apartments of the defendant's wife on said night, and that she had invited him there. These statements were material to the defendant's case, and should have been admitted by the court.

Wright v. Boston, 126 Mass. 161; *Salem v. Lynn*, 13 Met. 544; *May v. Bradlee*, 127 Mass. 414; *Blake v. Damon*, 103 Mass. 199.

A record of the court to be used in evidence for the purpose of affecting the issue involved is not evidence if not conclusive.

Bethlehem v. Watertown, 51 Conn. 494, 47 Conn. 237; *Burdick v. Norwich*, 49 Conn.

228; *Parker v. Kenyon*, 112 Mass. 264; *Globe Works v. Wright*, 106 Mass. 207.

The record and file of the superior court relative to the petition for divorce wherein the defendant in this case and Mary C. Bradneck, his wife, were the parties, was a matter entirely foreign to the criminal proceedings in this case, and did not bear upon it in any way which the law will recognize.

State v. Alford, 31 Conn. 41.

The fact that the trial court stated that this evidence was not conclusive will not excuse his error. If it was not conclusive it was not evidence.

Bethlehem v. Watertown, 51 Conn. 494, 47 Conn. 237; *Burdick v. Norwich*, 49 Conn. 225; *Globe Works v. Wright*, 106 Mass. 207; *Parker v. Kenyon*, 112 Mass. 264.

The state's witness, Donegan, had emphatically in several different forms denied that he had ever been guilty of adultery with said Mary C. Bradneck at any time. Upon cross-examination said Donegan was specifically asked if he had not made statements out of court, contradicting his testimony during the trial to which said Donegan replied in the negative. Thus, it will be seen that all conditions necessary to make evidence to contradict him admissible and pertinent and material were complied with, and therefore a gross error was committed in excluding the same.

Thorp v. Brookfield, 36 Conn. 325; *McGinnis v. Grant*, 42 Conn. 79; *Beecher v. Beecher*, 43 Conn. 561; *Beardsley v. Wildman*, 41 Conn. 516; *White v. Griffing*, 44 Conn. 448; *Saunders' Appeal*, 54 Conn. 114; *Hedge v. Clapp*, 22 Conn. 266, 58 Am. Dec. 424; *State v. Randolph*, 24 Conn. 368; *Stevens v. Curtis*, 3 Conn. 265; *Beers v. Broome*, 4 Conn. 257; *Salisbury v. State*, 6 Conn. 104.

Mr. George M. Gunn for appellee.

Fenn, J., delivered the opinion of the court:

The appellant was tried in the court of common pleas for the transaction of criminal business in New Haven county, charged with the crime of refusing and neglecting to support his wife. He was convicted, and appealed to this court.

It appears, from the finding, that upon the trial the state offered evidence to prove the neglect and refusal of the appellant to support his wife; that the appellant offered no evidence to contradict this, but relied for his defense upon the claim, as an excuse, that his wife had been guilty of adultery with one Daniel Donegan of New Haven. Under such claim the appellant offered testimony tending to prove, and claimed he had proved, various acts of adultery on the part of his wife with said Donegan upon particular dates in July, August, September, and October, 1895. The state, in rebuttal offered in evidence the files and records in certain divorce proceedings brought by the appellant against his wife, tried in the superior court, and dismissed. This evidence was objected to; but the court, after examining the papers, said: "It appears, from an examination of

the files in the divorce proceedings in the case of *John H. Bradneck v. Mary C. Bradneck*, that the specific statement filed by the plaintiff contains allegations of adultery on all the dates which have been claimed here; that these allegations were denied, and therefore put in issue. I think the record is admissible." To this ruling the appellant excepted. The court in its charge to the jury, referring to this evidence, said: "There is one thing I ought to suggest to the jury, and that is that Mr. Bradneck on his own volition, or at his own volition, has had a portion, at least, of this case submitted to a tribunal which had jurisdiction of it. He brought an action for divorce against his wife, and had a trial, and that tribunal was not satisfied that he had there proved the charges on the dates which he now alleges in this court were the dates on which she committed adultery. While I do not rule that this is conclusive evidence in this case, it is my duty, having admitted it, to suggest to the jury that it is evidence to which they ought to give serious consideration."

We think it clear that in admitting this evidence the court below erred. That criminal sentences are not evidence in civil issues has been often held, the reason being that the parties to a criminal prosecution and those in a civil suit are necessarily different, and the objects and results of the two proceedings are equally diverse. See *Betts v. New Hartford*, 25 Conn. 185; 2 Wharton, Ev. § 777. So the converse of this rule, namely, that a judgment in a civil action is not admissible in a subsequent criminal prosecution, is equally true. Thus, for example, a judgment recovered against a defaulting tax collector and his sureties, in a civil action at the suit of the county, was held not competent evidence against them in a prosecution on the criminal side afterwards instituted for the default. *Britton v. State*, 77 Ala. 202. So, in *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646, a former judgment in a civil action was held not conclusive in a penal action between the same parties, though the same question was litigated in both actions, because the measure of proof is different in the two actions. The only case upon which the state relied, in argument before us, as holding a different doctrine, is that of *Dorroll v. State*, 83 Ind. 357. This was a prosecution for the unlawful removal of a fence from land; and it was there considered that a judgment in a former civil action between the defendant and the prosecuting witness, rendered before the commission of the alleged trespass, whereby the disputed boundary line between their respective lands was defined and settled, was admissible in evidence. But the court here also recognized the general rule that civil judgments are not admissible in criminal prosecutions, but decided as it did because it thought that the establishment of the boundary line was one of the "legal consequences" of the judgment, to prove which, as well as the fact of its rendition, a judgment is always admissible, even against strangers. The error to which we have referred, in admitting the evidence

in question, was not relieved by what the court stated to the jury, to the effect that such evidence was not conclusive, but merited serious consideration. As was held by this court in *Bethlehem v. Watertown*, 51 Conn. 494: "A judgment is conclusive, or it is nothing. If not conclusive, there is no rule by which courts can measure and determine its effect."

The appellant offered evidence to prove that on one occasion the said Donegan was caught at night in the bedroom occupied by the appellant's wife; that he endeavored to escape, but, as he came running out of the house, hat in hand, he was arrested by an officer. Thereupon the appellant's brother, who was present at the time of such arrest, was asked, as a witness for the defense: "What was the conversation that you had with Daniel Donegan at the time when Officer Shields grabbed him, or what statements, if any, did he make?" The question was objected to by counsel for the state on the ground that whatever Donegan then said was hearsay, and not admissible in the absence of Mary Bradneck. It was claimed by the appellant to be admissible as part of the *res gestæ*, as words accompanying an act and explanatory of the act. The question was excluded, and the appellant excepted. A similar question was asked of another witness, and a similar ruling made, and exception taken. These rulings were correct. *Stirling v. Buckingham*, 46 Conn. 461. The declarations in question neither grew out of the main fact—the alleged adultery,—were not contemporaneous with it, nor did they serve to illustrate its character. It would be useful to the appellant only as a statement out of court by one person concerning the past conduct of another not present at the time such

statement was made. But a far different situation was presented later during the trial. The said Donegan was offered as a witness for the state upon rebuttal, and testified regarding the events which happened on the various dates on which it was claimed that he had committed adultery with Mrs. Bradneck, and denied that on those dates he had been in her apartments, and in general testified that he had never committed adultery with her, or been unduly intimate with her. On cross-examination Donegan was asked if he had not, at a certain place and on a certain day, while in conversation with one Evans, stated to said Evans that he was criminally intimate with Mrs. Bradneck. The witness replied in the negative. In reply to the objection of the state that Mrs. Bradneck ought not to be convicted of adultery on any general statements that this witness or any other might have made outside the court, the court replied that the question was admissible as proper cross-examination of the witness, but that the court would hold the defendant to the answer to the extent that he would not be permitted to bring in witnesses on surrebuttal to prove that the witness had made these statements out of court. The appellant did afterwards offer several witnesses upon surrebuttal to prove such statements, but the court adhered to its ruling, and excluded all such evidence. This was error. *Hedge v. Clapp*, 22 Conn. 262, 58 Am. Dec. 424.

The other reasons of appeal are of slight importance, and do not seem to require special attention.

There is error, and a new trial is granted.

The other Judges concur.

DISTRICT OF COLUMBIA COURT OF APPEALS.

ANGLO-AMERICAN SAVINGS & LOAN ASSOCIATION *et al.*, *Appts.*,

v.

William D. CAMPBELL *et al.*

(.....D. C.....)

1. A mortgage for money to be advanced for building purposes, when put on record before any contract for building, has priority over all liens for labor and materials subsequently supplied for the buildings.
2. A mortgagee may continue to make advances to a mortgagor, when the loan is made expressly for building purposes, although he has notice of claims for labor and materials furnished for the buildings, and of the filing of liens therefor, if his contract does not require him to see to the application of the money advanced.
3. A mere promise to advance the full amount of a loan for building purposes

NOTE.—On the subject of constructive trusts in a fund, see also *Curdy v. Berton* (Cal.) 5 L. R. A. 189; and *American Sugar Refining Co. v. Fancher* (N. Y.) 27 L. R. A. 757. 43 L. R. A.

does not impress a trust upon a part thereof retained by the mortgagee in favor of the holders of mechanics' liens.

4. The breach of a mortgagee's promise to advance funds to the mortgagor does not create any liability in equity to creditors of the mortgagor who would have derived benefit from the performance of the promise, unless the mortgagee owed them some obligation or duty.
5. Money withheld by a mortgagee in breach of his promise to advance the full amount of a mortgage loan made expressly for the erection of buildings by the mortgagor, on land not yet paid for, is subject to a constructive trust in favor of persons who have furnished labor or materials for the buildings in reliance upon the mortgagee's representations that the money was to be advanced to the mortgagor.
6. Representations may constitute an estoppel, although not made to any particular person, if made to all persons likely to come into contractual relations with another, and relied upon by one of them in good faith.
7. The purchaser under foreclosure sale of property subject to a mechanic's lien is within the meaning of a statute

providing that in proceedings to enforce such liens the "defendant" may file an undertaking with sureties and release the property from the lien.

8. In a suit for the compensation by persons who have performed labor on a building to which a mortgagee who has failed to comply with his contract to advance money to erect the building, and the obligors in a bond to release the building from mechanics' liens, are made parties, the decree should not go against the latter if it merely impresses the funds in the hands of the mortgagee with a trust in favor of the laborers, and does not purport to foreclose the liens.

(December 13, 1898.)

A PPEAL by defendants from a judgment of the Supreme Court of the District of Columbia in favor of plaintiffs in an action brought to enforce a mechanic's lien. *Modified and affirmed.*

The facts are stated in the opinion.

Messrs. Ralston & Siddons and William F. Mattingly, for appellant Anglo-American Savings & Loan Association:

If complainants have any right to proceed against the appellant association, it could only be after they have exhausted all remedies against the person primarily and exclusively liable to them on account of their claims, the defendant Lea, and by showing that the money paid by the association on account of the loan was not sufficient to pay the bills incurred in constructing the buildings under the building contracts.

Comp. Stat. chap. 45, § 1, 2d proviso; *Martin v. Campbell*, 6 Mackey, 296; Phillips, Mechanics' Liens, § 225; *Davis v. Alvord*, 94 U. S. 545, 24 L. ed. 283.

There is no express trust made out in favor of the complainants, and it appears equally certain that there is no such relation between the appellant association and appellees as could give rise to any implied or constructive trust in the latter's favor, thereby entitling them to treat the money in question as trust funds for their benefit.

Boisot, Mechanics' Liens, § 322; *Hadley v. Hill*, 73 Ind. 442; *Patrick Land Co. v. Leavenworth*, 42 Neb. 715; *Rogers v. Central Loan & T. Co.* 49 Neb. 676; *Hill v. Aldrich*, 48 Minn. 73; *Moroney's Appeal*, 24 Pa. 373; *Richardson v. Belt*, 13 App. D. C. —, 26 Wash. L. Rep. 505; *Thompson v. White Water Valley R. Co.* 132 U. S. 68, 33 L. ed. 256; *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 33 L. ed. 905.

The mechanic's lien statute in force in this District fixes the priority and extent of the lien that it gives to materialmen and its other beneficiaries, and the court will not extend the statute to meet cases for which the statute itself does not provide, though they may be of equal merit with those provided for.

1 Jones, Liens, 2d ed. § 105; *Copeland v. Kehoe*, 67 Ala. 594; *Rogers v. Currier*, 13 Gray, 129.

The statute provides that every building erected or repaired by the owner or agent and the ground upon which such building is erected or repaired shall be subject to a lien. 43 L. R. A.

The remedy is against the property, and to the extent only of the interest of the building owner in said property (2 Jones, Liens, § 1244), and no personal judgment can be rendered, except where, after a sale of the property in satisfaction of the lien, the proceeds of such sale are insufficient for the purpose, then a judgment for the deficiency may be rendered against the party who incurred the debt, if he be made or become a party to the suit, but not otherwise.

D. C. Comp. Stat. chap. 45, § 5; *Emack v. Rushenberger*, 8 App. D. C. 254.

Where the mortgage has been executed and recorded before the work of construction has been commenced or any materials furnished, the mechanic or materialman furnishes the labor or material solely on the personal credit of the mortgagor and on his interest in the land, subject to the mortgage.

2 Jones, Liens, § 1480.

The appellant association was not charged with constructive notice of the liens recorded subsequent to the recordation of its own mortgage or deed of trust.

Jones, Mortg. §§ 372, 562; *Truscott v. King*, 6 Barb. 349; *Moyer v. Hinman*, 13 N. Y. 191; *Ackerman v. Hunsicker*, 85 N. Y. 49, 39 Am. Rep. 621; *Birnie v. Main*, 29 Ark. 591; *Ward v. Hague*, 25 N. J. Eq. 397; *Leach v. Beattie*, 33 Vt. 195; *Kyle v. Thompson*, 11 Ohio St. 616; *King v. McVickar*, 3 Sandf. Ch. 192; *Doolittle v. Cook*, 75 Ill. 354; *Heaton v. Prather*, 84 Ill. 330; *Taylor v. Maris*, 5 Rawle, 51.

The mere fact that the building was commenced after the mortgage was given, and that the mortgagee knew this, is not sufficient to charge him with knowledge of the lien.

Jones, Mortg. § 562; *Ward v. Hague*, 25 N. J. Eq. 397; *Cotton v. Holden*, 1 McArthur, 463.

A mortgage for obligatory future advances is valid.

Jones, Mortg. § 365; Phillips, Mechanics' Liens, § 236; *United States v. Hooe*, 3 Cranch, 73, 2 L. ed. 370; *Shirras v. Craig*, 7 Cranch, 34, 3 L. ed. 260; *Lawrence v. Tucker*, 23 How. 14, 16 L. ed. 474; *Leeds v. Cameron*, 3 Sumn. 489; *Commercial Bank v. Cunningham*, 24 Pick. 270, 35 Am. Dec. 322; *Goddard v. Sawyer*, 9 Allen, 78; *Truscott v. King*, 6 N. Y. 147; *James v. Morey*, 2 Cow. 292, 14 Am. Dec. 475; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 73, 8 Am. Dec. 538; *Fassett v. Smith*, 23 N. Y. 252; *Brackett v. Sears*, 15 Mich. 244; *Seaman v. Fleming*, 7 Rich. Eq. 283; *Garber v. Henry*, 6 Watts, 57; *Robinson v. Consolidated Real Estate & F. Ins. Co.* 55 Md. 105.

It is not necessary that the mortgage should express on its face that it is given to secure future advances.

Jones, Mortg. § 374; *Collins v. Carlike*, 13 Ill. 254; *Darst v. Gale*, 83 Ill. 136; *Bank of Utica v. Finch*, 3 Barb. Ch. 293, 49 Am. Dec. 175; *Murray v. Barney*, 34 Barb. 336; *Craig v. Tappan*, 2 Sandf. Ch. 78; *Wescott v. Gunn*, 4 Duer, 107; *Walker v. Snediker*, Hoffm. Ch. 145; *Townsend v. Empire Stone-Dressing Co.* 6 Duer, 208; *Foster v. Rey-*

nolds, 38 Mo. 553; *Griffin v. New Jersey Oil Co.* 11 N. J. Eq. 49.

Advances covered by a mortgage have preference over the claims of junior encumbrancers who have become such with notice of an agreement under the mortgage for the advances.

Jones, Mortg. § 308, and cases cited in note 4; *Kramer v. Farmers' & M. Bank*, 15 Ohio, 253; *Truscott v. King*, 6 N. Y. 147; *Taylor v. LaBar*, 25 N. J. Eq. 222; *Platt v. Griffith*, 27 N. J. Eq. 207; *Wisconsin Planing Mill Co. v. Schuda*, 72 Wis. 277.

The mortgage or deed of trust in this case was for obligatory advances, and where this is the case it is well settled that actual notice of subsequent liens will not relieve the mortgagee of his obligation to the mortgagor to make such advances, and having made them his position of priority of lien is preserved to him.

Jones, Mortg. § 370; *Boisot, Mechanics' Liens*, § 152; 15 Am. & Eng. Enc. Law, p. 799; *Lyle v. Ducomb*, 5 Binn. 585; *Moroney's Appeal*, 24 Pa. 372; *Wilson v. Russell*, 13 Md. 495, 71 Am. Dec. 645; *Brooks v. Lester*, 36 Md. 65; *Crane v. Deming*, 7 Conn. 387; *Griffin v. Burtnett*, 4 Edw. Ch. 673; *Brinkmeyer v. Browneller*, 55 Ind. 487; *Brinkmeyer v. Helbling*, 57 Ind. 435; *Nelson v. Iowa Eastern R. Co.* (Iowa) 8 Am. Ry. Rep. 82; *Martolf v. Burnwell*, 15 Kan. 612; *Taylor v. LaBar*, 25 N. J. Eq. 222; *Macintosh v. Thurston*, 25 N. J. Eq. 242; *Platt v. Griffith*, 27 N. J. Eq. 207; *Iaegle v. Bossieux*, 15 Gratt. 83, 76 Am. Dec. 189; *Hill v. Aldrich*, 48 Minn. 73; *Wisconsin Planing Mill Co. v. Schuda*, 72 Wis. 277; *Richards v. Waldron*, 9 Mackey, 585; *Frye v. Bank of Illinois*, 11 Ill. 367; *Spader v. Lawler*, 17 Ohio, 371, 99 Am. Dec. 401; *Ladue v. Detroit & M. R. Co.* 13 Mich. 380, 87 Am. Dec. 759.

Messrs. A. S. Worthington and J. C. Heald, for appellant Thomas H. Pickford:

The act provides that "the defendant" may file a written undertaking, etc. The principal in these undertakings, Harvey T. Winfield, never was a defendant in the cause, and the court had no authority to accept the bonds in which he was principal.

These being bonds, taken in a judicial proceeding, not authorized by law, are void, and the principles relating to voluntary bonds cannot be invoked to give them validity.

Charter Oak v. Hosmer, 1 Mackey, 297; *Wallace v. Pratt*, 4 Mackey, 259; *United States, Davis, v. Draper*, 8 Mackey, 85.

Messrs. Bates Warren and J. J. Darlington, for appellees:

The appellant association cannot, in equity and good conscience, be permitted to gain the security of the complainants' material and labor by its representations that it would advance a specified sum with which to construct the buildings, and then, when the materials and labor have been furnished upon the faith of those representations, withdraw that promise and cut down the amount to be so advanced, with or without the consent of the builder, retaining the benefit of the complainant's labor and materials so advanced upon the faith of that promise.

Kinney v. Farnsworth, 17 Conn. 355; *Hef-* 43 L. R. A.

ncr v. Vandolah, 57 Ill. 520, 11 Am. Rep. 39; *Patrick Land Co. v. Leavenworth*, 42 Neb. 715; *Rogers v. Central Loan & T. Co.* 49 Neb. 676; *Taylor v. Ely*, 25 Conn. 250; *Crane v. Deming*, 7 Conn. 388.

The association has \$3,000 in its hands which is justly applicable to payment of the materialmen, and therefore falls clearly under the equitable principle declared and applied by this court in *Emack v. Rushenberger*, 8 App. D. C. 254, and *Keller v. Ashford*, 133 U. S. 610, 33 L. ed. 667.

The lien may be filed either against the party who was the owner at the time the contract was made, or against the party who is owner at the time of lien filed.

Lester v. Forsberg, 1 App. D. C. 36.

Shepard, J., delivered the opinion of the court:

This suit to enforce a mechanics' lien was begun on February 19, 1897. The bill was filed by William D. Campbell for himself and on behalf of all others having like demands against David M. Lea, the debtor and owner of the legal title to the premises, and the Anglo-American Savings & Loan Association, a corporation of New York, and other encumbrancers, together with the trustees in the conveyances securing the several encumbrances.

Leave having been granted for the purpose, Allen S. Johnson, the Julius Lansburgh Furniture & Carpet Company and Landon & Merriam intervened by petition, respectively, setting up demands for labor and materials furnished David M. Lea in the construction of certain houses on the lots described in the bill; and joining in the prayers of said bill.

The aggregate amount of the indebtedness sought to be recovered in the bill and petitions of intervention is \$3,253.40 with interest, and notices of liens having been duly registered by the parties, respectively, in the manner required by law.

There is no question in respect of the amount of each demand and the validity of the lien therefore as against David M. Lea.

There is little or no conflict in the evidence, and the material facts shown in the record may be stated substantially as follows:

On and before March 27, 1896, David M. Lea was the owner of the premises—then vacant lots—at the corner of R and Seventeenth streets, Northwest, in the City of Washington. These, when conveyed to him, were subject to a vendor's lien secured by a deed of trust for about \$10,000. He became indebted to his grantors for part of the purchase money, amounting to \$6,157, for which he executed notes as follows: one for \$1,500, payable one month after date; another for \$2,500 payable two months after date; and a third for \$2,157 payable three months after date. All bore date as of March 28, 1896, and were secured by a trust deed of the same date, that was recorded March 30, 1896.

The dates of these notes and trust deed were so arranged as to give precedence to the trust deed securing the Anglo-American Savings & Loan Association hereinafter mentioned.

Lea purchased the lots for the purpose of improving them, and made a subdivision of them to accord to the plan for the erection of five substantial dwellings.

The Anglo-American Savings & Loan Association of New York is what is ordinarily called a building association, and is a corporation of that state. M. I. Weller, who resides in the District of Columbia, was the appraiser of property offered to the association as security for loans.

On March 2, 1896, David M. Lea addressed him a note saying: "I propose to spend \$46,500 in the construction of five houses at the corner of Seventeenth and R. sts., N. W., for which purpose I make application to your association for a loan." This was followed on March 7, 1896, by a formal application upon the blank form provided by the association as security for the purpose.

In this form the application was required to answer in detail questions propounded in respect of the location, condition, and value of the lots, and to describe the contemplated buildings, as well as to furnish the plans and specifications therefor. He was also required to describe the property owned by him, his indebtedness, and so forth. He stated that he had purchased the property in December, 1895, paying therefor \$24,000, and declared that the buildings to be erected would cost \$46,500, and would be insured for that amount for the benefit of the association.

The association agreed to make the loan of \$46,500, which was to be secured upon the property and upon the four hundred and sixty-five shares of the stock of the association for which Lea subscribed in accordance with its rules.

He therefore executed a bond to the association, dated March 27, 1896, in the sum of \$93,000, which recited the subscription to, and delivery of, the stock, and the loan of the said \$46,500; and was conditioned upon the payment by the said Lea, monthly, of certain stipulated sums, as interest at the rate of 5 per cent per annum; as premiums on the principal, and by way of monthly dues on said stock, and the said bond was secured by the conveyance of the premises to Stephen Van Wyck and F. L. Siddons, trustees, in the usual form, which was recorded March 28, 1896. The certificate for the 465 shares of stock was returned to the association by Lea with a formal assignment thereof executed March 27, 1896. As additional security, Lea, with two sureties, Samuel Ross and Thomas H. Pickford, executed and delivered a bond to the association of the sum of \$46,500. This recited the agreement for the loan, and, among other things, that:

"Whereas, it was a condition precedent to such loan or advance that said David M. Lea, together with a sufficient surety, should execute and deliver to said association a bond obligating said David M. Lea to complete and finish the construction and erection of the aforesaid improvements on or before the 27th day of August, A. D. 1896, and to protect said association from any loss or damage by reason of any lien or claim made against said land and improvements under 43 L. R. A.

the law commonly known as the 'Mechanics' Lien Law.'"

The conditions were that they should indemnify the association against any loss and damage incurred by the failure of Lea to perform his agreements, and should pay any and all sums by the said association or its successors, paid, laid out, expended, or incurred, on account of, or by reason of, the failure, omission, neglect, or refusal to fully erect, complete, and finish the said building or buildings and the appurtenances on or before the 27th day of August, A. D. 1896, or on account of, or by reason of, any lien or claim, or notice of any lien or claim, hereafter filed, within the period allowed by law, under the law commonly called the "Mechanics' Lien Law," by any person or persons, firm or firms, body or bodies corporate, association or associations, against said land, or any part thereof, or against said building or buildings, or either of them, for or on account of any work or labor done or to be done, or for and on account of any materials, apparatus, implements, machinery, fixtures, or ornaments, furnished or to be furnished, on, in, about, for the benefit of, or in relation to, said building or buildings, or either of them, from the commencement of said buildings to the full completion thereof, and which may be held to be paramount to the lien of the aforesaid mortgage, or any of them, or any part thereof, or prior or paramount to any of the advances made or to be made as aforesaid, then this obligation to be null and void; otherwise to be and remain in full force and virtue at law and in equity.

There was some arrangement, the particulars of which do not appear, by which Lea's grantors agreed to postpone the lien for the remainder of the purchase money to that in favor of the association; and in accordance therewith the dates of their notes and trust deed were given as before stated.

There was also a collateral agreement between Lea and the association, the details of which do not appear, relating to the times and amounts in which the \$46,500 should be advanced, and controlling their disbursement. The allegations of the bill in respect of the manner of the advancement, which the answers admit, are: One third when the first-floor joists should be in all of the said houses; one sixth when the roofs should be on all of them; one sixth when all should be "white-coated"; one sixth when the plumbing and carpenter work should be completed; and one sixth when all the houses should be completed.

The first building contract was not made by Lea until March 31, 1896, and the work was commenced thereafter.

The first payment made by the association was \$15,217.38 on April 28, 1896, through a check on itself, signed by its treasurer, and payable to David M. Lea or order. This was indorsed by Lea to Ralston & Siddons, who were the attorneys of the association in Washington. Other payments were made in the same way.

Mr. Siddons testified that the association first deducted the monthly dues of Lea to date, and sent the draft for the remainder of

the instalment to be at the time advanced. Ralston & Siddons deposited the drafts received for collection and disbursed the money on account of Lea.

Out of the first payment they discharged the first mortgage on the lots, amounting to about \$10,300, principal and interest.

Certain fees due M. I. Weller, the appraiser, and some other bills were paid for taxes and insurance. Some of the bills on account of building were paid at the request of the sureties on Lea's bond, and the remainder was paid to one of the sureties, Samuel Ross, in pursuance of a written order of Lea dated April 11, 1896. It was upon the written order of Ross that the first mortgage was paid off. Mr. Siddons also testified that he notified the sureties of the existence of claims that came to his knowledge from time to time and paid the same at their request; among these was the bill of a watchman employed by Weller.

The contractor-in-chief for the erection of the buildings failed before completion, and the remainder of the work was done under the direction of the sureties on Lea's bond aforesaid. Some of the last money paid to the sureties, or on Lea's account, was after the filing of Campbell's lien and perhaps others.

The entire amount actually advanced by the association to Lea, or on his account, including his dues, deducted as aforesaid, was \$43,500. The sum of \$3,000 was deducted from the last draft by Lea's consent. He indorsed the last draft with that understanding and at the request of his sureties. He stated further that the association claimed that he had not come up to his plans, specifications, and agreements with them; but that he and his sureties and the architect claimed that the building had been done according to the plans and specifications.

No evidence was introduced on the part of the association tending to show a failure to complete the buildings according to the plans and specifications submitted with the application for the loan. M. I. Weller, the appraiser for the association, testified that he supervised the construction of all buildings in the District under loans made by it, including the houses in question; and that they were completed on December 9, 1896, and so reported to the association.

There is also a stipulation, noted by the examiner taking the depositions, to the effect "that the buildings were completed on or about December 9, 1896, formal proof of the date and facts of completion being waived."

It also appears from the evidence of Campbell that when he notified Weller of his contract to furnish Lea with certain lumber and stairwork, Weller informed him that it would have to be good or he would not pass it.

Campbell testifies that he knew of the trust deed to secure the association; that Lea told him of his arrangement to get the money for building; and that he would pay him for his material from that loan. He further testifies that he entered into his contract on that representation, and that he learned from Mr. Siddons at what stages of the building the instalments were to be paid.

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The contract between Lea and Campbell shows that the amount contracted for—\$3,750—was to be paid as follows: \$875 when the roofs are on all the houses; \$1,000 when said houses are "white-coated"; and the remainder, \$1,875, in four months from date.

The interveners' contracts were made with R. M. Boyle, the general contractor with Lea, and they understood from Boyle that the money to pay for the work was to come from the loan of the association.

Pending the suit the premises in controversy appear to have been sold under the second mortgage to secure the purchase-money notes, and the legal title thereof conveyed to one Harvey T. Winfield.

Said Winfield, as owner, filed the statutory undertaking with sureties, binding himself to the claimants of the liens in case they should be established, and thereupon a decree was entered discharging the premises from the liens.

Upon the hearing a final decree was entered requiring the association to pay into the registry of the court, within thirty days, the sum of \$3,000, with interest from December 9, 1896, for distribution among the complainant and interveners. In default of such payment by the association, it was decreed that the said sum should be paid by the said Winfield and M. I. Weller and Thomas H. Pickford, sureties on the undertaking given to secure the payment of the liens on the premises, which had been discharged thereby.

There are several questions suggested by the facts in this case, as stated above, that, in view of the terms of the decree, do not necessarily require decision; but, at the same time, they enter more or less into the consideration of the principles upon which that decree must stand or fall, and will, therefore, be briefly considered.

1. The obligatory character of the contract of the Anglo-American Savings & Loan Association with David M. Lea to advance him the full sum of \$46,500, to be paid in instalments at certain stages in the construction of his houses, and the record of the conveyance to its trustees to secure the same, before any contract by him let or entered into for the construction in any particular, gave that mortgage priority over all liens for labor and materials supplied to him under his subsequent contracts for construction. D. C. Comp. Stat. § 3, p. 367; *Moroney's Appeal*, 24 Pa. 373; *Hoagland v. Lowe*, 39 Neb. 397, 407.

2. Nor is there anything in the arrangement between Lea and his vendors and the association, contemplating a scheme for the purchase of the property and the joint construction of the buildings thereon, that would justify the subordination of the mortgages of the former to the liens of the furnishers of labor and materials, in accordance with the doctrine of such cases as *Bohn Mfg. Co. v. Kountze*, 30 Neb. 719, 725, 12 L. R. A. 33, and *Henderson v. Connelly*, 123 Ill. 98. And that doctrine need not, therefore, be either approved or denied.

3. Although the loan was obtained for the express purpose of erecting the houses according to plans and specifications submitted

with the application therefore there is nothing in the nature of the contract or in its terms that made it obligatory upon the association to see that the money advanced thereunder was applied to payments for labor and material furnished in the construction. Hence, payments made to Lea, after, as well as before, notice of the claims due the appellees, and the filing of their liens were in discharge of the contract of the association and brought it under no liability to them. *Moroney's Appeal*, 24 Pa. 373; *Rogers v. Central Loan & T. Co.* 49 Neb. 676; *Patrick Land Co. v. Leavenworth*, 42 Neb. 715.

4. The right to recover the amount of money retained by the association from the last instalment cannot be enforced in favor of the mechanics' lien holders by virtue of any declared trust, or one to be implied from the terms and conditions of its contracts alone. From the proposition that the association was under no obligation by virtue of its contract to see to the application of the money advanced, the conclusion necessarily follows, that from the mere promise, no matter how binding, to advance Lea the full sum of \$46,500, no trust was impressed upon the part thereof retained by the association, in favor of the holders of the mechanics' liens any more than in favor of Lea's creditors generally.

It likewise follows that the promise made to Lea of the payment of the entire sum cannot be enforced in equity, upon that ground alone, in favor of the appellees, under the doctrine enounced in *Keller v. Ashford*, 133 U. S. 610, 625, 33 L. ed. 667, 674, and explained again in *Constable v. National S. S. Co.* 154 U. S. 51, 74, 38 L. ed. 903, 914.

In this last case it was said, following the court of appeals of New York, that, "to give a third party, who may derive a benefit from the performance of a promise, an action, there must be, first, an intent by the promisor to secure some benefit to the third party, and, second, some privity between the two, the promisor and the party to be benefited, and some obligation or duty owing from the promisor to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent to him personally."

5. It now remains to inquire whether by reason of the special circumstances disclosed in the evidence, there is any other ground upon which the decree, enforcing the claim of the appellees against the \$3,000 retained from the loan, can be upheld.

If there is, it must be by virtue of a constructive trust raised up by those special circumstances and conditions, consisting of representations and conduct upon one side, and of action founded thereon, upon the other, in accordance with established principles of equitable estoppel.

The special circumstances relied on to create the trust are summed up as follows for consideration:

It appears, with sufficient certainty, that the houses had been completed in compliance with the plans and specifications submitted with the application for the loan, and that they cost the sum of \$46,500.

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If the association had any defense upon either of those grounds, the facts were within its knowledge, and it was its duty to prove them. It had a supervisor, charged with the duty of seeing that the building was carried on according to the plans and specifications, and he had a watchman employed also. He was a witness, and testified that the buildings were completed December 9, 1896, and no question was asked him regarding the character of that completion, or the cost of the entire construction. The evidence shows that the appellees, particularly Campbell, looked to the fund to be advanced under the contract for the loan as a means of obtaining payment for their labor and materials.

The written contract with Campbell shows the times of his payments corresponding with those of the advances to be made to Lea. They knew the details of the loan contract, and say that they relied upon it as the basis of the credit extended to Lea. That they did so, and did not rely upon the individual capacity of Lea, or their right to a last lien upon the premises, is supported by every reasonable inference deducible from the surrounding circumstances. Lea was engaged in building upon land for which he had not paid, and that was under mortgages to secure at least two thirds of the purchase money. The existence of these mortgages emphasized the incapacity of Lea to build without a pre-arranged loan, that was attested by the contract with the association for the express purpose of building. It appears, moreover, that the loan could not be obtained without giving the mortgage for its security priority over the second purchase-money mortgage. It required very little testimony therefore, to produce the conclusion that, without confidence in the payment to Lea of the full amount of the loan contracted for, the appellees would not have extended him credit for their labor and materials. The reasonableness of such expectations on their part ought, naturally, to have suggested itself to the association. Engaged in the business of lending money to enable owners of city lots to improve, the association must have known, in the ordinary course of such transactions, that the consummated contract for the money to be advanced to Lea as the building progressed, under a mortgage taking priority over the statutory liens available to those contracting with him, would constitute a material inducement to them in supplying him with labor and materials. Charged with this knowledge it contracted to advance Lea the full sum of \$46,500. It is true, as we have before said, that this contract with Lea did not bind the association to see that he actually applied the money, when advanced, to the payment of the contractors.

Payment into his hands was all that it was bound to make, and Lea's creditors had, therefore, no legal right to ask anything more. Had he received all of the money and then failed to pay them, they would have no remedy against the association, for its obligation would have been completely discharged.

Notwithstanding this, it appears, as if in express recognition of the reasonable expect-

tations of Lea's contractors, that the practice in making payments was this: When the time for a payment arrived, a draft payable to Lea's order was sent by the association to its attorneys in Washington. Lea at once indorsed it to them and they collected the draft and disbursed the money. Claimants of money on account of the buildings often notified them of the same, and they, in turn, notifying Lea's sureties, were sometimes directed to pay them, and did so. All that remained was then delivered to the sureties on the bond given by Lea to indemnify the association; among other things, against mechanics' liens. It was, of course, to their interest, as such sureties, to see that the money went to the contractors of Lea, and it would seem, from the failure of others to intervene in the suit, that the contractors were paid as long as the association continued to make the advances.

But when the time for the payment of the last instalment arrived, the association, for its own advantage and without justification shown in the conditions of the contract, or by the evidence in the cause, withheld the sum of \$3,000, which, imputing common sense to Lea's sureties, and to him common honesty and an intention to fulfil his obligations to the appellees, would have been paid over to them. If any presumption is to be indulged in respect of this it ought to be in favor of honesty and right doing. Be that as it may, however, the association would be entitled to no benefit from any lack of certainty on that point if it acted wrongfully as to the appellees in retaining the money and giving Lea no opportunity to discharge his obligations with it. *Angle v. Chicago, St. P. M. & O. R. R. Co.* 151 U. S. 1, 12, 38 L. ed. 55, 62.

Conceding, as has been done, that there was no intention on the part of the association to create a trust in favor of Lea's contractors, by the terms of the contract, and granting that the contract made it no wrong, actionable on behalf of the appellees, to withhold the money, does not, in our opinion, answer the conditions presented by the special facts and circumstances stated above.

Equity will impress a trust contrary to the intention and will of a party where a fund has been obtained by him in violation of his duty to another.

In order to raise this duty as the foundation of a constructive trust there need be neither a promise for the benefit of another, nor express fiduciary relations between them. It may be raised by representations, conduct, and the like, that have been relied upon by another under such circumstances as create an equitable estoppel upon one to pursue thereafter an opposite course for his own advantage. To create such an estoppel it is not always essential that some special representation be made to a particular person at the time. In this case the representation was made, in the first place, to all persons likely to come into contractual relations with Lea in the construction of his buildings; but when acted upon by one of them in good faith it became as if made personally to him. *Horn v. Cole*, 51 N. H. 287, 293, 12 Am. Rep. 111. 43 L. R. A.

That the representations in respect of the amount and purposes of the loan were not made to defraud anyone at the time, is apparent; but this is not essential. Nor is it necessary that the arrangement with Lea, who was in no condition to be specially concerned at the time, for the detention of a portion of the money, should have been made for the purpose of defrauding the appellees. *Horn v. Cole*, 51 N. H. 287, 292, 12 Am. Rep. 111; 2 Pom. Eq. § 803. Notwithstanding that the association was under no legal obligation to see that Lea paid the money, when advanced, to the appellees, it was under a moral obligation to them, at least, to pay over to him all that it had contracted to advance to enable him to pay for the construction of the houses.

Having, by its conduct, induced or contributed to induce the appellees to contract with Lea, and with their materials to increase the security for its own debt, it would be inequitable and unjust to permit the association to withhold the money upon which they relied for reimbursement.

The foundation of equitable estoppel is justice and good conscience. "Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed and been enforceable by other rules of the law, unless prevented by the estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel." 2 Pom. Eq. § 802.

Upon these equitable considerations, we conclude that the court did not err in decreeing the enforcement of a constructive trust in favor of the appellees upon the fund withheld from the loan to Lea.

The researches of counsel, likewise our own, have failed to discover a decision directly in point to guide us in reaching the conclusion at which we have arrived in this case; but we are none the less satisfied that its facts, though novel, bring it within the application of the well-established equitable principles that have been stated.

There is, however, a decision of the Supreme Court of the United States in an analogous case, within the governing principle of which this case, in our opinion, is clearly included. See *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 26, 38 L. ed. 55, 67.

In that case it appears that Angle had a contract with a railway corporation called the Portage Company, to construct a certain part of a railway that was to be completed to earn a grant of lands from the state of Wisconsin. The Portage Company arranged with a trust company for the advancement of the necessary money to complete the road, and Angle entered upon the performance of its contract with a large and sufficient force. He had no contract entitling him to a lien upon the Portage Company's land grant, but that formed the chief inducement of the credit that it had arranged for.

Whilst the work was being diligently prosecuted by Angle, the Chicago, St. Paul, Minneapolis, & Omaha Railway Company (called the Omaha Company), by bribery of

the Portage Company's officers secured the control of that company and forced the suspension of the work. Its conduct caused the trust company to withdraw its promised aid. The Omaha Company, then, by fraudulent representations, induced the legislature of the state to repeal the grant to the Portage Company and bestow the land upon it, instead. Angle recovered a judgment against the now insolvent Portage Company for the work done by him, and then filed his bill against the Omaha Company to subject the aforesaid land grant thereto. His bill was dismissed, and that decree was, upon his appeal, reversed.

In the course of the opinion delivered by Mr. Justice Brewer for the majority of the court, it was said: "While no express trust attached to the title to these lands, either in the Portage or in the Omaha Company,—while it may be conceded that when the legislature resumed the grant it took the title discharged of any express trust or liability in favor of the creditors of the Portage Company, and might have transferred an absolute title to any third party beyond the reach or pursuit of the Portage Company, or its creditors,—yet it is still true that the lands were given to the Portage Company, as they had been given by Congress to the state in the first instance, for the purpose of aiding in the construction of this road; that a part of the work necessary for such construction had been done, and there is, therefore, an equity in securing to the extent to which the work had been done, the application of these lands in payment thereof. And when the Omaha Company, by its wrongdoings, secured the full legal title to those lands, equity will hold that the party who has been deprived of payment for his work from the Portage Company, by reason of their having been taken away from it, shall be able to pursue those lands into the hands of the wrongdoer, and hold them for the payment of that claim which, but for the wrongdoings of the Omaha Company, would have been paid by the Portage Company, partially, at least, out of their proceeds. While no express trust is affirmed as to the lands, yet it is familiar doctrine that a party who acquires title to property wrongfully may be adjudged a trustee *ex maleficio* in respect of that property. . . . The property was in the Portage Company for the purpose of aiding in the construction of this road; work was done by the plaintiff in that direction. Equity recognizes a right that that property should be applied in the payment for that work. The wrongdoing of the defendant, the Omaha Company, has wrested the title of this property from the Portage Company and transferred it to itself. It has become, therefore, a trustee *ex maleficio* in respect to the property."

That case is not distinguishable from this because of the element of actual fraud found to have been practised by the party in whose possession the property was impressed with the trust. Actual fraud, intentional as regards the party seeking relief, is not essential to the raising up of a constructive trust any more than an equitable estoppel. If one

makes an appropriation of a fund, which, if permitted to stand, would, by reason of the circumstances attending the transaction, work a wrong to another having an equity therein, and give him an unconscientious advantage over that other, the act will be regarded as what is called a constructive fraud in equity. 2 Pom. Eq. §§ 1044, 1053.

6. There remain to be considered certain questions raised on the appeal of the sureties in the undertaking given under the permission of the statute to release the premises from the lien.

The property, as appears by stipulation made part of the record, was twice sold at public sale after the bill had been filed. The sale under the second deed of trust was made to one Mitchell. That under the association's deed of trust is recited as made to the "party secured thereby, for the sum of \$45,300."

It seems, however, that the conveyance of the legal title under this sale was made to Harvey T. Winfield, who filed the undertaking aforesaid with M. I. Weller and Thomas H. Pickford as sureties, and procured orders, on November 25, 1897, releasing the premises from the operation of the liens sought to be established in this suit.

(1) The first contention on behalf of the sureties is, that the undertaking is void because Winfield, the principal therein, was not a defendant in the proceeding and therefore not within the operation of the statute. The statute provides: "That in all proceedings under this act the defendant may file a written undertaking, with two or more sureties, to be approved by the court, to the effect that he and they will pay the judgment that may be recovered, and costs, which judgment shall be rendered against all persons so undertaking, and thereby release his property from the lien hereby created. . . . If such undertaking be approved before the filing of the aforesaid bill in equity to enforce said lien, the said sureties shall be made parties thereto, and if, after the filing of said bill, said sureties, upon the approval of said undertaking, shall *ipso facto* become parties thereto, and in either case the decree of the court shall run against them as well as the principal on such undertaking." D. C. Comp. Stat. § 11, p. 368.

That this undertaking may be entered into and substituted for the building before as well as after the filing of the bill to enforce the mechanics' lien, is sufficient to indicate that the word "defendant" was not used in its technical sense, but with a meaning broad enough to cover the owner of the premises in whom, at the time, the title may be vested. It was intended as a means whereby the property might be speedily unencumbered and rendered marketable, and this was, necessarily, for the benefit of the owner at the time. The ambiguity of the section of the statute as it now stands under the act of 1884, recited above, grows out of the broadening therein, by amendment, of the scope of § 708 and others of the Revised Statutes of the District of Columbia, the effect of which in permitting notices of the liens claimed thereunder to be made out against

the owner of the property, at the time the right to assert the lien accrued instead of the owner at the time of the contract, was declared in *Lefler v. Forsberg*, 1 App. D. C. 36, 40.

It follows that this ground of objection to the decree is not well taken. That Winfield may have become the owner of the premises by purchase under the first mortgage or in any other way, is immaterial; he is bound as owner by the recital of the undertaking and the release of the lien obtained thereon.

(2) The point of the second contention is well taken.

No decree for the payment of the money withheld by the association, and upon which a trust was impressed, should have been rendered against Winfield and his sureties, because there was no foreclosure of the mechanics' liens set up in the bill.

The decree impresses a trust, in favor of the appellees, upon the \$3,000 retained by the association from the loan, and orders it paid over.

It is in the nature of the decree approved by this court in the case of *Emack v. Ruskenberger*, 8 App. D. C. 249, 254.

The undertaking was not entered into to cover any liability of that character on the part of the association or of the former owner of the property. Its obligation is confined to the purpose of the statute.

Upon the failure to establish the mechanics' liens upon the premises, under the allegations and prayer of the bill, the obligation of the undertaking ceased, and it should have been so decreed.

For the reasons given, the decree will be modified so as to release the principal and sureties upon the undertaking, and in all other respects affirmed, with costs to the appellees.

The cause will be remanded to the court from whence it comes, with directions to modify and amend the decree in accordance with this decision.

It is so ordered.

GEORGIA SUPREME COURT.

B. S. CALHOUN, *Plff. in Err.*,

v.

E. P. LITTLE.

(.....Ga.....)

1. The town of Waresboro derives its authority to exercise corporate functions from an act of the general assembly passed on December 9, 1893 (Acts 1893, p. 335), granting a new charter to such town. Under this act, an ordinance which confers upon the police court of the town authority to punish by imprisonment without giving persons convicted of offenses against the town an opportunity to pay a fine is void for want of authority in the town council to pass it.

2. In all cases where judges of courts of general jurisdiction are exempt from civil liability in damages for their judicial acts, presiding officers of courts of limited jurisdiction are likewise exempt. (a) It follows, therefore, that where the presiding officer of a municipal court judicially determines that a given ordinance is valid, though in fact it is void for want of authority in the town council to pass it, he will not be liable in damages to a person convicted in his court of an offense against the town, and punished under such ordinance by imprisonment, without having been given an opportunity to pay a fine, provided the court in which such person is convicted has jurisdiction of the subject-matter of the offense.

3. Where a section of the Code has been codified from a decision of this court, it will be construed in the light of the source from which it came, unless the language of the section imperatively demands

a different construction. (a) Section 752 of the Political Code has no application to acts of a member of a town council when he is presiding in a police court which is authorized by the charter of the town.

4. The principles above announced control the case. There was no material error in the charges complained of. The evidence amply warranted the verdict, and there was no error in refusing a new trial.

(December 28, 1898.)

ERROR to the Superior Court for Ware County to review a judgment in favor of defendant in an action brought to recover damages for alleged false imprisonment. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hitch & Myers, for plaintiff in error:

An ordinance passed by a municipality in excess of or without charter authority is void.

17 Am. & Eng. Enc. Law, pp. 236, 248, § VIII.

Waresboro had no charter authority for all ordinances inflicting imprisonment without alternative of fine.

Imprisonment as a fine can be inflicted only when the power is given by charter. The power to imprison never arises by implication.

17 Am. & Eng. Enc. Law, pp. 257, 258 (4); *Briewick v. Brunswick*, 51 Ga. 639, 21 Am. Rep. 240.

Malice and bad faith are not a necessary element of false imprisonment, unless the imprisonment be under warrant. Any illegal

*Headnotes by COBB, J.

NOTE.—As to the liability of judicial officers to civil action for acts of a judicial nature, see *Austin v. Vrooman* (N. Y.) 14 L. R. A. 138, and *note*; *Thompson v. Jackson* (Iowa) 27 L. 43 L. R. A.

R. A. 92, and *note*; also *Scott v. Fishplate* (N. C.) 30 L. R. A. 696; and *Glazer v. Hubbard* (Ky.) 39 L. R. A. 210.

deprivation is actionable, and good faith can only mitigate the damages.

Code, § 3851; 7 Am. & Eng. Enc. Law, p. 663, notes 2, 3.

The fact that defendant was claiming to act in a judicial capacity makes no difference, for by our statute law a municipal officer is personally liable to anyone whom he damages by an act committed without authority of law.

Code 1895, § 752; *Pruden v. Love*, 67 Ga. 190.

Any judicial officer acting in excess of jurisdiction is personally liable for his injurious acts.

12 Am. & Eng. Enc. Law, p. 32, VII., p. 33, 2, a, b, p. 35; *Austin v. Vrooman*, 128 N. Y. 229, 14 L. R. A. 140, 25 Am. Rep. 902.

Though a court had jurisdiction over the person and subject-matter, but did not have jurisdiction to enter the particular judgment complained of, the judgment is void.

United States, Wilson, v. Walker, 109 U. S. 258, 27 L. ed. 927; *Nielsen, Petitioner*, 131 U. S. 176, 33 L. ed. 118; 12 Am. & Eng. Enc. Law, pp. 246, 1470, a; *Ponce v. Underwood*, 55 Ga. 601.

To refuse bail and imprison one entitled to bail is itself false imprisonment.

Manning v. Mitchell, 73 Ga. 663.

Mr. Leon A. Wilson for defendant in error.

Cobb, J., delivered the opinion of the court:

On June 26, 1896, Little, as mayor *pro tem.* of the town of Waresboro, tried Calhoun upon the charge of violating the following ordinance of the town: "It shall be unlawful for any person or persons to engage in fighting or riotous conduct within the corporate limits of the town of Waresboro, or resist or obstruct the marshal or any policeman while in the discharge of their official duties." The accused was convicted, and the following sentence was passed upon him: "After hearing the evidence in the above-stated case, it is ordered and adjudged by the court that the defendant be kept in the jail of the town of Waresboro for three days." It appears from the minutes of the town council that this sentence was afterwards commuted, by the officer who tried the accused, to imprisonment for one day. This sentence was passed pursuant to the following ordinance: "Any person who shall commit any or either of the offenses hereinbefore mentioned . . . shall on conviction for each offense be sentenced to pay a fine of not less than \$1 nor exceeding \$20, or imprisonment and work on the public streets not exceeding thirty days." The ordinances herein quoted were passed in 1888. The present suit is an effort on the part of Calhoun to recover damages from Little on account of the alleged illegal detention of the plaintiff in the town jail. The petition alleges that the sentence above quoted was without authority of law, and that the imprisonment of petitioner thereunder was malicious and in violation of law; that petitioner had violated no ordinance of the town; and that the conviction and sentence 43 L. R. A.

was a wilful and malicious persecution. The petition further alleges that efforts were made on the part of friends of petitioner to give bond or deposit any sum of money required to enable him to have the sentence reviewed and set aside, but that these efforts were unavailing. The defendant answered, denying that the sentence and imprisonment thereunder were malicious or without authority of law, and averred that his acts were in furtherance of law and order. The allegations in the petition as to efforts to give bond in order to have the sentence reviewed are also denied. At the trial the evidence showed that the defendant was regularly elected a member of the town council on June 22, 1896. From an extract of the minutes of the council it appears that the defendant was elected mayor *pro tem.* on July 6, 1896, but there was testimony showing that he was mayor *pro tem.* at the date of the trial of the plaintiff, for the alleged violation of the ordinance of the town. The defendant testified that no bond was ever offered him either by Calhoun or by anyone in his behalf. The jury returned a verdict for the defendant, and, plaintiff's motion for a new trial being overruled, he excepted.

1. Were the ordinances under which the plaintiff in error was convicted and sentenced to imprisonment by the defendant valid at the time of the trial? These ordinances were passed under authority of a charter granted to the town by the superior court, the provisions of which charter will be found in §§ 685-710 of the Political Code. An examination of these provisions will show that the ordinances were valid at the time of their passage. In 1891 an act was passed prohibiting the general assembly from granting charters to towns of less than 2,000 inhabitants, and conferring upon the superior courts exclusive power to grant such charters. Acts 1890-91, p. 190. This act was repealed on December 1, 1893. Acts 1893, p. 65. In the case of *Fullington v. Williams*, 98 Ga. 807, this act was held to be constitutional and valid. On December 9, 1893, a new charter was granted the town of Waresboro by the general assembly. Acts 1893, p. 335. This act has never been repealed either expressly or by implication, nor has its validity been in any way impaired. From it, therefore, the town of Waresboro must derive whatever authority it has to exercise corporate functions. This act repeals all former charters granted to the town, but provides that all ordinances then in force, and not inconsistent with its provisions, shall be valid and of force until amended or repealed by the mayor and aldermen of the town. An examination of the act will show that the ordinance which defined the offense for which Calhoun was tried is perfectly consistent with its provisions. Is the ordinance which prescribes the punishment to be inflicted upon persons convicted of offenses against the town also consistent with the provisions of the act? Section 11 of the act is as follows: "Be it further enacted, that the mayor or mayor *pro tem.* of said town shall hold a police court in said town at any time for the trial and punishment of all vio-

lators of their ordinances, by-laws, rules, and regulations of said town, the punishment inflicted not to exceed a fine of \$100, or in default of the payment of said fine and costs, by labor on the streets of said town or public works of said town not to exceed sixty days, or confinement in the common jail of the said town not to exceed sixty days." It needs no argument to show that an ordinance of the town which allows imprisonment without first giving the person convicted an opportunity to pay a fine is rendered void by this section of the act.

2. The question therefore arises: Is the defendant liable to the plaintiff in damages for inflicting a punishment upon him under a void ordinance? The court over which the defendant presided had jurisdiction of the person of the plaintiff, and jurisdiction to try and punish him for the offense with which he was charged. The defendant has only exceeded his authority in fixing the punishment. It is universally conceded that judges of courts of superior and general jurisdiction are exempt from liability in damages for judicial acts, even when such acts are in excess of their jurisdiction. This doctrine has become firmly fixed in the jurisprudence of both England and the United States. Upon its strict application depends, to a very great extent, the usefulness of courts, and the fearless and impartial administration of justice. See Broom, Com. pp. 103-106; 7 Am. & Eng. Enc. Law, p. 668; *Pratt v. Gardner*, 2 Cush. 63, 48 Am. Dec. 652; 2 Hilliard, Torts, p. 161; Cooley, Torts, pp. 472 *et seq.*; Bishop, Noncont. Law, § 781; *Randall v. Brigham*, 7 Wall. 523, 19 L. ed. 285; *Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646.

But it is said that the law affords no protection to presiding officers of inferior courts when they exceed their jurisdiction. *Piper v. Pearson*, 2 Gray, 120, 61 Am. Dec. 438; *Vanderpool v. State*, 34 Ark. 174; *Tracy v. Williams*, 4 Conn. 107, 10 Am. Dec. 102; 7 Am. & Eng. Enc. Law, p. 669. Judge Cooley, after stating that there is a distinction as to liability for judicial acts between judges of courts of general and those of limited jurisdiction, gives as the reasons for this distinction the following: "The inferior judicial officer is not excused for exceeding his jurisdiction because, a limited authority only having been conferred upon him, he best observes the spirit of the law by solving all questions of doubt against his jurisdiction. If he errs in this direction, no harm is done, because he can always be set right by the court having appellate authority over him, and he can have no occasion to take hazards so long as his decision is subject to review. The rule of law, therefore, which compels him to keep within his jurisdiction at his peril, cannot be unjust to him, because, by declining to exercise any questionable authority, he can always keep within safe bounds, and will violate no duty in doing so. Moreover, in doing so he keeps within the presumptions of law, for these are always against the rightfulness of any authority in an inferior court which, under the law, appears doubtful." Cooley, Torts, 43 L. R. A.

p. 491. We are unable to appreciate the force of the reasons embodied in the above quotation, which contains all the arguments we have been able to find in favor of the distinction. On the other hand, we quite agree with the supreme court of Iowa when it says, in *Thompson v. Jackson* (Iowa) 27 L. R. A. 92, 95 (93 Iowa, 376) that, "after an exhaustive examination of the cases which make this distinction, we have to say that we do not think they are founded upon grounds which can be sustained by any logical or reasonable argument." In the case just referred to, it was held that "a justice of the peace, like judges of the superior courts, is protected from personal liability for judicial acts in excess of his jurisdiction, if he acted in good faith, believing he had jurisdiction." Mr. Bishop, in his work on Noncont. Law (§ 783), commenting upon this distinction, says: "But, in reason, if judges properly expected to be the most learned can plead official exemption for their blunderings in the law, *a fortiori* those from whom less is to be expected, and who receive less pay, should not be compelled to respond in damages to their mistakes honestly made after due carefulness." And this, we think, is a complete answer to all of the reasons given why such distinction exists. In *Bell v. McKinney*, 63 Miss. 187, it was held that where a magistrate had authority to require a person brought before him to give bond to appear at the circuit court, but under an erroneous judgment as to the extent of his authority, and in good faith, tried such person, and upon his conviction sentenced him to pay a fine or be imprisoned, the magistrate was not liable in damages to the person aggrieved. In the case of *Henke v. McCord*, 55 Iowa, 378, the facts were almost identical with those in the present case. It was there held that "a justice of the peace who enforces an ordinance which is void for want of power in the city to enact it cannot be held liable therefor in a civil action." The distinction between the liability of presiding officers of inferior and those of superior courts is mentioned, but it was not necessary to decide whether or not the distinction was rational. We have seen, however, that this same court, in a more recent case, declared in very vigorous terms that the distinction was utterly illogical. In *Brooks v. Mangan*, 86 Mich. 576, it was held that a justice of the peace, who, in the exercise of his honest judgment, holds an unconstitutional ordinance constitutional, is not liable for such an error of judgment. In the opinion, Grant, J., uses this language: "These inferior tribunals should be left to the exercise of their honest judgment, and, when they have so exercised it, they are exempt from civil liability for errors." In *Clark v. Holdridge*, 58 Barb. 61, it was held that a justice of the peace who inflicted a larger fine than the law required would be protected by the principle of judicial irresponsibility. See also *McCall v. Cohen*, 16 S. C. 445, 42 Am. Rep. 641; *Scott v. Fishblate*, 117 N. C. 265, 30 L. R. A. 696; *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80; *Austin v. Vrooman*, 128 N. Y. 229, 14 L. R. A. 138.

These decisions settle, we think, beyond doubt, that no good reason exists in law why presiding officers of inferior courts should not be measured by the same rules with respect to liability for their judicial acts as judges of courts of general jurisdiction. We must not be understood, however, as ruling that these officers have immunity from civil liability in all cases. As was said in *Bradley v. Fisher*, 13 Wall. 335, 352, 20 L. ed. 646, 651. "Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible." But all judicial officers stand on the same footing, and must be governed by the same rules. It follows from what has been said that where the court has jurisdiction of the subject-matter of the offense, and the presiding officer erroneously decides that the court has jurisdiction of the person committing it, or commits an act in excess of his jurisdiction, he will not be liable in a civil action for damages. But, where there is a clear absence of jurisdiction over the subject-matter, the officer will be liable for exercising it, provided such want of jurisdiction is known to him. There is nothing in § 3852 of the Civil Code to conflict with the ruling made in the present case. That section is as follows: "If the imprisonment is by virtue of a warrant, neither the party bona fide suing out, nor the officer who in good faith executes the same, is guilty of false imprisonment, though the warrant be defective in form, or be void for want of jurisdiction. In such cases the good faith must be determined from the circumstances of each case. The same is true of the judicial officer issuing the warrant, the presumption being always against him as to good faith, when he has no jurisdiction." The section seems to provide that a judicial officer who in bad faith issues either a defective or a void warrant will be liable in an action for false imprisonment, at the instance of the person imprisoned thereunder. It is, however, limited by its very terms, not only to an act done out of court, but one which, though to some extent judicial, is largely ministerial in its nature; and in no event can it have any application to the acts of a judicial officer while presiding in court, and, as a court, in passing upon a question involving the jurisdiction of this court, and which he is bound to decide.

In the present case, the court over which the defendant in error presided had jurisdiction of the subject-matter of the offense, and of the person of the plaintiff in error. The sentence was passed pursuant to a void ordinance, it is true; but on the defendant in error, in the first instance, was cast the duty of determining whether or not this ordinance was valid. Acting in a judicial capacity, he, in effect, decided that the ordinance was valid. True, the question was not directly made before him, but he necessarily held it to be valid, because this was the only source from which he could derive his authority. 43 L. R. A.

To hold that he was liable in a civil action for damages for erroneously deciding that this ordinance was valid would be, in effect, to hold that the law makes it the duty of an officer to decide a question, and then punish him for not deciding it correctly. The law never does this. The presiding officer of a court clothed with authority to decide questions of law which may come before it will be protected in the exercise of this authority, however erroneous the decision might be. It is far better for a few innocent persons to suffer than for the ends of justice to be thus hampered.

3. It is contended, however, by counsel for the plaintiff in error, that § 752 of the Political Code makes a different rule applicable to the defendant in error. That section is as follows: "Members of the council and other officers of a municipal corporation are personally liable to one who sustains special damages as the result of any official acts of such officer, if done oppressively, maliciously, corruptly, or without authority of law." By reference to the margin of the page on which this section appears, it will be seen that it is codified from a decision of this court. Unless the language of the section imperatively requires a different construction, it will be presumed that the general assembly, in adopting it, intended merely to adopt the principle of law announced in the decision from which it is taken. See, in this connection, *Sutherland*, Stat. Constr. § 300. The decision from which the section is codified is *Pruden v. Love*, 67 Ga. 190. In that case it appears that the town council, at a meeting appointed for that purpose, and of which the plaintiff (Love) had no notice, condemned as a nuisance the house of the plaintiff, and had it torn down, without giving him a hearing. The court held that for this act the members of the town council were personally liable in damages to the owner of the building. Chief Justice Jackson, in the opinion, says: "Whilst, therefore, we hold, with the judge below, that the mayor and council could not be held personally liable unless they acted either maliciously, corruptly, oppressively, or without authority of law, yet we agree with him, too, in the opinion, evinced by his denial of a new trial, that there is sufficient evidence to uphold a verdict that they did act without complying substantially with the law in a most essential element of a fair trial,—notice of time and place,—and thereby acted so as to oppress the defendant in error." The mayor and council in that case were not a court, and were not held liable because, when sitting as a court, they made an erroneous decision. The section of the Code, it will be noticed, uses the expression "official acts," and can have no application to a member of a town council when presiding as a judge over the police court of the town.

4. It is not necessary to express any opinion as to whether or not the defendant in error would have been liable for a refusal to accept a valid bond tendered by the plaintiff

in error for the purpose of having the decision reviewed, as the evidence on this point was conflicting, and no ruling of the trial judge on this point was excepted to. Under the views above expressed, if any errors were

committed by the presiding judge in charging the jury, such errors were immaterial. Judgment affirmed.

All the Justices concur.

OREGON SUPREME COURT.

Waldemar SETON, *Respt.*,
v.

Ralph W. HOYT, Treasurer of Multnomah County, *Appt.*

(.....Or.....)

1. A county is but an arm or agent of the state, which cannot be required to pay interest except when self-imposed.
2. County warrants indorsed "Not paid for want of funds," upon which, by Hill's Anno. Laws, § 2465, interest is payable at the legal rate, are thereby made contracts on which the rate of interest cannot be decreased by subsequent statute.

(January 16, 1899.)

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County, Department 2, in favor of plaintiff in a mandamus proceeding to compel payment of interest on county indebtedness at the rate which existed before the passage of a statute reducing the general interest rate. Affirmed.

The facts are stated in the opinion.

Messrs. R. R. Giltner and Russell A. Sewall for appellant.

Mr. W. A. Cleland, for respondent:

The warrants are a legal and valid claim against Multnomah county. They become non-negotiable promissory notes or contracts of Multnomah county.

Frankl v. Bailey, 31 Or. 285.

Where the right to interest is based upon contract either expressed or implied, if allowed by the statute then in force, it cannot be impaired by subsequent legislation declaring their true intent and meaning. Such legislation can only apply to future transactions.

Koshkonong v. Burton, 104 U. S. 668, 26 L. ed. 886.

The Constitution makes no distinction between express and implied contracts.

Edwards v. Kearzey, 96 U. S. 600, 24 L. ed. 796; *Effinger v. Kenney*, 115 U. S. 566, 29 L. ed. 495; *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587.

A warrant is a contract to pay money, and the legal rate in effect at the time enters into the contract as a part thereof, and cannot be affected by a subsequent law reducing the rate.

Union Sav. Bank & T. Co. v. Gelbach, 8 Wash. 497, 24 L. R. A. 359; *State, Theis, v. Bowen*, 11 Wash. 432; *Dill. Mun. Corp. §§ 485-487*; *Dan. Neg. Inst. §§ 427-430*.

NOTE.—For a similar case, see *Union Sav. Bank & T. Co. v. Gelbach* (Wash.) 24 L. R. A. 359.
43 L. R. A.

Where an ordinance provides for interest on warrants upon which payment has been refused by reason of want of funds, the liability of the city is not affected by the repeal of the ordinance.

Scranton v. Hyde Park Gas Co. 102 Pa. 382.

The law existing when a contract is made is a part of it.

First Nat. Bank v. Arthur, 10 Colo. App. 283.

A statute should not receive such a construction as to make it impair existing rights, create new obligations, or impose new duties in respect of past transactions, unless such plainly appears to be the intention of the legislature.

Sutherland, Stat. Constr. § 464; *Green v. Anderson*, 39 Miss. 359; *Crigler v. Alexander*, 33 Gratt. 674; *Campbell v. Nonpareil Fire-Brick & Kaolin Co.* 75 Va. 291; *Moon v. Durden*, 2 Exch. 22; *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291; *Wood v. Oakley*, 11 Paige, 400; *Johnson v. Burrell*, 2 Hill, 238; *Butler v. Palmer*, 1 Hill, 324; *Snyder v. Snyder*, 3 Barb. 621; *Hackley v. Sprague*, 10 Wend. 114; *McMannis v. Butler*, 49 Barb. 176; *Re Protestant Episcopal Public School*, 58 Barb. 161.

Upon a contract which stipulates for interest at the agreed rate, or, in the absence of an agreed rate, the rate prescribed by law at the date of the contract will be the rate recoverable until the payment of the principal sum.

Spencer v. Masfield, 16 Wis. 179.

A judgment with interest at the legal rate affirmed by the supreme court is not affected by subsequent legislation reducing the legal rate of interest, unless the statute so declares.

Missouri P. R. Co. v. Patton (Tex. Civ. App.) 35 S. W. 477; *Butler v. Rockwell*, 17 Colo. 290, 17 L. R. A. 611.

Laws should be construed prospectively and not retrospectively, unless the intention clearly appears from the statute.

Bauer Grocery Co. v. Zelle, 172 Ill. 407; *Guard, Robinson, v. Rowan*, 3 Ill. 499; *Marsh v. Chestnut*, 14 Ill. 223; *Deininger v. McConnel*, 41 Ill. 227; *Russell & A. Drainage Dist. v. Benson*, 125 Ill. 490.

Wolverton, Ch. J., delivered the opinion of the court:

This is a proceeding by mandamus, the purpose of which is to determine whether the act of October 14, 1898, reducing the legal rate of interest, is operative upon interest-bearing county warrants issued prior to its passage, so as to limit the interest there-

on to the present rate from and after said date. The act alluded to changes the prescribed rate of interest from 8 to 6 per centum on all moneys after the same become due; on judgments and decrees for the payment of money; on money received to the use of another, and retained beyond a reasonable time without the owner's consent, express or implied, or on money due upon the settlement of matured accounts from the day the balance is ascertained; on money due or to become due, where there is a contract to pay interest, and no rate specified. It contains an emergency clause reciting "that inasmuch as the counties of the state are paying interest on their county warrants at the rate of eight per cent per annum, thereby imposing a useless burden upon the taxpayers, this act shall become a law upon receiving the signature of the governor." Section 3587, Hill's Anno. Laws, Or., of which this act is amendatory, is an amendment of § 1 of "An Act to Regulate the Rate of Interest on Money and to Prevent and Punish Usury," approved October 16, 1862. Or. Sess. Laws 1862, p. 115. The original act contained a provision (§ 6) which has been continued in force until the present day (Hill's Anno. Laws (Or.) § 3592) to the effect that it shall not be construed so as to affect or change the rate of interest to be received by virtue of any contract entered into prior to its becoming a law. Section 2465, Hill's Anno. Laws (Or.) as amended (see Sess. Laws 1893, p. 59), relating to the duties of the county treasurer, provides, among other things, that "he shall pay all orders of the county clerk when presented, if there be money in the treasury for that purpose, and write on the face of such order the date of redemption and his signature. If there be no funds to pay such order when presented, he shall indorse thereon 'Not paid for want of funds,' and the date of such presentment, over his signature, which shall entitle such order thenceforth to draw legal interest, provided that such interest shall cease from the date of notice by publication," etc. By § 2467 county orders are redeemable by the county treasurer according to the time of presentment, but it is further provided that such orders as are payable out of the county revenue shall be received in payment of county taxes without regard to priority of presentment, but that the treasurer shall not pay any balance thereon over and above such tax, when there are outstanding orders unpaid for want of funds. These are the only provisions of the statute which have any bearing upon the case in hand.

Defendant's theory touching the controversy embodies three principal contentions: First, that the county is but an arm or agent of the state, and that the sovereign is not required to pay interest, except when self-imposed; second, that a county order is not a contract between the county and the holder; and, third, that interest, when demandable under the statute, except when due upon an express contract for its payment, is in the nature of a penalty or damages for the detention of money due and unpaid, and, therefore, that it constitutes a part of the remedy

in the enforcement of the demand, which may be modified, or even repealed altogether, by subsequent legislation, without impairment of any contractual relations. In our view of the case, we do not conceive the second proposition to be important or essential to the determination of the cause. As to the first, we are in accord with the contention of counsel, but as to the last we cannot give it our approval. There is some conflict in the authorities upon the question whether a sovereign state is required to pay interest unless self-imposed, but the weight thereof seems to support the contention that it is not. The Supreme Court of the United States has adopted the rule that interest is not allowable on claims against the government, whether they originate in contract or tort, or arise in the ordinary business of administration, or under private acts for relief, passed by Congress on special application. But it recognizes the existence of two well-established exceptions,—one wherein the government has stipulated to pay interest, and the other where interest is given by act of Congress either expressly as such, or under the name of damages. *United States, Angarica, v. Bayard*, 127 U. S. 251, 32 L. ed. 159. In a subsequent case *United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 336, Mr. Justice Gray says: "Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money, or of property, or of compensation, to which the plaintiff is entitled; and, as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers." The rule applies as well to a sovereign state as to the national government. Nor is the state within the purview of a general law regulating the rate of interest upon money due or to become due, and this goes upon the ground that a sovereign is not bound by the words of a statute unless it is expressly named. *State, Parrott, v. Ohio Public Works*, 36 Ohio St. 409; *Carr v. State, Coetquet*, 127 Ind. 204, 11 L. R. A. 370; *Atty. Gen. v. Cape Fear Nav. Co.* 37 N. C. (2 Ired. Eq.) 444; *Bledsoe v. State*, 64 N. C. 392; *Mt. Morris v. Williams*, 38 Ill. App. 401; *Madison County v. Bartlett*, 2 Ill. 67.

That the county is but the agent or instrumentality of the state, constituted and employed essentially for the promotion of its general government, and therefore subject to like rules and restrictions governing its liabilities as the state, there can be no controversy. 1 Dill. Mun. Corp. § 23. We take it, therefore, that a county is not liable for the payment of interest under the general provisions of the statute regulating the rate upon the demands enumerated in said § 3587, as an individual would be where there is no contract to pay interest. As a general rule, it may be conceded that where the demand falls within the purview of the statute, and by reason thereof is subject to an interest charge at the legal rate, the rate upon the demand will vary as the law fixing it may

be changed or varied by the legislature during the life of the demand. The reason of the rule is that the person from whom the money is retained or withheld is entitled to an indemnity for the loss which he sustains on account of being deprived of its use, and it is assumed that the legal rate of interest for the time of the withholding is a fair measure of damages by which to determine such loss, in the absence of any other method of arriving at the exact or precise loss actually incurred. *State v. Guenther*, 87 Wis. 673; *Wilson v. Cobb*, 31 N. J. Eq. 91; *White v. Lyons*, 42 Cal. 279; *Jersey City v. O'Callaghan*, 41 N. J. L. 349.

Where there is an agreement to pay interest upon an obligation at a stipulated rate to a day certain,—as, for instance, at maturity,—and there is no engagement touching the rate the obligation shall subsequently bear, the authorities are in hopeless conflict as regards the rate of interest recoverable upon the deferred payment. They divide accordingly as it has become the settled policy of the courts touching the nature of the indemnity recoverable for the detention of the money beyond the day upon which it has fallen due and payable. Upon the one hand, it is held that such indemnity is purely a matter of damages, not in the least referable to the contract, although for breach thereof; and that the proper and appropriate measure of such damages is the rate of interest which the law has prescribed. Upon the other, it is considered that, while the indemnity is recoverable as damages, yet that the rate of interest which should be allowed is rather to be implied from the terms of the contract touching it prior to the maturity of the obligation. The idea is clearly expressed by Lord Selborne in *Cook v. Fowler*, L. R. 7 H. L. 27. He says: "Although in cases of this class interest for the delay of payment *post diem* ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted, in an ordinary case of this kind, by a court or jury, as a proper measure of damages for the subsequent delay; but that is because, ordinarily, a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might be the duration of the loan, has been agreed to." *Price v. Great Western R. Co.* 16 Mees. & W. 244; *Morgan v. Jones*, 8 Exch. 620; *Keene v. Keene*, 3 C. B. N. S. 144,—support this principle. Mr. Justice Gray, while chief justice of the supreme court of Massachusetts, by a most exhaustive and learned opinion, in which he has collated and reviewed all the authorities pro and con, came to the conclusion expressed by the following language: "When a written agreement is made, as authorized by the statute, to pay a greater rate of interest yearly than 6 per cent the intention of the contract and the effect of the statute appear to us to be that the creditor shall receive the stipulated rate of interest so long as the debtor has the use of the principal; and that, in an action upon the contract, the creditor shall recover interest at that rate, 43 L. R. A.

not merely until the time when the principal is agreed to be paid to him, but until it is actually paid, or his claim for principal and interest judicially established." Later he denotes the principle upon which it rests. He says: "The interest after the breach of the contract, though not strictly recoverable as part of the debt, but rather as damages, is ordinarily to be measured, according to the intention manifested by the contract, by the standard thereby established." *Union Inst. for Sav. v. Boston*, 129 Mass. 82, 37 Am. Rep. 305. See also *Brannon v. Hursell*, 112 Mass. 63. Although the Supreme Court of the United States is committed to the other view, yet it is there held that the question is one of local law. Mr. Justice Field, in *Cromwell v. Sac County*, 96 U. S. 51, 24 L. ed. 681, after holding, in accord with the Iowa courts, that contracts drawing a specified rate of interest before maturity draw the same rate afterwards, and citing other authorities in support of the rule, says: "There are, however, conflicting decisions; but the preponderance of opinion is in favor of the doctrine that the stipulated rate of interest attends the contract until it is merged in the judgment." Without further citation of authorities, we may say that the later tendency of the courts is in favor of the rule as announced in *Union Inst. for Sav. v. Boston*, 129 Mass. 82, 37 Am. Rep. 305. *Shaw v. Rigby*, 84 Ind. 375, 43 Am. Rep. 96, and it is the one which appeals most strongly to our judgment. In consonance with this view it is said in *State v. Guenther*, 87 Wis. 673, that "on a contract which stipulates for interest, interest at the agreed rate, or, in the absence of an agreed rate, at the rate prescribed by the law at the date of the contract, will be the rate recoverable until the repayment of the principal sum. A change of the legal rate would not affect the rate of interest recoverable upon such a contract,"—citing *Spencer v. Masfield*, 16 Wis. 179. So it was held in *Pruyn v. Milwaukee*, 18 Wis. 368, that city bonds conditioned for the payment of the principal at a specified day, with interest above the legal rate, continued to draw the stipulated rate after maturity. And Earl, J., in *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64, states the rule to be that "where one contracts to pay money on demand 'with interest,' or to pay money generally 'with interest' without specifying time of payment, the statutory rate then existing becomes the contract, and must govern until payment, or at least until demand and actual default, as the parties must have so intended." In support of this proposition, see also *Paine v. Caswell*, 68 Me. 80, 28 Am. Rep. 21.

With this discussion of the rules of law that obtain relating to the recovery of interest upon agreements for its payment, we are now prepared to consider the effect of the county treasurer's indorsement, "Not paid for want of funds," upon a county order or warrant under the law which requires payment of interest thereon after such indorsement at the legal rate. It is contended by counsel for the plaintiff, contrary to defendant's position, that the order or warrant is

itself a contract; but with this we have little concern. It is sufficient if the obligation which the law imposes upon the county, where the parties have dealt with it upon the faith of such obligation, constitutes a contract for the payment of the legal rate of interest obtaining at the time of the indorsement. The order or warrant itself has at least the force of an audited demand against the county, and prima facie will support an action which may be instituted upon it to establish the same by judgment. *Goldsmith v. Baker City*, 31 Or. 249. People deal with the county upon the understanding that under the law their audited demands, evidenced by orders received from the clerk, will be paid on presentation to the treasurer, or, in case of lack of funds, indorsed so as to entitle them thenceforth to draw interest at the legal rate. They must also understand that the indorsed orders can only be redeemed by the county treasurer according to the priority of their presentment and indorsement. And thus it is that the time for payment is, from the nature of things, indefinite, depending entirely upon the state of the county treasury. This understanding the supreme court of Nebraska has characterized as an implied agreement on the part of the person dealing with the county that he shall wait until money is made available by the ordinary mode of collecting revenues, and in the usual course of the county's business. *Brewer v. Otoe County*, 1 Neb. 373. This case is cited as authoritative in *Chapman v. Douglas County*, 107 U. S. 348, 27 L. ed. 378. Now, if there is an implied agreement on the part of the holder of the warrant to abide the accumulation of funds in the ordinary course with which to meet the demand, the converse ought to be, and undoubtedly is, true, that there is an implied, if not an express, agreement, engendered by operation of law and the transaction of public business, which must be in conformity with its requirements, that the county will pay the legal rate of interest upon the indorsed county order. So that here is, in effect, an agreement or contract upon the part of the county to pay the legal rate of interest. But it is argued, admitting a contract to exist to this extent, that the agreement is to pay only the legal rate as it may be established from time to time by the legislature, and that the contract was made with reference to the variable rate, and not solely with reference to that which prevailed at the date of the indorsement. In this we cannot concur, for, if we apply the general rule of law that where a person contracts for the payment of a definite rate of interest to a day certain, or contracts for the payment of interest without naming the rate, that interest is recoverable in the one instance at the agreed rate after the day named, and in the other at the legal rate until judgment, we have a clear case of the right of the holder of the indorsed order or warrant to recover from the county interest at the rate prevailing at the date of the indorsement to the time of its payment by the treasurer; and such we believe to be the law governing the

transaction. It is well understood that the county cannot be coerced into making payment, and the warrant holder, although he may sue upon his warrant, and obtain judgment against the county, which would entitle him to another order or warrant in lieu of the judgment, yet he must abide his time, and await the accumulation of funds whereby to discharge the obligation in accordance with his implied agreement. And it would be unjust and inequitable if the other party to the contract, being an agency of the state, could, through the legislature, abolish or reduce interest to a nominal rate, and thus leave the party remediless for the recovery of any compensation for loss sustained by reason of delayed payment of his demand. The constitutional provision against the impairment of contracts is not limited in its scope and purpose to express contracts and specific agreements, but extends as well to "that much larger class," says Mr. Justice Miller in *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587, "in which one party having delivered property, paid money, rendered service, or suffered loss at the request or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the state than that arising on a promissory note." See also 2 Story, Const. § 1377. Even in the absence of a constitutional inhibition to a retrospective operation of legislative enactments, it is a general rule that a statute was intended to operate prospectively only, unless a purpose to give it a retrospective force is declared by clear and positive command, or is to be inferred by necessary and unavoidable implication from the language of the act, taken in its appropriate signification, and construed in connection with the subject-matter and the occasion of the enactment, admitting of no reasonable doubt, but precluding all question as to such intention. Endlich, *Interpretation of Statutes*, § 271; *Lesseps v. Wicks*, 12 La. Ann. 739; *People, Withersbee, v. Essex County Supers.* 70 N. Y. 228; *Chew Heong v. United States*, 112 U. S. 536, 28 L. ed. 770; *Bay v. Gage*, 36 Barb. 447; *Bauer Grocer Co. v. Zelle*, 172 Ill. 407. Nor does the emergency clause inserted in the amendatory act indicate an intention upon the part of the legislature to extend its regulations to outstanding county orders or warrants, but, when considered in a prospective sense, under the rule which governs unless the intention otherwise clearly appears, the construction of the act in question is obvious, and its application clear. In *Koshkonong v. Burton*, 104 U. S. 668, 28 L. ed. 886, the question was involved whether the holders of certain municipal bonds were entitled to interest upon coupons thereto attached, after their maturity, they not having been paid at the date stipulated therefor. It appears that the state courts of Wisconsin had construed the statute in force at the time of the issuance of such bonds as in harmony with the allowance of such interest. Thereafter the legislature, by direct enactment,

attempted to place the opposite construction upon such statute, but it was held that the later enactment impaired the implied obligation of the municipality to pay interest upon interest as the law stood under the construction of the state courts, and that such interest was recoverable notwithstanding the latter act. *Union Sav. Bank & Trust Co. v. Gelbach*, 8 Wash. 497, 24 L. R. A. 359, is parallel with the case at bar, and it was there held, but upon reasoning different from that which seems to us to be more in harmony with the legal conditions which prevail and surround the transaction, that a change in the legal rate of interest by legislative enactment did not affect the rate theretofore payable upon warrants issued prior to the date when the new enactment became operative. This case was followed in *Williams v. Shoudy*, 12 Wash. 362, wherein it is said: "The right of the holder of a warrant legally issued to interest (after proper presentment and indorsement made) is as fixed and certain in law as the right to demand payment of the principal." See also *State, Theis, v. Bowen*, 11 Wash. 432; *Scranton v. Hyde Park Gas Co.* 102 Pa. 382; *Missouri P. R. Co. v. Patton* (Tex. Civ. App.) 35 S. W. 477; *First Nat. Bank v. Arthur*, 10 Colo. App. 283;

Butler v. Rockwell, 17 Colo. 290, 17 L. R. A. 611; *Murdock v. Franklin Insurance Co.* 33 W. Va. 407, 7 L. R. A. 572; *Marks v. Purdue University*, 37 Ind. 155. Upon these principles and authorities we are constrained to affirm the judgment of the court below. We have reached the conclusion after much deliberation, and believe it to be in harmony with justice and fair dealing. The other view would lead, under the system adopted for the transaction of county business and the manner of payment of the orders or warrants of the county, to a practical repudiation of a material portion of the county's obligations. In the present case the county has become obligated by positive enactment to pay the legal rate. Parties have dealt with it upon that understanding, and when claims duly audited, which have accrued in course of business transactions with the county, are presented, and indorsed, "Not paid for want of funds," the law reads into the transaction a contract to pay interest thenceforth upon the warrant, and the measure of recovery for delay in payment is the then existing rate of interest until paid, and subsequent legislation cannot affect or impair the obligation.

Affirmed.

GEORGIA SUPREME COURT.

J. B. CLEVELAND, Receiver of Charleston & Western Carolina Railroad Company,
Plff. in Err.,

v.

CITY COUNCIL OF AUGUSTA.

(102 Ga. 233.)

*A railroad corporation, which, under its charter, constructs its tracks across an existing public highway or street of a city, does so on the implied condition that it will yield to the reasonable burdens imposed by the growth and development of the country or the city, and, where the public welfare demands a change of the grade of the highway or street, the railroad company must, at its own expense, make such alteration in the grade of its crossing as will conform to the new grade.

(August 10, 1897.)

ERROR to the Superior Court for Richmond County to review a judgment in favor of defendant in a proceeding to determine who should bear the expense of raising railroad tracks to conform to the grade of a city street after the grade had been changed by the common council. *Affirmed.*

The facts are stated in the opinion.

Messrs. S. J. Simpson and Ganahl & Ganahl for plaintiff in error.

*Headnote by LITTLE, J.

NOTE.—As to the liability of a railroad company for the cost of changing the grade of a street on abolishing grade crossings, see note to *Kelly v. Minneapolis* (Minn.) 26 L. R. A. 92. 43 L. R. A.

Messrs. M. P. Carroll, J. S. Davidson, and W. T. Davidson, for defendant in error:

When the city limits were extended, all territory became subject to taxation, and to all the legal jurisdictional rights of the city.

1 Dill. Mun. Corp. § 126, and note.

The raising of the grade on either side of the street was an incident connected with the work, which the railroad was bound to do at its own expense.

Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309; *Illinois C. R. Co. v. Chicago*, 141 Ill. 586, 17 L. R. A. 530.

Little, J., delivered the opinion of the court:

The railroad company, in the construction of its line of railroad, in the year 1880, laid its track across a public highway outside of, but near, the then corporate limits of the city of Augusta. In 1882 the corporate limits of Augusta were, by legislative authority, so extended as to include the area over which said track crossed the highway. In 1893 the city undertook a public improvement for the purpose of protecting the city from overflows of the Savannah river, and determined during the course of such improvement to raise the level of the highway or street at the point where it was crossed or intersected by the railroad track, inasmuch as said street was alleged to be low, and below a proper grade, causing in times of an even ordinary high river the street at that

point to become flooded, and to be impassable, cutting off the western portion of the city over that street entirely, said street being the main thoroughfare to reach the manufacturing industries, and what is known as "Harrisburg" and "West End." In pursuance of its plans, the city constructed an iron bridge on the street across a certain canal at a point about 100 yards east of the point where the railroad intersected the street, and then proceeded to raise the grade of the street west of said bridge, and, after it had thus raised the grade on either side of the railroad crossing, notified the receiver of the railroad company, hereafter referred to as the "Railroad Company," to raise the grade of the railroad track. The railroad company claimed that it did not, at the time, have the necessary money to raise the grade of said road, and also denied liability to pay the expense thereof. An agreement was then entered into, whereby the railroad company was to have the work done, the city to pay the expenses, and the question of liability to be submitted to and determined by the courts. It appears that the raising of the grade of the railroad track where it intersected the highway involved an elevation of the track several feet for several hundred yards on either side of the approaches to said street.

The authority of the city to make the improvement of the street is conceded. The sole question presented is, Is the railroad company entitled to damages by way of compensation for so elevating its track and right of way as to conform to the new grade? At common law the rule is that, where a highway is made across another one already in use, the crossing must not only be made with as little injury as possible to the old way, but whatever structures may be necessary to the convenience and safety of the crossing must be erected and maintained by the person or corporation constructing and using the new way. *Dyer County v. Chesapeake, O. & S. W. R. Co.* 87 Tenn. 712; *Northern C. R. Co. v. Baltimore*, 46 Md. 445; *Eyer v. Alleghany County Comrs.* 49 Md. 269, 33 Am. Rep. 249; *People, Bloomington, v. Chicago & A. R. Co.* 67 Ill. 118; *Dygert v. Schenck*, 23 Wend. 446; 1 Thomp. Neg. pp. 328, 343; *Louieville & N. R. Co. v. State*, 3 Head, 523.

In most of the American states, however, this common-law rule, so far as applicable to railroads and like companies, has been abrogated and superseded by special statutes. The adjudications upon the relative rights of railroads and the public are in harmony in applying the common-law rule—declared as well by statute—that when the railroad constructs its track across a highway or street it must make and maintain suitable crossings. They are largely in harmony, too, in holding that when highways are laid out across a railroad it is the duty of the owner of the latter to construct proper crossings, but they are in conflict on the question as to whether such owners are entitled to damages by way of compensation for making such crossings, as well as to the measure of such damages in the respective jurisdictions 43 L. R. A.

where the right of the railroad to damages is recognized. Prior to the decision of the case of *Old Colony & F. R. R. Co. v. Plymouth County*, 14 Gray, 155, it had never been judicially determined that a railroad corporation which has, in the ordinary course of business, under an act of incorporation, built a road, and had it in full operation, could recover damages for injuries occasioned by laying out public highways over it. In this case Chief Justice Shaw said that such a corporation is entitled to damages for land taken by the laying out of the public highway across its railroad, subject to its use for such road, and for the expense of erecting and maintaining railroad signs and cattle guards at the crossing, and of flooring the same, and of keeping it in repair, or for any increased liability from accident for the increased expense of ringing the bell, or for its liability to be ordered by the county commissioners to build a bridge for the highway over its track. In *Illinois C. R. Co. v. Bloomington*, 76 Ill. 447, it was held that "corporations, when brought into existence, except so far as may be otherwise provided in their charters, or the general laws which enter into their charters, become liable to perform all the duties to the public that may be required of natural persons to the extent that they are capable of their performance, and they are entitled to protection in their rights to the same extent as natural persons"; and that "where, long after the construction of a railroad, a street was extended so as to cross the same, and the city passed an ordinance requiring the railway company to make a safe and proper crossing by grading the approaches of the street at the crossing, there being nothing in the charter of the company imposing such duty, or any such duty imposed by any general law in force at the time the company was created; held, that the company was not liable to this new burden any further than might have been required of an individual, and that, as the whole burden was sought to be placed upon the company without regard to benefits, the ordinance was in violation of the Constitution, and could not create any liability upon the company, and that the legislature itself could not impose such burden without making compensation." In *Miller v. New York & N. R. Co.* 21 Barb. 513, it was held that the legislature could not, under the usual reservation to the legislature, in the charter of a railroad company, of the power to alter, modify, or repeal it, pass a subsequent act requiring the railroad company to cause a proposed new street or highway, laid out by the commissioners of highways, to be taken across their track, and to cause all necessary embankments, excavations, and other work to be done on their road for that purpose, at their own expense. This case, however, was subsequently overruled in *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345, hereafter referred to. In *State, St. Paul, M. & M. R. Co., v. Hennepin County Dist. Ct.* 42 Minn. 247, 7 L. R. A. 121, it was held that upon the laying out of a public highway across the track and

right of way of a railroad company the latter is not entitled to compensation for providing and maintaining cattle guards and sign boards at the new crossing, such requirements being a legitimate exercise of the police power of the state; but it was further held that it was entitled to compensation for planking the roadway where it crosses the railroad tracks, and for the maintenance of the planking. In *Massachusetts C. R. Co. v. Boston, C. & F. R. Co.* 121 Mass. 126, it is said: "A railroad corporation across whose road another railroad or highway is laid out has the like right as all individuals or bodies politic and corporate owning lands or easements to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures upon the land or changes in its surface absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accommodate its own land to the new condition." And in Massachusetts and Maine it was ruled that the company was entitled to recover for lands taken by the laying out of the highway subject to use for railroad purposes. *State, Lancaster County, v. Chicago, B. & Q. R. Co.* 29 Neb. 412.

The various cases allowing compensation, together with the varying measures of damages laid down, may be found in the following reports: *State, St. Paul, M. & M. R. Co., v. Hennepin County Dist. Ct.* 7 L. R. A. 121, and note (42 Minn. 247); *Portland & E. R. Co. v. Deering*, 23 Am. & Eng. R. Cas. 51, and note (78 Me. 61, 57 Am. Rep. 784); *Boston & M. R. Co. v. York County Comrs.* 79 Me. 386; *Detroit Parks & B. Comrs. v. Detroit, G. H. & M. R. Co.* 93 Mich. 58; *Kansas C. R. Co. v. Jackson County Comrs.* 45 Kan. 716; *Chicago, K. & W. R. Co. v. Chautauqua County Comrs.* 49 Kan. 763; *Chicago & G. T. R. Co. v. Hough*, 61 Mich. 507; *Kansas City v. Kansas City Belt R. Co.* 102 Mo. 633, 10 L. R. A. 851; *Boston & A. R. Co. v. Cambridge*, 159 Mass. 283.

On the other hand, in *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345, the court overruling the decision in *Miller v. New York & E. R. Co.* 21 Barb. 513, held: "Nor is there anything unlawful in obliging the railroad company to make the necessary excavations or embankments for taking the highway across the railroad. The disturbance of the surface of the ground, which has rendered such work necessary, was effected by the railroad itself; and the reservation of legislative authority we may suppose to have been inserted for the purpose of obliging the companies to conform to such directions as subsequent legislatures should discover to be necessary for the public good, or which should be required by public policy. The difficulties which arose out of the rule that the grant of corporate power for individual emolument created a contract between the corporators and the state, led to the reservation referred to, and this case presents a strong illustration of the wisdom of the legislative policy." The statute under which this decision was made expressly authorized

the laying out of highways across the tracks of railroads without compensation. In the supreme court of Illinois it was held: "Under a statute requiring railroad companies to maintain and construct crossings and approaches at public highways a railroad is bound to construct and maintain a crossing where a street is laid out across its track, without compensation for the expense of such construction and maintenance." *Chicago & N. W. R. Co. v. Chicago*, 50 Am. & Eng. R. Cas. 150 [140 Ill. 309], in line with which are the following cases: *Boston & M. R. Co. v. York County Comrs.* 79 Me. 386; *State, New York & L. B. R. Co., v. Drummond*, 46 N. J. L. 644, 20 Am. & Eng. R. Cas. 16; *State, Lancaster County, v. Chicago, B. & Q. R. Co.* 29 Neb. 412; *Louisville, N. A. & C. R. Co. v. Smith*, 91 Ind. 119, 13 Am. & Eng. R. Cas. 608; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979; *English v. New Haven & N. Co.* 32 Conn. 240.

And it has been held in a number of cases that when a highway is laid out by proper authority across a railroad company's right of way, this is not such a taking of property as entitles the company to damages. See *State, New York & L. B. R. Co., v. Drummond*, 20 Am. & Eng. R. Cas., note on page 16, 46 N. J. L. 644. It is held, however, that the crossing must be so made as to occasion the least possible inconvenience to the railroad company. *Northern C. R. Co. v. Baltimore*, 46 Md. 425; *Milwaukee & St. P. R. Co. v. Faribault*, 23 Minn. 167; *Hannibal v. Hannibal & St. J. R. Co.* 49 Mo. 480. The ruling that the laying out of a highway across the right of way of a railroad is not such a taking of property as entitles the company to damages proceeds upon the theory that land already taken for a public use may be taken by proper authority for other public uses, and, when so taken, it is presumed that the second use is not inconsistent with, or destructive of, the former use. *Miller v. Craig*, 11 N. J. Eq. 175; *Talbot v. Hudson*, 16 Gray, 417; *Peoria & P. U. R. Co. v. Peoria & F. R. Co.* 105 Ill. 110; *Wood v. Macon & B. R. Co.* 68 Ga. 539; *Chicago & N. W. R. Co. v. Chicago & E. R. Co.* 112 Ill. 589; *Mills, Em. Dom.* § 143. Whatever may be the true rule as to the right of a railroad company to compensation for the right of way over which a public highway is laid, it is clear, as said by the court in *Sixth Ave. R. Co. v. Kerr*, 45 Barb. 138, that where a railroad is laid in a public street, under a permissive grant to the company to use a portion of the street for that purpose, the company does not acquire the same unqualified title and right of disposition to the land occupied which individuals have in their lands. The only exclusive power conferred by such grants is that of using railroad carriages in the same manner as the grant of a stage line confers, for the time being, the grant of a monopoly of using such stages for the transportation of passengers for hire on that route. Our statute requires that all railroad companies shall keep in good order, at their expense, the public roads or private ways established pursuant to law, where crossed by

their several roads; and build suitable bridges and make proper excavations or embankments, according to the spirit of the road laws. Statutes of similar import have been held constitutional as being a legitimate exercise of the police power of the state. The supreme court of Illinois (*Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309) says: "The only question is whether the appellant is bound to construct and maintain the crossing without compensation, or whether it should have been awarded damages for the expense of such construction and maintenance by the judgment of the court below. Government owes to its citizens the duty of providing and preserving safe and convenient highways. From this duty results the right of public control over public highways. Railroads are public highways, and in their relations as such to the public are subject to legislative supervision, though the interests of their shareholders are private property. Every railroad company takes its right of way subject to the right of the public to extend the public highways and streets across such right of way. *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.* 30 Ohio St. 604. In the separate opinion in *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.* 105 Ill. 388, 44 Am. Rep. 799, it was said: 'Unless, therefore, every railroad corporation takes its right of way subject to the right of the public to have other roads, both common highways and railways, constructed across its track, whenever the public exigency might be thought to demand it, the grant of the privilege to construct a railroad across or through the state would be an obstacle in the way of its future prosperity of no inconsiderable magnitude.' If railroads, so far as they are public highways, are, like other highways, subject to legislative supervision, then railroad companies, in their relations to highways and streets which intersect their rights of way, are subject to the control of the police power of the state,—that power of which this court has said that, 'it may be assumed that it is a power co-extensive with self-protection, and is not inaptly termed the law of overruling necessity.' *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71. The requirement embodied in § 8, that railroad companies shall construct and maintain the highway and street crossings and the approaches thereto within their respective rights of way, is nothing more than a police regulation. It is proper that the portion of the street or highway which is within the limits of the railroad right of way should be constructed by the railroad company and maintained by it because of the dangers attending the operation of its road. It should control the making and repairing of the crossing for the protection of those passing along the street and of those riding on the cars. . . . The grading of the approaches and the planking between the rails and tracks make it possible for men and teams to cross easily and quickly and thus avoid collision with passing trains, thereby insuring their own safety and the safety of the persons and

property upon the trains. The Supreme Court of the United States has said: 'Whatever differences of opinion may exist as to the extent and boundaries of the police power, . . . there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens.' *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036. . . . Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not taking or damaging without just compensation of private property, or of private property affected with a public interest. *Boston & M. R. Co. v. York County Comrs.* 79 Me. 386." In *Boston & M. R. Co. v. York County Comrs.* in passing upon the constitutionality of a statute of this character, the court said: "The purpose of this statute was evidently to promote the safety of travelers both upon the railroad and the county way. In view of the nature of the ordinary steam railroad, and the dangers necessarily attending its operation, and the onerous liability of the railroad company to its patrons and the public, it is clear that the company should have the whole control of all things necessary to be done within its location for any purpose, whether for the benefit of the company or that of the public. It must practically have the exclusive possession of the land within the line of its location,"—citing *Hayden v. Skillings*, 78 Me. 413. It is of vital importance to those traveling by rail or upon the public road that the crossing should be properly constructed, and kept in good order. Those crossings require attention the same as other portions of the track, and are liable to constantly get out of repair. The section men in the employ of the railroad are daily passing over the track, and would soon discover a defect in the crossing, and remedy it. Not so with the road supervisor. He seldom sees the crossing. The interest of the public as well as that of the railroad company requires that the latter should have an exclusive control of the crossings. If inexperienced road supervisors were required to construct and repair the crossings, great loss of life and property would likely result from the negligent construction of, or the failure to keep in good order, the crossings. The purpose of the legislature in placing this burden upon the railroad corporation was to secure the safety of the public travel and transportation.

The reasoning of the foregoing cases goes far in support of the proposition that the construction of crossings should be done under the direction and supervision of the railroads, but affords no support for the proposition that they should not be compensated. The great fundamental principle underlying the validity of such statutes and supporting adjudications rendered thereunder is that every citizen or corporation must so use his or its property as not unnecessarily to injure another. Therefore, if a railroad is empowered to cross a public highway, it is but just to impose upon the corporation the duty to construct and repair good and

sufficient bridges or passages under or over the railroad, so that travel over the highway shall not be impeded, and the public safety not imperiled. Railroad corporations receive many compensations for all the burdens imposed upon them. The company pays nothing for its franchise; pays no tax upon it, as a rule; its road crosses public ways and runs in places along such ways, without compensation to the town or county which paid for its easement to the original owner; may cross canals and navigable streams under some conditions, and this imposes burdens on other public interests; highways may be raised or lowered for its accommodation, thus affecting the grade of highways, and often the convenience and safety of travelers. Statutes requiring railroad companies to make proper crossings are founded on the most obvious principles of equity and justice. By laying its ties and rails and making its grade, the railroad renders a crossing necessary where no such necessity would otherwise exist. It is but requiring the railroad to so operate its property as not to injure the public in its property or otherwise. By reason of their dangerous character, statutes regulating the speed at which they may run their trains, requiring the placing of bells on their locomotives, the ringing of such bells, the fencing of the track, the erection and maintenance of cattle guards, sign boards, and gateways at crossings, and the stationing of flagmen thereat, and the maintenance of such other like measures and precautions as are necessary to shield the public and its passengers from the dangers incident and peculiar to its operation, have been sustained as being a valid exercise of the police power of the state. Indeed, statutes requiring railroad companies to construct and maintain proper crossings and approaches, bridges, etc., at their own expense rest upon the police power; otherwise they could not, under all circumstances, be sustained. The supreme court of Illinois (*Chicago & N. W. R. Co. v. Chicago*, 29 N. E. 1109) has said: "The provision of the act of March 31, 1874 (§ 8), requiring railroad companies to maintain and construct crossings and approaches at public highways, is a police regulation; and where railway lands are taken by a municipal corporation for street purposes interruption to travel or the cost and expense of constructing and maintaining such crossings are not proper elements of damage. . . . Requiring a railway company without compensation to construct and maintain street crossings over its railroad by a statute enacted for the public safety under the police power of the state is not a taking or damaging of private property without just compensation." [140 Ill. 309.] Of similar import is the case of *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979. And in construing a similar statute, and holding the same constitutional, and that it applied to a company whose charter provided that it was not to be altered, amended, or repealed, the court said that such statute did not impair the obligation of any contract 42 L. R. A.

with the company; that the power of the legislature to impose such burdens for the general safety is fundamental; that it was the police power, which must be sufficiently extensive to protect all persons and property. The court, in affirming the legislative power to impose uncompensated duties, and even burdens upon individuals and corporations for the general safety, speaking with reference to the police power, says: "Its proper exercise is the highest duty of government. The state may in some cases forego the right to taxation, but it can never relieve itself of the duty of providing for the safety of its citizens. This duty, and consequent power, override all statute or contract exemptions. The state cannot free any person or corporation from subjection to this power. All personal or property rights must be held subject to the police power of the state,"—citing *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585.

In one jurisdiction, at least, such a statute has been treated as not resting on the police power, and it has been declared that a statute which imposes upon the company the expense of cattle guards, fencing, and other outlays to complete the approaches, besides the cost of maintaining them, is in conflict with the constitutional provision forbidding the taking of private property without just compensation, and was therefore unconstitutional and void. *Chicago & G. T. R. Co. v. Hough*, 61 Mich. 507. The weight of authority and reason sustains such statutes as being a proper exercise of the police power, but the cases are at variance as to the extent of the uncompensated duties or burdens imposed. In Minnesota it is held that the company is not entitled to compensation for providing and maintaining cattle guards and sign boards, but that it is entitled to compensation for planking the roadway where it crosses the railroad tracks, and for the maintenance of the planking. *State, St. Paul, M. & M. R. Co. v. Hennepin County Dist. Ct.* 42 Minn. 247, 7 L. R. A. 121. In another case it is held that the company is entitled to recover the fair value of its land taken, the expenses of making and maintaining in repair the planking, paving, cattle guards, fences, sign boards, posts, gates, and gate house; but that the cost of operating the gates is not to be included in the verdict. *Boston & A. R. Co. v. Cambridge*, 159 Mass. 283. In still another it is held that the public authorities are required to build that part of the highway within the right of way which they would have been required to make had the railroad not been constructed. *State, Lancaster County, v. Chicago, B. & Q. R. Co.* 29 Neb. 412.

A proper interpretation of the statute will be made when the dividing line between the legitimate exercise of the police power and the taking or damaging of private property for public use is ascertained. The legislative will will not be interpreted as intending to infringe upon this great constitutional

provision, where it has not in express terms so declared, and where the statute may have a full and reasonable operation without the limits of such principle. The statute has for its purpose the protection and safety of the public and of the property of the railroads. It so polices their operations as to guard against the dangers incident to such institutions. Upon streets or highways crossed by it, or subsequently laid out, the railroad company must construct proper crossings (*State, Lancaster County, v. Chicago, B. & Q. R. Co.* 29 Neb. 412; *Louisville, N. A. & C. R. Co. v. Smith*, 91 Ind. 119, 13 Am. & Eng. R. Cas. 608), and must alter, change, or otherwise reconstruct such crossings whenever the public welfare demands (*English v. New Haven & N. Co.* 32 Conn. 240). When the railroad company laid its track across its highway, it did so subject to the right of the public authorities to make such alterations or changes in the highway, either by lowering or raising the grade, widening or otherwise improving the same, as the public safety and welfare might require. In doing so, the presence of the railroad necessitates a certain character of crossings and safeguards which otherwise would not exist; and with however much plausibility it might be argued that the public authorities should be required to do just such work as they would have to do did the railroad not exist, it is certain that the railroad company should bear the burden of such work as is made necessary by reason of the peculiar and dangerous character of its operation. The principle of the common-law rule is embodied in this statute. It is the railroad which makes the construction of a railroad crossing necessary, whether the highway be laid out before or after the construction of the railroad. As was said by the court in *Chesapeake, O. & S. W. R. Co. v. Dyer County*, 87 Tenn. 712: "There was the best of reasons for requiring the company to bear all the expenses necessary in constructing and keeping up the crossing, . . . so that the county would be injured as little as possible, and have no greater burden imposed upon it in maintaining its public highway than it would have had if the railroad had never been constructed at all." The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people, and herein is found the principle.—"So use your own property, or so conduct yourself, as not to unnecessarily injure or annoy others,"—which is the root from which the whole doctrine of the police power grows. To protect the health of the public, the sale of provisions has been regulated and abridged, and dealers have been required to submit them to inspection by a public officer. In the interest of public morals, the sale of liquors has been prohibited, licenses to manufacture them have been recalled, the manufacture thereof prohibited, after much expenditure by the licensees; lotteries chartered for a consideration suppressed; to se-

cure the life and safety of the public, the builder is often compelled to use in his structure more expensive material, and adopt more expensive appliances, than he otherwise would; infected places are disinfected, and infected clothing destroyed, all at the expense of the unfortunate owner; one who has been stricken with a fatal and contagious malady must repair to the quarantine station; in the emergency of danger from fire, private buildings may be torn down, and private property otherwise destroyed, without compensation, to prevent a greater destruction from the conflagration. *Boston & M. R. Co. v. York County Comrs.* 79 Me. 386.

As stated, the provisions of the statute are not repugnant to the constitutional provisions above referred to, but they are intended to coexist with and operate upon that class of cases in which, though property may be injuriously affected, it can in no sense be said that it is taken or damaged. It must be confined, however, within appropriate limits; otherwise the rule, though within itself just and equitable, may become arbitrary and oppressive, and the guide by which the relative rights of the railroad and the public may be ascertained, lost. While the railroad company must build such crossings and approaches as the character of its property renders necessary for the convenience and safety of the public, and must bear just such burdens as the public authorities would not have had to bear had the railroad not been lying across the street, yet the railroad company is not bound to furnish the highway, nor, under such circumstances, is the power of the state to damage its property in the construction or improvement of such highway unlimited. Indeed, except in so far as being required to properly guard and protect its property without cost or inconvenience to the public, the railroad company, with respect to its property, stands on the same footing as any other property owner. Under the guise of the police power, property of corporations or individuals cannot be confiscated. The same authority and reasoning that require the railroad company to so guard and use its property as to prevent it becoming a charge on or menace to the safety of the public will place such property on an equal footing with all other property, when the railroad company has complied with all reasonable police regulations. Thus, in those jurisdictions where statutes requiring railroad companies to construct and maintain suitable crossings at their own expense are upheld, damages are nevertheless allowed, where streets are projected and opened across the right of way of a railroad, for land taken belonging to such railroad as a right of way; the measure of compensation being the amount of decrease in the value of the use for railroad purposes caused by the use for purposes of a street. *Portland & R. R. Co. v. Deering*, 78 Me. 61, 57 Am. Rep. 784; *Boston & M. R. Co. v. York County Comrs.* 79 Me. 386; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309. No such element of damages, how-

ever, could arise in the present case, inasmuch as the grant to the company to use a portion of this highway upon which to lay its track does not vest in it the same unqualified title and right of disposition to the land occupied which individuals have in their lands. The only exclusive power conferred by such grant is that of using railroad carriages, upon and over such street, subservient to the right of the public to also use and travel the highway. *Sixth Ave. R. Co. v. Kerr*, 45 Barb. 138. Our statute requiring railroad companies to keep in good order, at their expense, the public roads or private ways established pursuant to law where crossed by their several roads, and build suitable bridges, and make proper excavations or embankments, according to the spirit of the road laws, and prescribing the extent of such crossings is a general law, which has been of force in this state since 1838 applicable alike to all railroads. The line of railroad of the plaintiff in error was constructed subject to this general law. The rights and powers acquired by the corporation in this state were taken subject to its provisions. As has been before said, the statute is a legitimate exercise of the police power of the state. The duty which it imposes is a continuing one. *State, Morris, v. Hannibal & St. J. R. Co.* 86 Mo. 13, 29 Am. & Eng. R. Cas. 604; *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb. 475; *Cook v. Boston & L. R. Corp.* 133 Mass. 185, 10 Am. & Eng. R. Cas. 328; 3 Elliott, Railroads, § 1111; *State, Minneapolis, v. St. Paul, M. & M. R. Co.* 35 Minn. 131. It has been held, under like provisions, that it was the duty of a railroad company, though its track was originally constructed at grade with a public highway, to construct a bridge or viaduct whenever the same might become necessary. *State, Minneapolis, v. Minneapolis & St. L. R. Co.* 39 Minn. 219; and that although a crossing might have been adequate when constructed, yet if, by reason of increase of business of the railroad, or travel on the street, it became dangerous, or seriously obstructed travel on the street, the company was bound to provide some other mode of crossing, as by carrying the street under or over the track. *State, Minneapolis, v. St. Paul, M. & M. R. Co.* 35 Minn. 131, and authorities cited on page 136. Under such a statute, the corporation does not discharge its duty by making such a crossing as to provide for the wants of travelers at the time of the construction of the road. If, by the increase of population in the neighborhood, or by reason of the increasing use of

the highway, the crossing, which was at the outset adequate, becomes inadequate, it is the duty of the railroad corporation to make such alteration as will meet the present needs of the public who have occasion to use the highway. *Cooke v. Boston & L. R. Corp.* 133 Mass. 185, 10 Am. & Eng. R. Cas. 328. To same effect, see *Pierce, Railroads*, 457, and authorities cited; 3 Elliott, Railroads, § 1111; *English v. New Haven & N. Co.* 32 Conn. 240. The duty being a continuing one, it is not fulfilled by putting the street, at the time of building the railroad, in such condition as not to impair or interfere with its use at that time, nor by maintaining it in such condition as would have accomplished that end had the state of things originally existing continued. The duty has reference to future exigencies, and requires the railroad company from time to time to put the street in such a condition as changed circumstances may render necessary. *State, Minneapolis, v. St. Paul, M. & M. R. Co.* 35 Minn. 131. The duty of the railroad company to construct and maintain, at its own expense, suitable crossings at the intersection of their railroads with highways applies as well to highways laid out and opened after the construction of the railway as to those existing prior to its construction. *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 266, 41 L. ed. 979; *Louisville, N. A. & C. R. Co. v. Smith*, 91 Ind. 119, 13 Am. & Eng. R. Cas. 608; *State, Lancaster County, v. Chicago, B. & Q. R. Co.* 29 Neb. 412.

We think it follows, as a logical conclusion from the principles of law above announced, that, when the corporation constructed its track across the public highway in question, it did so subject to the right of the public authorities to require such changes in the crossing from time to time as the public safety and welfare might demand, or to readjust its track and crossings to a change of grade of the street, demanded for the safety and convenience of travelers upon the highway, and that in doing so the expense incurred is involved in its compliance with a police regulation of the statute; and we know of no law whereby a corporation or natural person can recover damages on account of being compelled to render obedience to a public regulation designed to secure the common welfare. *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.* 105 Ill. 388.

Let the judgment of the court below be affirmed.

All the Justices concur.

ILLINOIS SUPREME COURT.

City of DU QUOIN
v.

W. A. KELLY, City Treasurer.

(176 Ill. 218.)

A private bank is not a "regularly organized bank," within the meaning of Rev. Stat. 1874, p. 228, § 9, authorizing the deposit of municipal funds in regularly organized banks.

(December 9, 1898.)

NOTE.—As to the constitutionality of statutes prohibiting private banking, see *State v. Scou-* 43 L. R. A.

gal (S. D.) 15 L. R. A. 477, and note; also *Blaker v. Hood* (Kan.) 24 L. R. A. 854.

MOTION for leave to file a petition for mandamus to compel defendant to deposit the city funds in the Bank of Du Quoin. *Denied.*

The city council passed an ordinance designating a private bank as the place where the city treasurer should deposit the funds of the city. He refused. The funds were already in a national bank, and the city applied for a writ of mandamus to compel him to comply with the ordinance.

Further facts appear in the opinion.

Mr. Silas H. Reid for relator.

Carter, Ch. J. (orally), delivered the opinion of the court:

The city of Du Quoin has entered a motion for leave to file a petition for mandamus to compel the city treasurer of that city to deposit the funds of the city in the Bank of Du Quoin, this being the bank of one Henry Horn. The city council, it seems, passed an ordinance designating that bank as the depository of its funds, and directed the city treasurer to comply with the ordinance, and make the deposit. He declined to do so. The statute provides that city councils may, by ordinance, designate the place or places for the deposit of city funds, provided, however, that such moneys shall be deposited in a "regularly organized bank." Rev. Stat. 1874, p. 228, § 9. The question here is whether the bank of Henry Horn, in which the council directed the treasurer to make the deposit, is, within the meaning of this act, a "regularly organized bank." The petition alleges, in general terms, that it is such bank, but states specifically that it is the bank of Henry Horn; that he is the owner and proprietor of the bank. It therefore appears from the petition which the city asks leave to file that this is a private bank, owned, conducted, and managed entirely by Henry Horn as proprietor. The legislature has passed an act providing for the incorporation and organization of banks, and making the stockholders liable, over and above their stock, to an amount equal to the stock held by them. The act of Congress providing for the organization of national banks contains similar provisions. The state law provides that, in cities and villages having a population not to exceed 5,000, the capital stock shall be \$25,000, and it is graded up according to the population. It provides the manner of organizing banks, requires detailed reports from time to time of their resources and liabilities, and makes provision for their inspection and examination by competent persons, under the authority of the state auditor. We are of the opinion that the term "regularly organized bank," in the city and village act, means a bank organized either under the state law or the act of Congress, and that it was not intended by the legislature that a city officer who has given bond for the safe-keeping of the funds in his hands should be required to deposit them in a private bank. There would seem to be no more reason for that than there would be for turning the funds over to a private individual. It is true, provision is made that such

banker or bankers shall give bond; but we do not think this alters the case. We think the legislature intended that some bank regularly organized under the law should be designated. The motion for leave to file the petition will therefore be denied.

Motion denied.

John CARPENTER *et al.*, *Appts.*,
v.

CAPITAL ELECTRIC COMPANY.

(178 Ill. 29.)

1. Electric-light wires and the cross arm attached to a pole which stands outside of an alley cannot be lawfully extended over a private alley the easement of which is confined to abutting owners, although it is done to furnish electric light to one of the parties entitled to the easement, but without the consent of the others.
2. The fact that electric-light wires are about 14 feet above the surface of a private alley over which they are strung without right will not prevent the court from ordering their removal,—especially when they might interfere with the operations of the fire department, and obstruct the transfer of freight or other materials to and from the second-story windows of a building.
3. Equity may order the removal of an obstruction to an easement,—especially when the injury is continuing or permanent.

(February 17, 1899.)

A PPEAL by plaintiffs from a decree of the Circuit Court for Sangamon County in favor of defendant in a suit brought to compel defendant to take down certain electric wires. *Reversed.*

Statement by *Magruder, J.*:

This is a bill filed by the appellants against the appellee, praying that the appellee may be decreed to take down two electric wires and a cross arm stretched and extending over a private alley in the rear of the property of the appellants, in the city of Springfield, and to remove said wires and cross arm from said alley, so as to render the use thereof with the appurtenances by the appellants as the same was used previous to the erection of the said wires and cross arm. The bill was answered by the appellee, and, upon hearing had, a decree was entered by the circuit court dismissing the bill at the cost of the appellants. The present appeal is prosecuted from such decree of dismissal.

The facts, as shown by the pleadings and proofs, are substantially as follows: The appellants herein are the children of one William Carpenter, now deceased. William Carpenter in his lifetime purchased at a judicial sale, held under a decree of the circuit court of Sangamon county entered in a certain suit pending therein, certain lots

—NOTE.—As to building over right of way, see note to *Hollins v. Demorest* (N. Y.) 15 L. R. A. 487.

fronting 36 feet on Washington street, in the city of Springfield, and running north 97 feet, and received for said property from the master in chancery of said court two deeds, —one dated October 25, 1852, and the other dated December 26, 1855. One of said deeds conveyed a strip 10 feet wide and 97 feet deep, and the other of said deeds conveyed a strip 26 feet wide and 97 feet deep. The deeds contained these words: "Ten feet in width by 26 feet (or 10 feet) on the north end to be used as an alley." In 1852 said master in chancery, in pursuance of the decree in the same cause, sold to one S. B. Fisher a parcel of land immediately west of the parcel so sold to William Carpenter, and having a frontage of 22 feet on Washington street, and a depth of 97 feet. In the same year the master in chancery, in pursuance of the same decree, sold to Fagan & Fitzpatrick a parcel of land immediately west of the land sold to Fisher, and having a frontage of 22 feet on Washington street, and a depth of 97 feet. All said deeds to Carpenter and Fisher and Fagan & Fitzpatrick were made at the same time, and by virtue of the same decree, in the same cause. Each of the deeds to Fisher and to Fagan & Fitzpatrick contained the words, "Ten feet in width by 22 feet on the north end, to be used as an alley." The grantees in said deeds took immediate possession of the premises so sold to them, and they, or their grantees and descendants, by themselves or tenants, have remained in possession thereof for more than twenty years last past, and are now in possession of the same. There are no other words in said deeds restricting the rights of the grantees therein, except the words above quoted. The said alley was closed at the west end thereof, and extended westward from its eastern opening only 80 feet, and did not run through the block in which it is located. Said alley has been open for the benefit of the parties for whom it was created, since said deeds were executed, and has been in continual use. The property in question is situated on the northeast corner of the public square in Springfield, and was when said deeds were made, and is now, business property, and business buildings were erected thereon soon after said deeds were executed. The appellee is a corporation organized under the laws of Illinois, and has a grant from the city of Springfield to erect poles and wires for the purpose of conducting electric currents for the purpose of furnishing electric lights on all the streets and alleys of said city. The tenant occupying the building on the lot 22 feet wide sold to Fisher, and lying next west of the lot on which the building of the appellants, 36 feet wide, stands, requested the appellee to introduce electric light into the building on said lot next west of the lot of appellants, through said alley, which was accordingly done. The wires were strung for this purpose along said alley, entering the alley at the east end thereof. The eastern ends of said wires are attached to a pole erected in Sixth street, which runs north and south on the east side of the building of appellants, and the wires extend west over

said alley to the premises immediately west of the lot of appellants. The west ends of said wires, which are two in number, are attached to a cross arm fastened to a pole at the top thereof, which cross arm extends into the alley. Said wires are about 14 feet above the surface of the ground, and about 3 feet in the rear of the store building on the premises of the appellants. The pole to which the western ends of the wires are attached does not stand in said alley, but said cross arm and pole are wholly upon the premises to the west of the lot of the appellants. Said wires are now used by appellee to furnish electricity for lighting purposes to the tenants of the building adjoining the building of the appellants on the west. The wires were erected without the knowledge or consent of appellants, or of either of them, before the commencement of this suit, and appellants requested appellee to remove said wires and cross arm from said alley, but appellee refused, and still refuses, to take down the two electric wires and cross arm from the alley. The present tenants of the Fisher lot are in the rightful possession of, and entitled to the enjoyment of, all easements and appurtenances created in favor of the Fisher lot.

Mr. C. A. Keyes for appellants.
Messrs. Brown, Wheeler, Brown, & Hay for appellee.

Magruder, J., delivered the opinion of the court:

The alley in the rear of the building of appellants is a private alley, created for the use of the appellants and of the owners of the two lots lying west of the lot of the appellants. It is alleged in the bill that the easement consisting of the use of said alley, as created by the original deeds conveying the property, was so created for the benefit of the property of the appellants, and of the two pieces of property adjoining the property of the appellants on the west. It is admitted in the answer that the alley was reserved, as alleged in the bill, for the benefit of the properties aforesaid, and for a right of way to and from the rear of said premises. The words contained in the deeds, to wit, "Ten feet in width . . . on the north end, to be used as an alley," taken in connection with the allegations of the bill and the admissions of the answer as above set forth, clearly indicate that the alley is a private alley. The purpose of the reservation in the deeds was not for the use of the public, but for the use of the parties to the deeds; and hence the public acquired no right to the use of the alley, and no public easement was created therein. The fee of that portion of the alley, 10 feet wide and 36 feet long, in the rear of the building of the appellants, was in the appellants, as owners of the abutting property, subject, however, to the right of the property owners on the west to use the strip of land reserved for the purposes of an alley. In other words, the title is in the appellants, but the property owners on the west have the right of passage over the alley,

and the title of appellants is burdened only with said right of passage or easement. The question then presented is whether the appellee had the right to extend electric wires over the portion of the alley in the rear of the building of appellants, for the purpose of furnishing light to the occupants of the building lying west of the property of appellants, without the consent of the appellants.

It is conceded that the appellee company had a grant from the city to erect its poles and string its wires for the purpose of furnishing electric light along the streets and alleys of the city. But the alley here was not a public alley, over which the city had control, but was a private right of way, the use of which was confined to the appellants and the owners of the two properties adjoining them on the west. *Garrison v. Rudd*, 19 Ill. 558. It served as a means of accommodation to a limited neighborhood for local convenience. 2 Am. & Eng. Enc. Law, 2d ed. p. 149. It is also to be observed that here the electric wires passing over and above the alley were so placed for the purpose of furnishing light to private persons, and not for the purpose of furnishing light to the public. It seems to be clear that the use of this alley for the purpose thus indicated imposed a new and additional burden upon the fee owned by the appellants, subject to the easement consisting in the use of the alley. The erection and use of telegraph poles in a public highway, where the abutting landowner is the owner of the fee in the highway, constitutes a new servitude, which entitles such owner to recover damages for the additional use thus created. *Board of Trade Teleg. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453. The principle which is applied to the erection of telegraph poles on a public highway, where the fee of the highway, to the center thereof is in the abutting owner, and to the stringing of wires upon said poles over the highway, applies to a private alley, like that here under consideration, where the fee of the ground is in the owner of the property abutting upon the alley. It is immaterial to inquire whether the damages are great or small. It is sufficient that the property rights of the appellants are interfered with in a manner detrimental to their interests, as the owners of the fee. The taking possession of their land forcibly and against their will comes within the constitutional inhibition that private property shall not be taken or damaged without just compensation. *Board of Trade Teleg. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453. Nor is it material that the telegraph wires are some 14 feet above the surface of the ground. The owner of land, unless restricted by covenant or custom, has the complete control of the soil, together with the space above and below, so far as he may choose to use it. *Tanner v. Valentine*, 75 Ill. 624. The uncontradicted evidence tends to show that the presence of the wires in the alley would operate as a hindrance to the fire department in case it should become necessary to extinguish a fire in the building of the appellants, and also that the presence

of the wires in the alley would have a tendency to obstruct the conveyance of freight or other material to and from the second story or upper window in the rear part of the building of appellants.

It is laid down in some of the authorities that the erection of electric-light poles by city authorities for the purpose of lighting the public ways and places is not a taking of private property for public use, upon the ground that the use of the streets for this purpose is in the nature of an exercise of the police power by the city. But when an electric-light company erects poles or strings wires, not for the purpose of lighting public ways and places, but for the purpose of supplying light to private individuals and firms in the transaction of its own corporate and commercial business, such erection of poles and stringing of wires constitute an additional easement in the highway or private alley, for which the owner of the fee may demand compensation. *Haverford Electric Light Co. v. Hart*, 1 Pa. Dist. R. 571; *Tiffany v. United States Illuminating Co.* 19 Jones & S. 280; *Croswell, Electricity*, § 126. It has been held that the laying down of gas pipes or other pipes for the purpose of supplying the city and its inhabitants with light is a legitimate use of the streets, for which the abutting owner is not entitled to compensation. 2 Dill. Mun. Corp. 4th ed. § 601, note; *Elliot, Roads & Streets*, p. 305; *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 255, 29 L. R. A. 485. And it has been said that the legal relations of electric-light wires through the streets of a city must be analogous to those of gas pipes, upon the ground that both the electric-light wires and the gas pipes are means of furnishing light from a central source of supply, and that, if the laying of gas pipes in a city street is not an additional servitude on the land of the abutting owner, the same should be true of laying tubes for electric-light wires, or placing posts in the ground for carrying the wires overhead. *Keasbey, Electric Wires*, p. 86. This doctrine, however, applies only to such public streets and alleys as are under the control of the municipality, and where the light to be transmitted by the wires or pipes is for the benefit of the public, as well as of property owners along the line of the street. The doctrine, however, can have no application to such a private alley as is that in the case at bar, where the fee of the ground in the alley is in the abutting owners, and where the easement consisting of the use of the alley, is confined to a limited number of property owners, whose lands abut upon the alley. When the strip of land in question was reserved in the original deeds for the purpose of an alley, it was intended for the ordinary purposes of passage and repassage and not for the erection of any such permanent obstruction as the stringing of wires in the manner shown in the present record.

It is said by the appellee that equity has no jurisdiction to entertain the present bill. We regard this contention as without force. Where a party has a right of way over, or

an easement in, certain real estate, and the same is obstructed, equity has jurisdiction, as the injured party has no adequate remedy at law. *McCann v. Day*, 57 Ill. 101. Moreover, the injury complained of is one of a continuing or permanent nature, for which an action at law would not afford a complete and adequate remedy. *Sterling's Appeal*, 111 Pa. 35, 56 Am. Rep. 246.

The decree of the Circuit Court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Lewis L. LEHMAN, *Appt.*,

v.

James H. CLARK, Receiver of Masonic Benevolent Association.

(174 Ill. 279.)

1. The contract of a member of a mutual benefit association is purely unilateral, and he may refuse to continue his payments at any time, in which event the association can only declare his interest forfeited, and cannot sue for unpaid assessments.
2. A suit by a mutual benefit association will not lie to recover assessments where the contract provides only for forfeiture of interest in case of nonpayment.
3. A receiver of a mutual benefit society cannot maintain a suit to recover assessments if the society itself could not do so.
4. No equitable principle exists to compel a member of a mutual benefit association to pay assessments on the ground that he has had the benefit of the insurance where the plan of the association is that all payments are in advance and entitle the member to protection until the next assessment is due.
5. The forfeiture is self executing, and requires no action on the part of the association under a by-law of a mutual benefit association providing that any member failing to pay assessments shall forfeit his membership and all benefits therefrom.
6. In case of the insolvency of a mutual benefit society the assets should be applied to unsettled death claims as far as they will go, leaving the balance unpaid and the living members to lose all they have paid in.

(June 23, 1898.)

APPEAL by defendant from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court of Coles County in favor of plaintiff in an action brought to enforce an assessment upon defendant's benefit certificate. *Reversed.*

The facts are stated in the opinion.

Messrs. Henley & Henley, J. W. Craig, and E. C. Craig, for appellant:

In the absence of statutory provisions courts of equity have no jurisdiction to decree the dissolution of a corporation by the forfeiture of franchises, either at the suit of an individual or at the suit of the state.

NOTE.—As to liability of a member of a benefit society to an action for assessments, see note to *Ellerbe v. Barney* (Mo.) 23 L. R. A. 435. 43 L. R. A.

Chicago Mut. L. Indemnity Assn. v. Hunt, 127 Ill. 274, 2 L. R. A. 549; *Hunt v. Le Grand Roller Skating Rink Co.* 143 Ill. 120.

Our statutes apply only to insurance corporations as such, and they have no application to corporations organized under § 31 of the corporation laws.

This association was not engaged in life insurance business within the meaning of the act of 1893 to incorporate companies to do the business of life or accident insurance upon the assessment plan. And the proceeding by the attorney general to dissolve this association is void.

Northwestern Life Assn. v. Stout, 32 Ill. App. 31; *Commercial League Assn. v. People*, 90 Ill. 166.

There is a distinction between beneficial societies and life insurance companies.

Com. v. Equitable Ben. Assn. 137 Pa. 412; *Northwestern Masonic Aid Assn. v. Jones*, 154 Pa. 99; *Dickinson v. Ancient Order of U. W.* 159 Pa. 258; *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127; *Com. v. Keystone Ben. Assn.* 171 Pa. 465.

This assessment was not authorized in law, and this judgment cannot be sustained for the reason that no valid assessment is shown to have been levied or made.

The receiver represents only the association. The rights of creditors to prosecute their claims against members of the association never were the property of the association, and the appointment of such receiver did not clothe him with power to assess and enforce the property right which belongs only to parties who are not before the court and who are not asking its assistance.

Republic L. Ins. Co. v. Swigert, 135 Ill. 150, 12 L. R. A. 323; *Robinson v. Raulston*, 33 Ill. App. 166.

The just demands against the company must be ascertained before an assessment can be made to pay such indebtedness.

Embree v. Shideler, 36 Ind. 423.

The contract declared upon discloses no personal liability on the part of appellant.

Covenant Mut. Ben. Assn. v. Baldwin, 49 Ill. App. 212; *Northwestern Benev. & Mut. Aid Assn. v. Hand*, 29 Ill. App. 75.

The assessments were for future insurance; if paid his membership continued, if not paid it terminated.

Its Protection L. Ins. Co. 9 Biss. 188; *Chicago Mut. L. Indemnity Assn. v. Hunt*, 127 Ill. 257, 2 L. R. A. 549; *Farmer v. State*, 69 Tex. 561; *Burdon v. Massachusetts Safety Fund Assn.* 147 Mass. 360, 1 L. R. A. 146; *Rood v. Railway Pass. & Freight Conductors' Mut. Ben. Assn.* 31 Fed. Rep. 62; *People, Swigert, v. Golden Rule*, 114 Ill. 34; *Niblack, Ben. Soc.* 471; 2 Bacon, Ben. Soc. § 357.

By contract, usage, and custom payment by members is voluntary and not compulsory.

Munn v. Burch, 25 Ill. 38; *Brooklyn L. Ins. Co. v. Dutcher*, 95 U. S. 270, 24 L. ed. 411; *State v. Conklin*, 34 Wis. 22; *Chicago & G. E. R. Co. v. Vosburgh*, 45 Ill. 315; *McDonough v. Hennepin County Catholic Bldg. & L. Assn.* 62 Minn. 122.

Messrs. James F. Hughes and Andrews & Vause, for appellee:

The contract between a mutual benefit or assessment association and its members is found in the certificate, but it is to be construed and governed by the charter and by-laws of the society and the statutes of the domicile of the corporation.

1 Bacon, Ben. Soc. § 161; *Miner v. Michigan Mut. Ben. Asso.* 63 Mich. 338; *Mulroy v. Supreme Lodge, K. of H.* 28 Mo. App. 463; *Maryland Mut. Benev. Soc. v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52; *Burbank v. Rockingham-Mut. F. Ins. Co.* 24 N. H. 550, 57 Am. Dec. 300; *Masonic Mut. Relief Asso. v. McAuley*, 2 Mackey, 70; *Simeral v. Dubuque Mut. F. Ins. Co.* 18 Iowa, 319; *Mitchell v. Lycoming Mut. Ins. Co.* 51 Pa. 402; *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. 348; *Grand Lodge O. of H. S. v. Elsner*, 26 Mo. App. 109; *McMurry v. Supreme Lodge, K. of H.* 20 Fed. Rep. 107; *National Ben. Asso. v. Bowman*, 110 Ind. 355; *Britton v. Supreme Council of R. A.* 46 N. J. Eq. 102; *Lorscher v. Supreme Lodge K. of H.* 72 Mich. 316, 2 L. R. A. 206; *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Asso. v. Robinson*, 147 Ill. 152; *Alexander v. Parker*, 144 Ill. 364, 19 L. R. A. 187.

Generally, and unless the laws provide otherwise, the issuance and acceptance of the certificate furnish sufficient consideration for the member's agreement to pay any assessment made during the time he should continue a member, and upon his failure an action will lie against him therefor, unless the contract leaves it optional with the member.

2 Bacon, Ben. Soc. § 378.

His contract with his fellow members was not to bear any part of his own loss. He was to help bear theirs, if theirs happened before his.

When the contingency happened, when the period of payment arrived, the mutuality, which up to that time existed, at once ceased, and the policy holder whose policy became due is thereupon *ipso facto* creditor.

Vanatta v. New Jersey Mut. L. Ins. Co. 31 N. J. Eq. 15; *Fogg v. Supreme Lodge, U. O. of G. L.* 159 Mass. 9; *Northwestern Traveling Men's Asso. v. Schauss*, 148 Ill. 310; *Proichett v. Schaefer*, 11 Phila. 166; *New Era Life Asso. v. Rossiter*, 132 Pa. 314; *Mutual Ben. L. Ins. Co. v. French*, 2 Cin. Sup. Ct. Rep. 321; *McDonald v. Ross-Lewin*, 29 Hun, 88; *Ellerbe v. Barney*, 119 Mo. 632, 23 L. R. A. 435.

In the case of benefit societies, the contract must be construed liberally in order to carry out the benevolent object of the creation of these organizations.

1 Bacon, Ben. Soc. § 178; *Covenant Mut. Ben. Asso. v. Sears*, 114 Ill. 108.

There is no reason why a contract of insurance between a mutual company and its members should be given any significance different from what would be the fair construction of a similar contract entered into between any parties.

1 Bacon, Ben. Soc. § 190; *Cluff v. Mutual Ben. L. Ins. Co.* 99 Mass. 325; *Willcuts v. Northwestern Mut. L. Ins. Co.* 81 Ind. 300; 43 L. R. A.

Covenant Mut. Ben. Asso. v. Sears, 114 Ill. 113.

On petition for rehearing.

The court overlooked a very material difference between this contract and an old line life insurance contract on what is known as the level premium plan. The latter is based on the expectancy of human life and the practical theory that if a number of people pay in a certain sum during their natural lives regardless of the number of deaths, and it is carefully invested at 4 per cent per annum and compounded, it will raise a fund sufficient to pay each one's family a certain sum at his death, even though the company does no more business or secures no new members. While, on the contrary, the former is based upon the theory that it is better for the member and enables people of moderate means to better obtain insurance to leave this surplus fund in the hands of the members, which then becomes a trust fund in their hands to be called in by the association when needed, by assessments.

Covenant Mut. Ben. Asso. v. Sears, 114 Ill. 108.

The court overlooked the fact that their decision in this case obliterates the rule laid down in *Covenant Mut. Ben. Asso. v. Sears*, 114 Ill. 108: "That the association stands as a trustee of a fund in the hands of its numerous members, but belonging to the beneficiaries, which can be called in by assessment for their use."

Union Mut. Acci. Asso. v. Frohard, 134 Ill. 228, 10 L. R. A. 382; *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Asso. v. Robinson*, 147 Ill. 138.

The court overlooked the fact that their decision in this case overrules *Northwestern Traveling Men's Asso. v. Schauss*, 148 Ill. 310, on the question of forfeiture, without so stating.

Illinois Masons' Benev. Soc. v. Baldwin, 86 Ill. 482; *High Court I. O. of F. v. Zak*, 136 Ill. 185; *Metropolitan Safety Fund Acci. Asso. v. Windover*, 137 Ill. 417; *Supreme Lodge K. of H. v. Dalberg*, 138 Ill. 508; *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Asso. v. Tucker*, 157 Ill. 194; 3 Am. & Eng. Enc. Law, 2d ed. pp. 1086, 1087.

Appellant never in this case demurred to the declaration, nor made any motion in arrest of judgment thereby raising the sufficiency of the same in a proper manner to be passed upon by this court, but plead to it and went to trial on the issues joined thereby admitting its sufficiency.

McLaughlin v. Hinds, 151 Ill. 403; *Wilson v. Myrick*, 26 Ill. 35; *Schofield v. Settley*, 31 Ill. 518; *People v. Cloud*, 50 Ill. 439; *Culver v. Third Nat. Bank*, 64 Ill. 532; *Chicago & R. I. R. Co. v. Morris*, 26 Ill. 400; *Wear v. Jacksonville & S. R. Co.* 24 Ill. 594; *Rockford, R. I. & St. L. R. Co. v. Beckemeier*, 72 Ill. 267; *Kipp v. Lichtenstein*, 79 Ill. 359; *Roberts v. Corby*, 86 Ill. 182; *Chicago, B. & Q. R. Co. v. Harwood*, 90 Ill. 426; *Chicago, B. & Q. R. Co. v. Warner*, 108 Ill. 138; *Lake Shore & M. S. R. Co. v. O'Connor*, 115 Ill. 254; *Chicago & E. I. R. Co. v. Hines*, 132 Ill. 165; *Stearns v. Cope*, 109 Ill. 346; *Supreme*

Lodge K. of P. v. McLennan, 171 Ill. 419; 1 Shinn, Pl. 773.

The sufficiency of the declaration being all through the record admitted by appellant, and the question of fact not being properly before this court, there was nothing before this court going to the merits of this case.

Gray v. Agnec, 95 Ill. 318; *Wrought Iron Bridge Co. v. Utica & Deer Park Highway Comrs.* 101 Ill. 521; *American Exch. Nat. Bank v. Chicago Nat. Bank*, 131 Ill. 550; *Joliet, A. & N. R. Co. v. Velie*, 140 Ill. 59; *Dunham Towing & Wrecking Co. v. Dandelin*, 143 Ill. 412; *McLaughlin v. Hinds*, 151 Ill. 403; *Western Stone Co. v. Whalen*, 151 Ill. 472; *North Chicago Street R. Co. v. Eldridge*, 151 Ill. 542; *Goldie v. Werner*, 151 Ill. 551; *Mobile & O. R. Co. v. Massey*, 152 Ill. 144; *Streator Reclining Car Seat Co. v. Rankin*, 152 Ill. 622; *Illinois C. R. Co. v. Reardon*, 157 Ill. 372; *Berriman v. Marvin*, 162 Ill. 415; *Lord v. Wichita Bd. of Trade*, 163 Ill. 47; *Bolton v. Johnston*, 163 Ill. 234; *Peirce v. Walters*, 164 Ill. 560; *West Chicago Street R. Co. v. Yund*, 169 Ill. 48; *Gilbert v. Watts-De Golyer Co.* 169 Ill. 129; *Chicago & N. W. R. Co. v. Delancy*, 169 Ill. 581.

Phillips, J., delivered the opinion of the court:

Appellee brought this suit as receiver of the Masonic Benevolent Association of Central Illinois to recover the amount of assessment made by him as such receiver, under an order of the court, against appellant, a member of the association, to cover death losses accrued while the association was doing business. The general issue is pleaded together with the stipulation that all defenses might be made under that plea. On trial a verdict was rendered for the plaintiff and damages assessed at \$158.40. A motion for a new trial was overruled, and remittitur of \$19.80 being entered, judgment was rendered for \$138.60 and costs. The appellate court of the third district affirmed that judgment, and made a certificate of importance, under which the case is brought to this court.

The Masonic Benevolent Association, of which appellee is receiver was organized under an act concerning corporations, approved April 18, 1872; and the amendments to that act, approved March 28, 1874, May 22, 1883, and June 4, 1889, are to be considered in the discussion of the question here presented, together with an act approved June 22, 1893, under which the bill in this case was filed and the receiver appointed. It was held in *Bastian v. Modern Woodmen of America*, 166 Ill. 595, that the two acts approved June 22, 1893, were designed to create certain classes of corporations furnishing life insurance or indemnity under various former acts, and to enact and create a complete code for each. The Masonic Benevolent Association, of which appellee is receiver, belongs to a class governed by one of the acts of June 22, 1893, which was entitled "An Act to Incorporate Companies to Do the Business of Life or Accident Insurance on the Assessment Plan, and

to Control Such Companies of This State and Other States Doing Business in This State, and to Repeal Certain Acts therein Named, and Providing and Fixing the Punishment for the Violation of the Provisions Thereof." This act was a revision of the subjects mentioned in its title, and provided by § 7 that such an association as the one for which appellee was receiver was declared to be engaged in the business of life insurance upon the assessment plan, and subject to the provisions of that act. The act further provided for reincorporation under it of corporations theretofore existing, but this was not made obligatory, and, if the corporation did not reincorporate, it could continue to exercise such existing powers and privileges as were not inconsistent with the act; but such corporations were to be governed by the provisions of the act. Sections 18 and 19 authorize the attorney general to file a bill when any incorporated organization under the laws of this state doing business in this state of the character prescribed in the act shall be insolvent, and so reported by the auditor, under which the court may dissolve the corporation, appoint a receiver, etc.

The question presented by this bill is as to the authority of the court to order an assessment of the members to pay liabilities and the right of the receiver to recover. The liability of appellant with the association of which appellee is receiver is to be decided by determining whether his contract of life insurance is a unilateral contract or not. The contracts for life insurance are almost universally held to be unilateral in their character, unless clearly expressed otherwise. The business transacted by the Masonic Benevolent Association of Central Illinois was a life insurance business, so far as it pertains to the issuing of beneficiary certificates payable upon the death of the holders or collection of mortuary assessments and the payment of death benefits. In May on Insurance (§ 550) it is stated: "There are certain organizations prevalent in this country and elsewhere under the name of relief, benefit, or benevolent societies, or some similar name, which generally have for their object aid to their members or to their widows and children after the decease of their respective members. . . . These associations, though not speculative, and not based upon capital paid in as an investment, have nevertheless a general purpose of mutual protection. . . . Their certificates of membership often resemble, both in form and substance, ordinary policies of life insurance; and the courts have with great uniformity treated them as substantially life insurance companies, applying to them and to the virtual relatives of the members the rules and principles applicable to the contract of life insurance." In *Com. v. Wetherbee*, 105 Mass. 161, it is said: "This is not the less a contract of mutual insurance upon the life of the assured because the amount to be paid by the corporation is not a gross sum, but a sum graduated by the number of members holding similar contracts; nor because a portion of the premiums is to be paid upon the

uncertain periods of the deaths of such members; nor because, in case of nonpayment of assessments by any member, the contract provides no means of enforcing payment thereof." In *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Asso. v. Robinson*, 147 Ill. 138, it is held that a mutual benefit association is a life insurance company for all purposes except that it is relieved from certain conditions and rules provided by the statute in the act of March 26, 1860. In that opinion it is held: "The object and purpose for which the defendant was incorporated . . . was to furnish pecuniary aid to the widows, heirs, devisees, and representatives of deceased members of the association, . . . and on proof of such death the association should assess and collect from each surviving member the sum of \$2.50 for the benefit of the heirs or devisees of the deceased member, the same to be paid to him or them, to the amount of not exceeding \$2,500, within thirty days after collection of the assessment. There can be no doubt, we think, that the benefits provided for by the constitution and by-laws of the association are in the nature of life insurance, and that the contract between the association and the member, evidenced by the Constitution, by-laws, and membership certificate, is, in substance, a policy of insurance upon the life of the member." In *Rockhold v. Canton Masonic Mut. Benev. Soc.* 129 Ill. 440, it was said (p. 457): "That the undertaking evidenced by the certificate is one of insurance . . . cannot be seriously questioned. It is an undertaking by a society, in view of the ascertained age and condition of health of one of its members, in consideration of a present payment of a sum of money and of the undertaking to pay other contingent sums in the future by him, to pay a sum to him, or to his widow or heirs, etc., contingent as to time, upon the duration of his life; and it has been held that the undertaking is not the less a contract of insurance because the amount to be paid by the corporation is not a gross sum, but a sum graduated by the number of members holding similar contracts; nor because a portion of the premium is to be paid upon the uncertain periods of the deaths of such members; nor because, in case of nonpayment of assessments by members, the contract provides no means of enforcing payment thereof." It is stated in *Bacon on Benefit Societies and Life Insurance* (§ 357): "In a contract of life insurance there is generally no absolute undertaking of the insured to pay the premiums or assessments, and consequently no personal liability therefor." In *People, Swigert, v. Golden Rule*, 114 Ill. 35, it was said (p. 45): "Although the payment of dues to a corporation on account of . . . assessments upon its members may be purely voluntary, persons may acquire legal rights to share in them when they are paid. Through forfeiture of benefits . . . payments of . . . assessments may be almost, if not quite, as effectually enforced as by legal process." In *Chicago Mut. L. Indemnity Asso. v. Hunt*, 127 Ill. 257, 2 L. R. A. 549, it was 43 L. R. A.

said (p. 277): "The contention is that the certificate of membership is a personal contract between the member and the association, and that, as an infant is capable of making only a voidable contract, his admission to membership is a violation of those principles of mutuality which lie at the basis of mutual benefit societies. We may admit in the broadest sense that these societies are founded upon the principle of entire mutuality in relation to burdens as well as benefits, yet we are unable to see how that principle places the membership of infants upon any footing different from that of adults. While the certificate of membership is a contract, such contract, in the absence of express stipulations to the contrary, is purely unilateral. It may be enforced against the association where the member has performed all the prescribed conditions, but none of its stipulations are enforceable against the member. If he fails to pay his assessments, . . . the certificate becomes void, and the membership ceases. . . . The making of an assessment . . . does not make the member a debtor to the association, so as to authorize it to bring a suit for its recovery in case of his neglect or refusal to pay. Payment is left wholly to his discretion."

Under these authorities, a contract for insurance in any benevolent association is a unilateral contract, and by the association provision is made that, for a failure to pay the assessments made on a member who holds a certificate, all benefits he may have under and by virtue of such certificate, and all payments theretofore made, are forfeited. Such is the rule with reference to insurance under almost all circumstances. If any other rule should exist than that a contract is purely unilateral, then, in effect, a partnership would be formed by which every person insured would become liable to all others insured, and the benefits derived from life insurance would be rendered so doubtful and uncertain, and so prejudicial to those seeking insurance, that their individual interests would require them to abstain from taking out a policy or a certificate of membership. If by taking out a certificate of membership or a policy they create a continuous liability against themselves which might be enforced by the company or association, or by the court through its receiver, then few men would avail themselves of the benefits of a policy or certificate of membership which would create a liability they could not throw off at pleasure, but that would make them indefinitely liable for assessments or premiums. The whole scheme of insurance is based on a contract purely unilateral, and whether the payment for insurance be termed a premium or an assessment, the right of the association or company is to declare a forfeiture for nonpayment of premium or assessment, and not a right to recover the assessment or premium in a suit. Section 1 of article 5 of the by-laws of the association of which appellee is receiver provides: "The board of directors shall furnish each member of the association with a certificate of membership, . . . which

shall contain the agreement on the part of the association and the member." The certificate of membership provides "that the Masonic Benevolent Association of Central Illinois, in consideration of the representations and warrants made to it in the application for this membership, which is hereby made part," declares the application is a part of the certificate of membership and the basis of the contract. The application for membership declares: "I acknowledge and agree that the above statement shall form the basis of the agreement with the association, and constitute a warranty; and I further agree, if accepted as a member of the association, to faithfully abide by all its rules and regulations. Nor shall the association be liable for any benefit thereon until a certificate duly signed and sealed shall issue from the principal office of the association; or if any omission or neglect to pay any of the dues or assessments on or before the days on which they shall be due and payable shall take place, or if any fraudulent and untrue answers and misrepresentations have been made, in either event said certificate shall become null and void, and all money which shall have been paid forfeited." This application and the certificate, each referring to the other, must be taken together as constituting the contract, and by the by-laws above quoted, the agreement is contained in the certificate of membership and the application. By this application and certificate of membership there is no promise to pay, but a purely unilateral contract is made. Section 1 of article 3 of the by-laws provides that upon the death of a member the secretary shall send notice by mail of the assessment due from each member, which shall be deemed and taken to be lawful and sufficient notice for the payment of the assessment called for, and any member failing to pay such assessment within fifteen days after such notice shall forfeit his membership, and all benefits therefrom. The constitution of the association (§ 1, art. 7) provides that upon the death of a member of the association each member shall be assessed and shall pay according to the class in which he is a member. This provision of the constitution and these several by-laws, together with the application and certificate of membership, must be held to create the contract of insurance between the association and the member. It is a contract of life insurance. By article 8 of the constitution it is provided a surplus fund shall be raised from admission fees, from that portion of the assessments not used for the payment of benefits, etc., and that the surplus fund shall be limited to \$40,000, and be held for the following purposes: That benefits may be paid to the heirs of deceased members before assessments are collected from survivors; to insure stability and perpetuity, and make up deficiencies caused by those who fail to pay assessments, and to provide for contingencies that may arise; to pay for medical examinations, printing, and other expenses of management. Admission fees were in no way connected with mortuary assessments,

except as was provided by that article of the constitution under which benefits were to be paid to the heirs of the deceased members before assessments were collected from the survivors when it became necessary. When a person became a member of this association by an application and certificate of membership, which were to be considered together with the by-laws and constitution, he became entitled to all the benefits of membership, and by the payment he had then made he paid for his insurance up to the time of the maturity of the next assessment upon the death of a member. The application, certificate of membership, and by-laws all provided that upon failure to pay any assessment for a death benefit within the time specified the certificate of membership shall become void, and the member forfeit all benefits in the association, and all moneys paid. The provisions of the contract make the forfeiture a part of the contract, and a failure to pay within the time limited causes the forfeiture, and the contract is self-executing in creating the forfeiture. *Northwestern Traveling Men's Assn. v. Schauss*, 148 Ill. 304. As said in *Chicago Mut. L. Indemnity Assn. v. Hunt*, 127 Ill. 257, 2 L. R. A. 549. "the making of the assessment does not make the member a debtor to the association, so as to authorize it to bring a suit for its recovery in case of his neglect or refusal to pay." From the principles underlying the whole business of life insurance, whether by what may be termed the old companies, or by mutual benefit associations, the unilateral character of the contract is well expressed in the case last cited. The making of an assessment does not make the member a debtor to the association, so as to authorize it to bring a suit for recovery in case of his neglect or refusal to pay, and it would be an anomaly if the law would authorize a proceeding to be had by an officer appointed by a court of equity to have a recovery in favor of, and for the benefit of, a corporation, where the corporation itself could not sue and recover. No principle would authorize such a recovery.

It is insisted that a member who has had the benefit of insurance ought to be required to pay the death benefit of other members, who die while he thus had the benefit of insurance. The payment of an admission fee is insurance in advance up to the maturity of the first assessment provided for by the constitution and by-laws and by the certificate of membership and the application. If the member paid no more, he simply forfeited all that he had paid, and all benefits under his certificate, but had paid for all he had received. By paying the first assessment, and continuing to pay assessments thereafter made from time to time, each time he so paid an assessment his assessment was for his insurance until the maturity of the next assessment. Only when he failed to pay an assessment made did he cease to be a member, and forfeit all benefits thereunder; and no equitable principle exists which gives a right of recovery against a member who thus elects to no longer pay assessments and

who has paid for all he has received in way of insurance. By ceasing to pay, he ceased to be a member, and a forfeiture existed, and he acted in accordance with that contract, having paid for all he received. The provisions of the constitution, by-laws, application, and certificate of membership provided for the payment of assessments, and also created the full penalty for the failure to pay such assessments, which is a forfeiture of insurance, of membership, interest in the surplus fund, and all benefits by reason of belonging to the association, together with all moneys paid.

Appellee urges the principles established in the case of *New Era Life Assn. v. Rossiter*, 132 Pa. 314. In that case the application contained the agreement that "the members and beneficiary shall be jointly and severally liable for all death claims," etc. The promise in that case is express and absolute, and constitutes a joint and several promise and undertaking, and cannot be held to constitute in the application a provision for a unilateral contract. Great reliance is had on the authority of *Ellerbe v. Barney*, 119 Mo. 632, 23 L. R. A. 435. In that case three of the seven judges dissented. The opinion of the court is based on the position that the contract is not really an insurance contract, and that the assessments ought to be treated, not as premiums, but as lodge dues. In the latter case the supreme court of Missouri said: "The unilateral feature contended for in this contract has been very generally imposed upon the contract of the regular, old-line, premium-collecting life insurance companies. These companies were unable to commence business except upon capital paid in by the members or stockholders, to be used in meeting death losses as they occurred. Until called for, the capital, along with all premiums not wanted for expenses, was required to be invested for profit and accumulation. The premiums were payable annually, and invariably in advance. Upon payment of the first premium, as a condition precedent, the assured received a policy covering him for one year, with the option to continue it by payment of other premiums. This payment constituted the full consideration of value to be paid during the year of insurance. Nothing in the shape of dues or assessments could be exacted from him for the period covered by the premium paid. If any of the old-line companies should suddenly stop insuring, and decline to issue another policy, every policy outstanding would be paid from the accumulated capital as it matured. An inability to do so would put it out of line in the business of insurance, and indicate that it had not been conducted and managed according to the principles upon which it was founded." But in speaking of the certificate in the Masonic Benefit Society of Missouri it was said: "Hence the certificate of membership in such an organization is a contract with every member of it, to be enforced by the managing officers as representatives or trustees for all the members of the concern. When the member joins, he pays the admission fee, which is used to de-

fray necessary expenses, but which is altogether too small to constitute a fund or capital wherewith to satisfy death losses. No fund or capital is kept on hand or invested for such a purpose. Indeed, the economy underlying the plan of the organization aims at doing away with the expense and loss incident to the management, investment, and accumulation of capital. As a substitute therefor, each member promises to contribute an equal share with every other member upon occasion of every death in the membership, which is collected and paid over by the officers of the association to the wife or children of the deceased member, as the case may be. The ascertainment and declaration of death losses is left to the members of the association, and their action in that behalf is known as an assessment. They are bound to make these assessments on occasion of every death, and the wife or children of the deceased member or other beneficiary have the right to compel them to make and collect the assessments inuring to their benefit. It is manifest that these assessments, in their nature, bear a near resemblance to the dues incident to membership in a friendly society, and constitute a consideration for the promised insurance of the association, materially differing from the annual premium stock companies. When considered in the light of society dues, it will be admitted that a person cannot, by discontinuing his membership, escape the obligation of paying those dues which accrued before the termination of his membership." The contract in this case is in no sense for the assessment and collection of lodge dues. By the provisions of the constitution and by-laws of this association assessments made are not lodge dues, but are assessments for the payment of death benefits. The payment of the premium is optional with the insured, and, if he makes default, the insurer has no other remedy than a forfeiture of the policy. 2 May, Ins. 3d ed. § 341a. And the same principle applies to certificates issued by mutual benefit life insurance societies as is applicable to ordinary life insurance companies. *Re Protection L. Ins. Co.* 9 Biss. 188; *Niblack, Ben. Soc.* 276; *Bacon, Ben. Soc.* § 357. The constitution and by-laws define the duty of the association and its officers, and provide the mode of obtaining and maintaining membership. An applicant possessing certain qualifications provided in the constitution and by-laws, upon performance of certain things required therein, may become a member, and by doing and refraining from doing certain things required by the constitution and by-laws he may maintain his membership. If he fails to do any of the things required or does any of the things forbidden, he forfeits his membership, and all benefits and all interest in all money he has paid. He agreed, in effect, that so long as he remained a member he would obey all the rules and regulations established for the government of the conduct of members, and the association on its part agreed that the sole and only penalty or liability for failure to obey should be the forfeitures above men-

tioned. There is no express, absolute promise to pay, or to continue to pay, assessments. There is nothing that can be tortured into a direct, express undertaking to remain a member, and continue to pay, as long as one lives. The language deliberately selected by the association in which to express its contract, as appears in the certificate, application, and by-laws, makes the forfeiture self-executing; and the member without any action on the part of the association, by mere force of his failure to pay *eo instanti*, ceases to be a member. This is not like those cases where the association must do something or refrain from doing something to make the forfeiture complete. *Northwestern Traveling Men's Assn. v. Schauss*, 148 Ill. 304. The language of § 1 of art. 3 of the by-laws here is: "Any member failing to pay such assessment within fifteen days after such notice has been served upon him shall forfeit his membership in the association and all benefits therefrom." Under the holdings in the cases above cited the forfeiture is absolutely self-executing.

The reasons why the option is not with the association are apparent. We have no statute in this state concerning withdrawing members, or providing for any mode of withdrawing, etc., and no one ever contemplated that every person who joins such an association or society is bound to stay in for life. There is no other provision in the constitution or by-laws of the association, or in the application, or in the certificate, or anywhere else, providing for the withdrawal of members. Such contracts have heretofore always been considered unilateral, and so the whole plan for withdrawing is embraced in these self-executing clauses of the by-laws and contract. The member's failure to pay is his declaration of severance, and the forfeiture provided for in the by-laws and contract is the association's compensation. The option is with the member, and not with the association. When appellant became a member, he was required, among other things, to pay a sum into the mortuary surplus fund. This sum was two maximum assessments on his \$4,000 certificate. This money went directly into the fund for paying death losses, not a cent of it for dues or expenses. This more than paid his insurance from the date of his admission to the date of the maturity of his assessment for the first death benefit after he became a member. When he had paid the first assessment, that paid for his insurance to the maturity of the second, and so on. The requirements for admission, not only in this association, but in all benefit associations or societies, more than cover the member's insurance from the date of his admission to the maturity of the first assessment after he becomes a member.

The statute under which the receiver was appointed contemplates that, if the court shall find that the association cannot longer continue in operation, and properly serve its purpose, then the court shall appoint a receiver, and wind up its affairs; or, if the court shall find that it might longer continue in business, and properly serve its purpose,

if its officers would do their duty in making assessments, then the court need not appoint a receiver, and wind up the concern, but may order an additional assessment to be made to meet deficiencies, and allow the concern to continue in operation. This shows that the legislature treated these contracts as unilateral. It did not contemplate the making of an assessment after the association had been found unable to longer properly serve its purpose. It is true that, a receiver having been appointed by the court, the court has power independently of any statute to order him to collect assets, but that power does not change the character of the contract between the association and the member, and make the member a debtor who, by his contract, is not so. When such association or society for any reason becomes unable longer to properly carry out its purpose, some must lose. All must lose except those that died and were paid before the association became disabled. Those that have died, and not been paid, should have all there is left, and lose the balance; those who continue to live get nothing, and lose all. But it is said those that continue to live had their insurance all the time. They had just that kind of insurance that those that died had, and no better, and paid just as much for it. Those that have died get the surplus fund, and whatever else there is, and those that have lived get nothing. The mistakes or mismanagement which caused the ruin, if the fault of the members at all, was as much the fault of the dead as of the living, and was equally the misfortune of all.

A majority of the court holds that under the provisions of this certificate of membership, taken together with the application and the constitution and by-laws of this association, the contract was purely unilateral, and no recovery could be had thereunder by the association against the member, and for the same reason a recovery could not be had by a receiver appointed by the court to take charge of the assets of the association.

The judgments of the Appellate Court of the Third District and of the Circuit Court of Coles County are each reversed, and the cause is remanded.

Boggs, J., took no part in the decision of this cause.

Rehearing denied October 6, 1898.

C. Stuart BEATTIE
v.

NATIONAL BANK OF ILLINOIS.

(174 Ill. 571.)

1. **The middle initial letter is not a part of a person's Christian name.**

—NOTE.—On the general subject of the acquisition and use of a name by an individual, see note to *Lafin & R. Powder Co. v. Steytler* (Pa.) 14 L. R. A. 890.

For omission of middle initial, see also *Crouse v. Murphy* (Pa.) 12 L. R. A. 58; *Davis v. Steeps* (Wis.) 23 L. R. A. 818; *Flucher v. Hanegan* (Ark.) 24 L. R. A. 543; and *State v. Higgins* (Minn.) 27 L. R. A. 74.

2. Title to a bill of exchange is not transferred by indorsement of one bearing the name of the payee but who was in fact a stranger to the bill and who acquired possession of it by mistake.
3. Forgery is committed by indorsing one's own name upon commercial paper belonging to another of the same name with knowledge of want of title and with intent to perpetrate a fraud.
4. The drawee of a draft cannot be compelled to make payment to one who holds under a spurious indorsement, although the draft was taken in good faith in due course of business.

(October 24, 1898.)

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of defendant in an action brought to recover the amount of a draft which plaintiff held under a forged indorsement. *Affirmed.*

Statement by **Magruder, J.:**

This suit was originally begun before a justice of the peace, and taken by appeal to the circuit court of Cook county. In the circuit court the cause was submitted by agreement to be tried by the court without a jury. The finding of the court was against the appellant here, who was the plaintiff below, and in favor of the appellee here, who was the defendant below. Judgment was rendered upon the finding, which was for an amount less than \$1,000. An appeal was taken to the appellate court. The appellate court has affirmed the judgment of the circuit court, and granted a certificate of importance. There is no controversy as to the facts. The case was tried upon a stipulation as to the facts, which were substantially as follows: On September 15, 1891, one George P. Bent, of No. 223 Canal street, Chicago, sent for collection to the First National Bank of Council Bluffs, Iowa, a note for \$133.50, made by a man by the name of Max Bournicus. On September 28, 1891, the First National Bank of Council Bluffs collected the note, and on the same day made its draft for \$133.25 on the National Bank of Chicago, Illinois, to the order of George A. Bent, Chicago. The draft was made payable to the order of George A. Bent, instead of George P. Bent, by mistake. It was mailed to George A. Bent, Chicago, Illinois. George P. Bent was intended to be made the payee in the draft. George A. Bent never had any business transactions with appellee, the drawee, or with the First National Bank of Council Bluffs, the drawer of the draft. The latter bank was never indebted to George A. Bent. A man named George A. Bent received the draft from the postoffice, and indorsed upon it his own name, George A. Bent, and sold it to the appellant. The facts tend to show that the appellant purchased the draft in good faith, relying upon one Beach, a broker whom he knew, although he was not acquainted with George A. Bent, the supposed payee in the draft. After purchasing the draft the appellant deposited it

for his own account in the Bank of Commerce in Chicago, which cleared through the Union National Bank of Chicago. The draft was paid by the appellee bank through the Union National Bank. The appellee returned the draft to the National Bank of Council Bluffs, and it was there discovered that George A. Bent had received the draft intended for George P. Bent. Affidavits setting up the facts and the mistake which had occurred were made and attached to the draft, and the draft, with the affidavits so attached, was returned to the appellee. The appellee returned the draft to the Union National Bank, which redeemed it, under the rules of the clearing house. The Union National Bank presented it to the Bank of Commerce, and the latter bank took it up, and required the appellant to make the same good. The appellant took the draft to the appellee bank, and, ascertaining that the appellee had funds in its hands belonging to the First National Bank of Council Bluffs, the drawer of the draft, demanded payment, but payment was refused by appellee on the alleged ground that the indorsement of the payee was a forgery. Six propositions were submitted by the appellant (the plaintiff below) to the trial court to be held as law in the decision of the case. Two of these were marked "Held," two were marked "Refused," and two were modified, and marked "Held" after being thus modified. The trial court, of its own motion, made in writing, and held affirmatively, a proposition holding that no right of action existed against the appellee, the National Bank of Illinois, and declined to hold whether or not the First National Bank of Council Bluffs was liable. Proper exceptions were taken to the action of the court.

Mr. Harry Vincent, for appellant:

Where the wrongful act of one party must fall upon one of two, both equally innocent, the loss must be borne, if by either, by the one whose negligence made the wrong possible,—is applicable to banks and bank paper.

Bank of United States v. Bank of Georgia, 10 Wheat. 339, 6 L. ed. 336.

The business of this bank is quasi public. *Meadowcroft v. People*, 163 Ill. 56, 35 L. R. A. 176.

The very highest degree of care is due from a bank at all times.

Gray v. Merriam, 148 Ill. 179, 32 L. R. A. 769.

Such circumstances create an estoppel in favor of the deceived party against the negligent party.

United States v. National Exch. Bank, 45 Fed. Rep. 163; *Hurdy v. Chesapeake Bank*, 51 Md. 585.

The drawing and delivery of a check upon a fund deposited in a bank is in effect an assignment of such fund in *toto* or *pro rata*, and, after demand made, the holder of the check has a direct cause of action against the bank if it has at the time sufficient funds of the drawer in its hands and refuses to make payment.

National Bank of America v. National

Bank, 164 Ill. 504; *Abt v. American Trust & Sav. Bank*, 159 Ill. 467.

What difference does it make in the relations of this drawee (appellee) and holder (appellant) whether appellant's title to the money represented by this draft is created by an act of the drawer, which amounts to a transfer by conveyance, or by an act of the drawer, which amounts to a transfer by estoppel? In either case it is the money of the Council Bluffs Bank which is transferred, and the act of the Council Bluffs Bank which makes the transfer. Under the law of Illinois appellee has absolutely no interest in this deposit except to keep it safely and to pay it out to the person to whom the drawer may transfer it by draft.

The suggestion that payment by appellee to appellant might be followed by a necessity of paying over again to George P. Bent is of no force here. The same law which binds the agent by the act of his principal gives the agent an action against the principal when damaged through his negligence. If appellant pays this money twice then it simply calls upon its negligent correspondent at Council Bluffs to pay it twice, and by giving notice to the Council Bluffs Bank and an opportunity to assist in defending this suit, appellant binds the Council Bluffs Bank by the judgment.

Blasdale v. Babcock, 1 Johns. 517; *Herman, Estoppel*, § 64; *Bigelow, Estoppel*, p. 131.

Mr. Arnold Heap for appellee.

Magruder, J., delivered the opinion of the court:

The question presented by this record is within a very narrow compass. It is whether a party holding a draft under a forged indorsement of the payee therein, or what amounts to a forged indorsement, can compel the drawee to pay him the draft. It is established clearly by the evidence that the George A. Bent who took the draft from the postoffice, and indorsed his name upon the back of it, was not the real payee, to whom the drawer of the draft intended to make it payable. It is true that the real and intended payee and real owner of the draft was named George P. Bent; but the fact that the name of the real owner and the name of the fraudulent possessor of the draft differ, so far as the middle letter of the name is concerned, does not make the case other than a case where the name of the real payee and the name of the assumed payee are the same. This is so because the law does not regard the middle initial letter as a part of a person's name, but only recognizes one Christian name of a party. *Thompson v. Lee*, 21 Ill. 242; *Erskine v. Davis*, 25 Ill. 251; *Miller v. People*, 39 Ill. 457; *Bletch v. Johnson*, 40 Ill. 116; *Humphrey v. Phillips*, 57 Ill. 132. Where a bill is payable to the order of a person, and another person of the name of the payee gets hold of it, and indorses it to a party who takes it in good faith and for value, such party acquires no title to the bill. *Cochran v. Atchison*, 27 Kan. 728. If the indorsement so made by a person who is

not the real payee, but has the same name as the real payee, is made by such person with full knowledge that he is not the real payee, and with intent to perpetrate a fraud, his indorsement cannot be regarded otherwise than as a forgery. In *Barfield v. State*, 29 Ga. 127, 74 Am. Dec. 49, it was held that where there were two persons of the same name, and one of them signed that name to certain notes with the intention that the notes might be used in trade as the notes of the other, it was a forgery. *Blackstone* (4 Com. 247) defines forgery to be the fraudulent making or alteration of a writing to the prejudice of another man's right. "One may be guilty of forgery if he fraudulently signs his name, although it is identical with that of the person who should have signed. Thus, if a bill of exchange is payable to A B or order, and it comes to the hand of a person named A B, who is not the payee, and who fraudulently indorses it for the purpose of obtaining the money, this is a forgery." *United States v. Long*, 30 Fed. Rep. 678. Where an indorsement is made for the purpose of being fraudulently used as the indorsement of another person, it is falsely made. The falsity of the act consists in the intent that the indorsement shall pass and be received as that of some other party, and in such case the charge of forgery can be maintained, although the signature is of a name which might lawfully be used by the person who put it on the draft or bill of exchange. *Com. v. Foster*, 114 Mass. 311, 19 Am. Rep. 353. In *People v. Peacock*, 6 Cow. 73, where certain coal was consigned to George Peacock of New York, and arrived there, and was claimed by another of the same name, who resided in the same city, but was not the true consignee, and he, knowing this, obtained an advance of money on indorsing the permit for the delivery of the coal with his own proper name, it was held that this was forgery. Nothing is better settled than that a forged indorsement does not pass title to commercial paper negotiable only by indorsement, and does not justify the payment of such paper. Here, whether the indorsement of the payee's name was technically a forgery, or was merely a spurious and false indorsement, in either case it was inoperative to change the title to the instrument. *Graves v. American Exch. Bank*, 17 N. Y. 205. In *Graves v. American Exch. Bank*, 17 N. Y. 205, it was held that the drawee of a bill of exchange is bound to ascertain that the person to whom he makes payment is the genuine payee, or is authorized by him to receive it, that it is no defense against such a payee that the drawee, in the regular course of business, with nothing to excite suspicion, paid the bill to a holder in good faith and for value, under an indorsement of a person bearing the same name as the payee. There it was said by the court: "The defendants, on whom the draft was drawn paid it upon the indorsement of another Charles F. Graves, residing at or near La Salle, who wrongfully took it from the postoffice at Mendota. Such a payment, although made in good faith, did not divest

or impair the title of the owner who had not seen or indorsed the paper." In *Mead v. Young*, 4 T. R. 28, the action was brought by the indorser of a bill of exchange against the acceptor, the bill having been drawn by one Christian on the defendant in London, payable to Henry Davis or order; and having been put into the foreign mail, inclosed in a letter from Christian, it got into the hands of another Henry Davis than the one in whose favor it was drawn. The defendant accepted the bill, and it was discounted by the plaintiff. It was held that it was competent for the defendant to prove that the person who indorsed to the plaintiff was not the real payee, though he was of the same name, and though there was no addition to the name of the payee on the bill; and it was also held that if a bill of exchange payable to A or order got into the hands of another person of the same name with the payee, and such person, knowing that he was not the real person in whose favor it was drawn, indorsed it, he was guilty of a forgery. In that case Ashhurst, J., said: "In order to derive a legal title to a bill of exchange, it is necessary to prove the handwriting of the payee: and therefore, though the bill may come by mistake into the hands of another person, though of the same name with the payee, yet his indorsement will not confer a title." In the same case Buller, J., said: "I am of opinion that it is incumbent on a plaintiff who sues on a bill of exchange, to prove the indorsement of the person to whom it is really payable. . . . Now, here it is clear that the indorsement was not made by the same H. Davis to whom the bill was made payable, and no indorsement by any other person will give any title whatever."

In the case at bar, when the appellant presented the draft for payment to the appellee the latter had a right to know that the appellant held the draft under a genuine indorsement. When the appellant presented the draft for payment, it had been ascertained that the indorsement was forged, or at all events spurious and false, and was therefore void. No title passed by it, and, if the appellee had made payment to the appellant, appellee could have been compelled again to pay the draft to the true owner thereof. Daniel, in his work on *Negotiable Instruments*, says: "The maker of a note or the acceptor of a bill must satisfy himself, when it is presented for payment, that the holder traces his title through genuine indorsements; for, if there is a forged indorsement, it is a nullity, and no right passes by it. And payment to a holder under a forged indorsement would be invalid as against the true owner, who might require it to be paid again. . . . The payor should also satisfy himself of the identity of the holder; for he cannot defend himself against the real payee by showing that he paid the amount of the bill or note to another person of the same name, in good faith and in the usual course of business." 2 Dan. Neg. Inst. 4th ed. § 1225. So, also, Randolph, in his work on *Commercial Paper*, says: "Where

a bank holds a note or bill for collection under a forged indorsement, and collects and pays it over to its principal, it will still be liable to the real owner for the amount collected. . . . So, if a bill is indorsed by another person in the payee's name, and paid to the holder under such indorsement, the payee may recover such payment." 3 Randolph, Com. Paper, § 1469.

It follows from the authorities thus referred to that the appellant, having no title to the draft, was not entitled to recover the amount thereof from the appellee. If, without knowledge of the real character of the indorsement of the draft by the supposed payee named therein, the appellee had paid the amount of the draft to the appellant, it could have recovered such amount back from the appellant. This results from the fact that "the indorser contracts that the bill or note is in every respect genuine, and neither forged, fictitious, nor altered." 1 Dan. Neg. Inst. 4th ed. § 672. Tiedeman, in his work on *Commercial Paper*, says: "Inasmuch as the indorser also warrants that he has a perfect title to the paper by indorsement, and is liable if his title proves defective, and since no title passes on a forged indorsement,—it follows as a necessary consequence that the indorser must warrant the genuineness of the prior indorsements." § 259. Randolph, in his work on *Commercial Paper*, says: "Since an indorsement warrants the genuineness of prior indorsements, payment made by the drawee to an indorser, holding under a forged indorsement, may be recovered from such holder." § 1469. It was held in *Chambers v. Union Nat. Bank*, 78 Pa. 205, that the holder of a draft which is indorsed and passed by him guarantees the prior indorsement. In *Cochran v. Atchison*, 27 Kan. 728, where a bill was payable to W. W. Owens and one W. W. Owen obtained possession of it and wrongfully indorsed it, it was held that a subsequent indorser could not relieve himself from liability to his immediate indorsee on the ground that the latter was guilty of negligence in taking the paper without the name of the actual payee indorsed thereon, upon the grounds that the indorser guarantees the genuineness of the signature of the payee, and that the difference in pronunciation between "Owens" and "Owen" was so slight as not to amount to a variance. The court held generally in that case that an indorser warrants the genuineness of indorsements on a bill of exchange. If, therefore, it be true that, upon payment of the amount of the draft to appellant by appellee, a recovery could be had by appellee from the appellant of the amount so paid, upon the ground that appellant by his indorsement had guaranteed the genuineness of the previous indorsement by George A. Bent, it would be useless to hold that a right of recovery exists in favor of the appellant against the appellee. To require the appellee to pay an amount which it could hereafter recover back again would be an idle ceremony.

Counsel for appellant claims that he has a right of action for negligence against the

First National Bank of Council Bluffs, Iowa, because of the alleged carelessness of that bank, which was the drawer of the draft, in not mailing it properly to the payee named therein. In other words, it is said that, instead of addressing the letter inclosing the draft to George A. Bent, of Chicago, it should have addressed it to George P. Bent, of 223 South Canal street, Chicago. We do not deem it necessary to decide whether or not an action will lie in favor of the appellant against the Iowa bank. This action is against the appellee bank, and it is sufficient to say that, so far as this record shows, the appellee was guilty of no negligence.

The judgment of the Appellate Court, affirming the judgment of the Circuit Court, is affirmed.

CENTRAL ELEVATOR COMPANY *et al.*,
Appts.,
v.

PEOPLE of the State of Illinois, *ex rel.*
Maurice T. MOLONEY, Attorney General,
and
Eight Other Cases.

(174 Ill. 208.)

1. That a statute providing for licensing public warehousemen provides an efficient remedy for violation of their duty cannot be raised for the first time on appeal in an equity case to enjoin them from using their privileges to suppress competition.
2. Equity has jurisdiction of a suit to enjoin a licensed warehouseman from using his license so as to suppress competition in trade in the articles stored in his warehouse, and enable him to monopolize the business.
3. One licensed to keep a public warehouse for storage of grain will not be permitted to deal in grain and store the same in his own licensed warehouse; and the same rule applies to stockholders of a corporation so licensed.
4. Failure of warehouse commissioners to appeal to the attorney general to institute suits, or to question the legality of the conduct of warehousemen in storing their own grain in their warehouses, does not amount to a practical construction of the statute providing for licensing warehouses so as to show that it authorizes such conduct.

(June 18, 1898.)

APPEALS by defendants from decrees of the Circuit Court for Cook County enjoining defendants and other stockholders from storing their own grain in their warehouses to the detriment of other grain merchants. *Affirmed.*

The facts are stated in the opinion. *

Messrs. Custer, Goddard, & Griffin, and James E. Munroe, with Mr. John J. Herriek, for appellants:

The storing of his own grain in his warehouse, by the proprietor of a warehouse of class A, is not unlawful.

The provision requiring the elevator proprietor to procure a license is in no respect different from a like provision in any law or ordinance requiring those engaged in any particular business or avocation to take out a license as a condition of doing business.

The plain distinction between a license and a charter creating a corporation is forcibly illustrated.

Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560; *Braun v. Chicago*, 110 Ill. 186; *Calder v. Kyrby*, 5 Gray, 598; *Metropolitan Bd. of Excise v. Barrie*, 34 N. Y. 667.

An elevator proprietor who procures a license under the requirements of this act, "to transact business as a public warehouseman," is not a "creation of the state" any more than any one of the multitude of individuals who take out licenses to pursue the variety of callings and avocations as to which this requirement is imposed by statute or ordinance.

Jurisdiction to restrain corporations "within the scope of the purposes of their creation" is sustained, not as a jurisdiction to prevent the commissions of illegal acts, but to prevent these artificial beings, creations of the state, from exercising franchises and powers not granted by their charters.

Atty. Gen. v. Great Northern R. Co. 1 Drew. & S. 154.

The long-existing practice of warehousemen, whether of grain or other property, to store their own property was not contrary to public policy or unlawful at common law.

The occupation of an elevator proprietor is that of a public warehouseman, and therefore governed by the same rules of law.

Low v. Martin, 18 Ill. 286; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

The storing by a warehouseman of his own grain with the grain of others is not contrary to public policy or unlawful at common law.

People, Illinois Inst. for Edu. of Deaf & Dumb, v. Miner, 46 Ill. 367; *McAuley v. Columbus, C. & I. Cent. R. Co.* 83 Ill. 348; *Low v. Martin*, 18 Ill. 286; *Cole v. Tyng*, 24 Ill. 100, 76 Am. Dec. 735; *Dole v. Olmstead*, 36 Ill. 150, 85 Am. Dec. 397; *Leonard v. Dunton*, 51 Ill. 482, 99 Am. Dec. 508.

Express decisions in Ohio, Iowa, Indiana, Michigan, Minnesota, and other states and in the United States Supreme Court, and text-writers, recognize the practice as both customary and lawful.

O'Dell v. Leyda, 46 Ohio St. 244; *James v. Plank*, 48 Ohio St. 255; *Seaton v. Graham*, 53 Iowa, 181; *Rice v. Nixon*, 97 Ind. 97, 49 Am. Rep. 430; *Ledyard v. Hibbard*, 48 Mich. 422, 42 Am. Rep. 474; *National Exch. Bank v. Wilder*, 34 Minn. 149; *Fishback v. Van Dusen* 33 Minn. 111; *Eggers v. National Bank of Commerce*, 40 Minn. 182; *Brass v. North Dakota, Stoesser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670; 29 Am. & Eng. Enc. Law, p. 668; *Jones, Pledges*, § 319; 6 Am. L. Rev. 459.

NOTE.—As to public warehousemen, see also *Delaware, L. & W. R. Co. v. Central Stock Yards & Transit Co.* (N. J. Eq.) 6 L. R. A. 805; *Hall v. Pillsbury* (Minn.) 7 L. R. A. 529; *Gell-43 L. R. A.*

fuss v. Corrigan (Wis.) 37 L. R. A. 166; and *Franklin Nat. Bank v. Whitehead* (Ind.) 39 L. R. A. 725.

The warehouse act of 1871 did not make it unlawful for the warehouseman to store his own grain in his own warehouse.

All statutes in derogation of the common law must be construed strictly.

Finley v. Steele, 23 Ill. 59; *Smith v. Luatsch*, 114 Ill. 279.

The right of the warehousemen under this act to store their own grain has been recognized, and in effect affirmed by this court, as authorized by the statute.

Broadwell v. Howard, 77 Ill. 305; *National Bank v. Langan*, 28 Ill. App. 401; *Ardinger v. Wright*, 38 Ill. App. 98.

The long practical construction given to the act, as to the right of warehousemen to receive and to store their own grain with the grain of others, should be conclusive of the question of construction.

Packard v. Richardson, 17 Mass. 122, 9 Am. Dec. 123; *Stuart v. Laird*, 1 Cranch, 299, 2 L. ed. 115; *Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447; *Boyden v. Brookline*, 8 Vt. 286; *Schoff v. Bloomfield*, 8 Vt. 478; *Hovey v. State*, Riley, 119 Ind. 386; *Isaacs v. Steel*, 4 Ill. 97; *Rhinehart v. Schuyler*, 7 Ill. 473; *Mathews v. Shores*, 24 Ill. 27; *Russell v. Rumsey*, 35 Ill. 362; *People, Badger, v. Loewenthal*, 93 Ill. 191; *McKeen v. Delancy*, 5 Cranch. 22, 3 L. ed. 25; *United States v. Philbrick*, 120 U. S. 52, 30 L. ed. 559; *Clark's Run & S. River Turnp. Road Co. v. Com.* 96 Ky. 525; *Scanlan v. Childs*, 33 Wis. 663; *Russ v. Kansas City, St. J. & C. B. R. Co.* 111 Mo. 18; *Venable v. Wabash Western R. Co.* 112 Mo. 103, 18 L. R. A. 68; *Troup v. Haight*, Hopk. Ch. 267; *Meriam v. Harsen*, 2 Barb. Ch. 232; *Re Breslin*, 45 Hun, 210; *Power v. Athens*, 99 N. Y. 592; *Cameron v. Merchants' & Mfrs. Bank*, 37 Mich. 240; *Com. v. Mann*, 168 Pa. 290.

Practice by state officers under the statute in accordance with a particular construction sanctioned by uniform acquiescence in this construction through a period of years, is controlling as a practical construction.

Russell v. Rumsey, 35 Ill. 362; *Clark's Run & S. River Turnp. Road Co. v. Com.* 96 Ky. 525; *Scanlan v. Childs*, 33 Wis. 663; *Venable v. Wabash Western R. Co.* 112 Mo. 103, 18 L. R. A. 68; *Troup v. Haight*, Hopk. Ch. 267; *Meriam v. Harsen*, 2 Barb. Ch. 232; *Re Breslin*, 45 Hun, 210; *Power v. Athens*, 99 N. Y. 592; *Atty. Gen. v. Bank of Newbern*, 21 N. C. (1 Dev. & B. Eq.) 216; *Atty. Gen. v. Bank of Cape Fear*, 40 N. C. (5 Ired. Eq.) 71; *Wetmore v. State*, 55 Ala. 198.

Analogous cases of practical construction are—

Russell v. Rumsey, 35 Ill. 382; *Re Breslin*, 45 Hun, 210; *Clark's Run & S. River Turnp. Road Co. v. Com.* 96 Ky. 525; *Troup v. Haight*, Hopk. Ch. 272; *Meriam v. Harsen*, 2 Barb. Ch. 232; *Scanlan v. Childs*, 33 Wis. 663; *Venable v. Wabash Western R. Co.* 112 Mo. 103, 18 L. R. A. 68; *Ross v. Kansas City, St. J. & C. B. R. Co.* 111 Mo. 18; *Atty. Gen. v. Bank of Newbern*, 21 N. C. (1 Dev. & B. Eq.) 216; *Atty. Gen. v. Bank of Cape Fear*, 40 N. C. (5 Ired. Eq.) 71; *Re Washington Street Asylum & P. R. Co.* 115 N. Y. 442; *Com. v. Mann*, 168 Pa. 290; *United* 43 L. R. A.

States v. Alabama G. S. R. Co. 142 U. S. 615, 35 L. ed. 1134; *United States v. Johnston*, 124 U. S. 236, 31 L. ed. 389; *Cameron v. Merchants' & Mfrs. Bank*, 37 Mich. 240; *Rogers v. Goodwin*, 2 Mass. 475.

A court of chancery has no jurisdiction on an information filed by the attorney general to enjoin a warehouse proprietor from committing alleged violations of the warehouse law, by storing his own grain.

The attorney general is not seeking to protect any property right of the state.

Atty. Gen. v. Utica Ins. Co. 2 Johns. Ch. 371; *Verplank v. Mercantile Ins. Co.* 1 Edw. Ch. 85; *Atty. Gen. v. Bank of Niagara*, Hopk. Ch. 354; *People v. Ballard*, 134 N. Y. 274, 17 L. R. A. 737; *Atty. Gen. v. Tudor Ice Co.* 104 Mass. 239, 6 Am. Rep. 227; *Atty. Gen. v. Bank of Michigan*, Harr. Ch. (Mich.) 321; *St. Johns v. McFarlan*, 33 Mich. 74, 20 Am. Rep. 671; *Fletcher v. Tuttle*, 151 Ill. 41, 25 L. R. A. 143.

The relief in equity, prayed by the informations, is barred by continuous acquiescence in the well-known practice and method of business of warehouse proprietors in storing their own grain, during the period of twenty-three years, which elapsed from the time the act went into effect, until the filing of the informations.

Com. Atty. Gen. v. Bala & B. M. Turnp. Co. 153 Pa. 47; *Atty. Gen. v. Johnson*, 2 Wils. 102; *Atty. Gen. v. Sheffield Gas Consumers' Co.* 3 De G. M. & G. 304; *Atty. Gen. v. Proprietors of Bradford Canal*, L. R. 2 Eq. 71; *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25; *Chicago & N. W. R. Co. v. People, Elgin*, 91 Ill. 251.

The decrees in the cases against the Central Elevator Company, the Armour Elevator Company, and the South Chicago Elevator Company are erroneous in enjoining the stockholders of the companies, and the companies themselves, from storing the grain of the stockholders.

The stockholders are not the corporation. They are merely individuals, private persons who own stock in the particular companies.

Reichwald v. Commercial Hotel Co. 106 Ill. 439; *Fey v. Peoria Watch Co.* 32 Ill. App. 618; 1 Cook, Stock & Stockholders, 3d ed. § 11; 2 Cook, Stock & Stockholders, 3d ed. § 709; 1 Beach, Priv. Corp. § 74; *Hoyt v. Thompson*, 19 N. Y. 207; *Hutchinson v. Green*, 91 Mo. 367; *Dana v. Bank of United States*, 5 Watts & S. 223; *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 596, 597, 29 L. ed. 499, 502; *Porter v. Pittsburgh Bessemer Steel Co.* 120 U. S. 649, 670, 30 L. ed. 830, 838; *Jessup v. Illinois C. R. Co.* 36 Fed. Rep. 741; *McCullough v. Moss*, 5 Denio, 567; *Winona & St. P. R. Co. v. St. Paul & S. C. R. Co.* 23 Minn. 359.

The jurisdiction to enjoin the stockholders cannot be sustained on the theory that the attorney general may obtain an injunction against a person who holds some statutory privilege or license, and is acting in excess of the rights thereby conferred on him.

Mr. John P. Wilson, also for appellants:

No implied contract on the part of a public warehouseman is created by his accepting a license under the warehouse act.

In none of the decisions has it ever been suggested or held that acts regulating public warehouses created the business, or conferred special privileges upon special warehousemen; but, on the contrary, it is settled by these decisions that these acts are valid only as attempting to regulate an existing public business under the police power; that the owners of the public elevators prior to the passage of the law had, by carrying on the public warehouse business, given the public such an interest in their property as gave the state the right to regulate such business.

Ruggles v. People, 91 Ill. 262; *Munn v. Illinois*, 94 U. S. 131, 24 L. ed. 80; *Budd v. New York*, 143 U. S. 528, 36 L. ed. 250, 4 Inters. Com. Rep. 45; *People v. Rudd*, 117 N. Y. 1, 5 L. R. A. 559; *Brass v. North Dakota*, 153 U. S. 394, 38 L. ed. 758, 4 Inters. Com. Rep. 670.

If not prohibited by statute, a grain dealer storing his own grain in his own warehouse has also the right to store the grain of others in his warehouse for hire.

The existence and legality of the practice of a warehouseman to store the grain of others, mixing it with his own, was recognized by the supreme court of this state as early as the case of *Low v. Martin*, 18 Ill. 286.

See Story, Bailm. § 40; *Cole v. Tyng*, 24 Ill. 101, 76 Am. Dec. 735; *Dole v. Olmstead*, 36 Ill. 155, 85 Am. Dec. 397; *Ives v. Hartley*, 51 Ill. 524; *Cool v. Phillips*, 66 Ill. 218; *Walton v. Westwood*, 73 Ill. 125; *Broadwell v. Howard*, 77 Ill. 308; *Cloke v. Shafroth*, 137 Ill. 399; *Ardinger v. Wright*, 38 Ill. App. 101; *The Idaho*, 93 U. S. 585, 23 L. ed. 981; *Forbes v. Boston & L. R. Co.* 133 Mass. 160; *O'Dell v. Leyda*, 46 Ohio St. 247; *Inglebright v. Hammond*, 19 Ohio, 337, 53 Am. Dec. 430; *Sexton v. Graham*, 53 Iowa, 188; *Merchants' & Mfrs. Bank v. Hibbard*, 48 Mich. 118, 42 Am. Rep. 465; *Rice v. Nixon*, 97 Ind. 97; *Schindler v. Westover*, 99 Ind. 305; *Preston v. Witherspoon*, 109 Ind. 457, 58 Am. Rep. 417; *National Exch. Bank v. Wilder*, 34 Minn. 158.

The warehouse act of 1871, now in force, does not prohibit public warehousemen from dealing in grain and storing their grain in their own warehouses.

The evidence as to the existence of the practice of the proprietors of public warehouses in this state to deal in and store their own grain prior to 1871 is uncontroverted, and is confirmed by the adjudicated cases in which this method of doing business is shown.

Low v. Martin, 18 Ill. 286; *Cole v. Tyng*, 24 Ill. 101, 76 Am. Dec. 735; *Dole v. Olmstead*, 36 Ill. 155, 85 Am. Dec. 397; *Ives v. Hartley*, 51 Ill. 524; *Cool v. Phillips*, 66 Ill. 218; *Walton v. Westwood*, 73 Ill. 125; *Broadwell v. Howard*, 77 Ill. 308; *Cloke v. Shafroth*, 137 Ill. 399; *Ardinger v. Wright*, 38 Ill. App. 101.
43 L. R. A.

The decree cannot be sustained upon the ground that it is against public policy for a warehouseman to store his own grain.

Thompson v. Weller, 85 Ill. 198.

The information did not state a case which called for the interposition of a court of chancery.

Atty. Gen. v. Utica Ins. Co. 2 Johns. Ch. 371; *Atty. Gen. v. Tudor Ice Co.* 104 Mass. 239, 6 Am. Rep. 227; *Morawetz, Priv. Corp.* § 1041; *Atty. Gen. v. Bank of Michigan*, Harr. Ch. (Mich.) 321; *Verplank v. Mercantile Ins. Co.* 1 Edw. Ch. 88; *Atty. Gen. v. Bank of Niagara*, Hopk. Ch. 354; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 250; *Fletcher v. Tuttle*, 151 Ill. 41, 25 L. R. A. 143; *Douglass v. Martin*, 103 Ill. 28; *People, Finam, v. Galesburg*, 48 Ill. 489; *People v. Lowe*, 117 N. Y. 190; *United States v. Union P. R. Co.* 98 U. S. 569, 25 L. ed. 143.

Messrs. Edward O. Akim, Attorney General, and *Henry S. Robbins*, for appellee:

There was no custom, usage, or practice of warehousemen to store their own grain in their own warehouses prior to 1885.

A custom or usage must be uniform, long established, and so well known as to induce the belief that parties legislated, or contracted, with reference to it.

Bissell v. Ryan, 23 Ill. 567; *Wilson v. Bauman*, 80 Ill. 493; *Turner v. Dawson*, 50 Ill. 85; *Adams v. Pittsburg Ins. Co.* 76 Pa. 411; *Lewis v. The Success*, 18 La. Ann. 1; *The Harbinger*, 50 Fed. Rep. 941; 27 Am. & Eng. Enc. Law, p. 743; *Lane v. Lesser*, 135 Ill. 567; *Allen v. Hickey*, 158 Ill. 362; *Coari v. Olsen*, 91 Ill. 273; *Johnson v. Johnson*, 125 Ill. 510; *Ellis v. Ward*, 137 Ill. 509; *Kusch v. Kusch*, 143 Ill. 353; *Greenwood v. Penn*, 136 Ill. 146; *Voss v. Venn*, 132 Ill. 14; *Baker v. Rockbrand*, 118 Ill. 365.

No practical construction favorable to appellants is shown.

It is unlawful for a class "A" warehouseman to store his own grain in his public warehouse.

The right of the warehousemen to mix the grain of different owners is in this state purely statutory, and hence exists only to the extent that the statute confers it.

The statute of 1871 does not permit a warehouseman to store his own grain.

The older view held that the deposit passed the title in the grain to the warehouseman placing the transaction on the same basis as the deposit of money in a bank. But this view occasioned much injustice to depositors of grain, and now generally, either by statute or judicial determination, it is the law that a deposit of grain in an elevator is a mere bailment, and does not pass the title to the grain.

28 Am. & Eng. Enc. Law, p. 668.

In this state this change was effected by statute.

When the identical thing delivered is to be restored, though in an altered form, the contract is one of bailment, and the title to the property is not changed, but when there is no obligation to restore the specific thing, and the receiver is at liberty to return another thing of equal value, he becomes a

debtor to make the return, and the title to the property is changed—it is a sale.

Jones, Bailm. p. 102; Story, Bailm. § 439; *Chase v. Washburn*, 1 Ohio St. 244, 59 Am. Dec. 623; *Smith v. Clark*, 21 Wend. 84, 34 Am. Dec. 213; *Norton v. Woodruff*, 2 N. Y. 155; *Ewing v. French*, 1 Blackf. 353; *Wilson v. Cooper*, 10 Iowa, 505; *Johnston v. Browne*, 37 Iowa, 200; *Carlisle v. Wallace*, 12 Ind. 252, 74 Am. Dec. 207; *Loneragan v. Stewart*, 55 Ill. 44.

At this stage in the development of the law there was no such thing as an authorized mixing by the warehouseman of grain deposited with him.

With the growth of the grain trade in this country and the consequent inconvenience resulting from requiring each depositor's grain to be kept separate, some courts became inclined to hold that where, by agreement, grain of the same kind belonging to several persons was deposited in the same bin of a warehouse, such depositors thereby became tenants in common of the entire mass.

This new legal theory was crude and inadequately suited to the warehouse business. There was not so much difficulty so long as the entire mass remained the same, but in the requirements of warehousing there must be constant withdrawals and substitutions, so that the original mass is not long preserved.

Chase v. Washburn, 1 Ohio St. 244, 59 Am. Dec. 623; *Sexton v. Graham*, 53 Iowa, 181; *Preston v. Witherspoon*, 109 Ind. 457, 58 Am. Rep. 417.

If the law of this state prior to the passage of the statute authorized warehousemen to mix the grain of different depositors why was it necessary to pass this provision of the statute? Does it not show that this right did not previously exist, and that the statute was passed to effect a change in the law?

Hall v. Pillsbury, 43 Minn. 33, 7 L. R. A. 529; *National Exch. Bank v. Wilder*, 34 Minn. 156.

Unless the present statute affirmatively confers upon these appellants this right to mix their own grain with other grain in their warehouses, they cannot do so.

The underlying object of the legislation is to protect the public.

If any doubt exists in the minds of the court in the construction of that act, that view ought to be taken which makes for the public.

Sloo v. Law, 3 Blatchf. 459.

The law may not be able to reach all forms of objectionable monopoly, but it certainly is able to prevent them in the case of public agencies, such as railroads and grain warehouses, over which the law is vested with the right of control.

Atty. Gen. v. Great Northern R. Co. 1 Drew. & S. 154.

As against the state a corporation and the firm or individual owning all its capital stock do not constitute separate persons.

State, Atty. Gen., v. Standard Oil Co. 49 Ohio St. 137, 15 L. R. A. 145; *People v.* 43 L. R. A.

North River Sugar Ref. Co. 121 N. Y. 582, 9 L. R. A. 33; *National Bank v. John G. Mattingly & Sons*, 18 Ky. L. Rep. 425; *Beal v. Chase*, 31 Mich. 490; *McCracken v. Robinson*, 14 U. S. App. 602, 57 Fed. Rep. 375, 6 C. C. A. 400; *Omaha Bridge Cases*, 10 U. S. App. 98, 51 Fed. Rep. 309, 2 C. C. A. 174.

These informations were within the equitable cognizance of the circuit court.

Dodge v. Wright, 48 Ill. 382; *Comstock v. Henneberry*, 66 Ill. 212; *Hickey v. Forristal*, 49 Ill. 255; *Know County Suprs. v. Davis*, 63 Ill. 405; *Ryan v. Duncan*, 68 Ill. 144; *Gridley v. Watson*, 53 Ill. 186; *Richards v. Lake Shore & M. S. R. Co.* 124 Ill. 516; *Crawford v. Schmitz*, 139 Ill. 564; *Ohlking v. Luitjens*, 32 Ill. 23; *Stout v. Cook*, 41 Ill. 447; *J. W. Butler Paper Co. v. Robbins*, 151 Ill. 588; *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206.

The state can resort to its chancery courts to prevent violation of law by corporations or individuals operating railroads or public warehouses by virtue of special rights or privileges conferred upon them, either by charter, or license, whenever it is necessary to prevent monopoly or injury to the public.

Hunt v. Chicago & Dummy R. Co. 20 Ill. App. 282; *Chicago Mut. L. Indemnity Asso. v. Hunt*, 127 Ill. 257, 2 L. R. A. 549; *Atty. Gen. v. Chicago & N. W. R. Co.* 25 Wis. 425; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092; *United States v. American Bell Teloph. Co.* 128 U. S. 315, 367. 32 L. ed. 450, 461; *Atty. Gen. v. Great Northern R. Co.* 1 Drew. & S. 154; *Queen Ins. Co. v. State. Atty. Gen.* (Tex. Civ. App.) 22 S. W. 1048; *Atty. Gen. v. Shreensbury (Kingsland) Bridge Co. L. R.* 21 Ch. Div. 752; *Atty. Gen. v. Oxford, W. & W. R. Co.* 2 Week. Rep. 330; *Atty. Gen. v. Chicago & E. R. Co.* 112 Ill. 520; *Chicago Fair Grounds Asso. v. People*, 60 Ill. App. 488; *Atty. Gen. v. Galway*, 1 Malloy, 103; *Atty. Gen. v. Tudor Ice Co.* 104 Mass. 239, 6 Am. Rep. 227.

Cartwright, J., delivered the opinion of the court:

Appellants in these nine cases were defendants in the circuit court of Cook county to informations in equity filed by the attorney general against them as licensed proprietors of warehouses of class A in Chicago, or stockholders of corporations so licensed. The informations made the same general allegations in each case,—that defendants had stored grain owned by themselves in the particular warehouse of which they were proprietors; that not less than three fourths of all the grain received in the public warehouses in Chicago was owned by the warehousemen; that the grades for inspection of grain were such that the grain of each grade was not of the same quality, but that separate car loads of different quality and value were graded in the same grade; that by reason of advantages of the defendants, as owners of warehouses, in mixing and manipulating grain, and rebating storage charges, and otherwise, they had been enabled to drive out competition, and to hold and enjoy the privilege of buying grain free from com-

petition; and that such storing of grain was unlawful and injurious to the public. All the informations prayed for the same relief,—a perpetual injunction to restrain defendants, as warehousemen, from storing grain in their own warehouses. The answers admitted in each case that defendants were operating public warehouses of class A, in which grain was stored in Chicago, and that they had stored grain owned by them in their own warehouses, and claimed the right to do so. The answers also set up a general custom of thirty years' standing, under which the proprietors of public warehouses were accustomed to store their own grain and mix it with the grain of their customers, and also that the warehouse commissioners had construed the act of 1871 as permitting that custom, and that such purchasers of grain and such custom had a beneficial effect upon producers, shippers of grain, and dealers in grain throughout Illinois and the Northwest. A great amount of evidence was taken, and a decree was entered in each case granting the relief prayed for. Where the defendant was a corporation, the stockholders were enjoined from storing their own grain in the elevators of their own corporations. These appeals were prosecuted from the decrees so entered. The cases were argued together, and were all submitted upon the same briefs and arguments.

It is contended that a court of equity has no jurisdiction in a case of this character, and especially because by the provisions of the warehouse act the license is made revocable for any violation of law, so that the statute affords a sufficient remedy for any illegal act by the licensee. This objection was not made by the answers, and the fact that the statute provides an efficient remedy for a violation of duty by a warehouseman and licensee cannot be raised for the first time in this court, if the case is one in which a court of equity might under any circumstances obtain jurisdiction. There are subjects which cannot be brought before a court of chancery, even by consent of the parties; but if a defendant makes no objection to a hearing of the cause, and participates in it, he must be regarded as consenting to the jurisdiction, and, if the subject-matter is such that jurisdiction can be conferred in that way, he will not be heard to complain of the want of it. In such a case, if a defendant goes to a hearing without objection he cannot, in case of defeat, make the objection here. *Stout v. Cook*, 41 Ill. 447; *Dodge v. Wright*, 48 Ill. 382; *Hickey v. Forristal*, 49 Ill. 255; *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571; *Gridley v. Watson*, 53 Ill. 186; *Knox County Supers. v. Davis*, 63 Ill. 405; *Ryan v. Duncan*, 88 Ill. 144; *Richards v. Lake Shore & M. S. R. Co.* 124 Ill. 516; *Crawford v. Schmitz*, 139 Ill. 564; *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206. Clearly, this is such a case. The relief sought by the informations, and the subject-matter, are neither of them foreign to equity jurisdiction. The Constitution declares that warehouses such as defendants are licensed to carry on are public warehouses, and that it

shall be the duty of the general assembly to pass all necessary laws to give full effect to that article of the Constitution, which shall be liberally construed to protect producers and shippers. In compliance with the requirements of the Constitution the warehouse act of 1871 was enacted, by which defendants were permitted to exercise the business of public warehousemen, and to conduct such public warehouses. They procured their licenses, and thereby voluntarily submitted their property to the law. The right of the state to control them in that business is conceded, and the right of the state, through its attorney general, to restrain them in the use of their public warehouses, within the limitations of the law, and to prevent resulting public injury, is not foreign to the powers or jurisdiction of a court of equity. Defendants could not operate their warehouses and devote them to such uses without a license, and the giving of a bond to faithfully comply with the law. The attorney general alleged injury to the public from violations of the laws governing them and their warehouses, and this authorizes the court of equity to protect the public right,—at least, where there is no objection that the law furnished an adequate remedy.

It is a firmly established rule that, where one person occupies a relation in which he owes a duty to another, he shall not place himself in any position which will expose him to temptation of acting contrary to that duty, or bring his interest in conflict with his duty. This rule applies to every person who stands in such a situation that he owes a duty to another, and courts of equity have never fettered themselves by defining particular relations to which alone it will be applied. They have applied it to agents, partners, guardians, executors, administrators, directors, and managing officers of corporations, as well as to trustees, but have never fixed or defined its limits. The rule is founded upon the plain consideration that the one charged with duty shall act with regard to the discharge of that duty, and he will not be permitted to expose himself to temptation, or be brought into a situation where his personal interests conflict with his duty. Courts of equity have never allowed a person occupying such a relation to undertake the service of two whose interests are in conflict, and then endeavor to see that he does not violate his duty, but forbid such a course of dealing, irrespective of his good faith or bad faith. If the duty of the defendants as public warehousemen stands in opposition to personal interest as buyers and dealers in grain storing the same in their own warehouses, then the law interposes a preventative check against any temptation to act from personal interest, by prohibiting them from occupying any such position.

The public warehouses established under the law are public agencies, and the defendants, as licensees, pursue a public employment. They are clothed with a duty towards the public. The evidence shows that defendants, as public warehousemen storing grain

in their own warehouses, are enabled to, and do, overbid legitimate grain dealers, by exacting from them the established rate for storage, while they give up a part of the storage charges when they buy or sell for themselves. By this practice of buying and selling through their own elevators, the position of equality between them and the public whom they are bound to serve is destroyed; and by the advantage of their position they are enabled to crush out, and have nearly crushed out, competition in the largest grain market of the world. The result is that the warehousemen own three fourths of all the grain stored in the public warehouses of Chicago, and upon some of the railroads the only buyers of grain are the warehousemen on that line. The grades established for different qualities of grain are such that the grain is not exactly of the same quality in each grade, and the difference in market price in different qualities of the same grade varies from 2 cents per bushel in the better grades to 15 cents in the lower grades. The great bulk of grain is brought by rail and in car loads, and is inspected on the tracks, and the duty of the warehousemen is to mix the car loads of grain as they come. Such indiscriminate mixing gives an average quality of grain to all holders of warehouse receipts. Where the warehouseman is a buyer, the manipulation of the grain may result in personal advantage to him. Not only is this so, but the warehouse proprietors often overbid other dealers as much as a quarter of a cent a bushel, and immediately resell the same to a private buyer at a quarter of a cent less than they paid, exacting storage, which more than balances their loss. In this way they use their business as warehousemen to drive out competition with them as buyers. It would be idle to expect a warehouseman to perform his duty to the public as an impartial holder of the grain of the different proprietors, if he is permitted to occupy a position where his self-interest is at variance with his duty. In exercising the public employment for which he is licensed, he cannot be permitted to use the advantage of his position to crush out competition, and to combine in establishing a monopoly by which a great accumulation of grain is in the hands of the warehousemen, liable to be suddenly thrown upon the market whenever they, as speculators, see profit in such course. The defendants are large dealers in futures on the Chicago Board of Trade, and together hold an enormous supply of grain ready to aid their opportunities as speculators. The warehouseman issues his own warehouse receipt to himself. As public warehouseman he gives a receipt to himself as individual, and is enabled to use his own receipts for the purpose of trade, and to build up a monopoly and destroy competition. That this course of dealing is inconsistent with the full and impartial performance of his duty to the public seems clear. The defendants answer

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that the practice had a beneficial effect upon producers and shippers, and naturally were able to prove that when, by reason of their advantages, they were overbidding other dealers, there was benefit to sellers, but there was an entire failure to show that in the general average there was any public good to producers or shippers.

The answers also set up, and it is claimed here, that there was at the time of the passage of the warehouse act a general custom of warehousemen to deal in grain, and to store it in their warehouses, and that the law was passed with reference to that existing custom. The evidence fails to establish any such custom. The amount so bought and stored or dealt in up to the year 1885 was trifling, and the first time when there was any material increase was in 1890. Many witness who would have known if such a practice or usage existed united in denying all knowledge of it, and many of them testified that they never knew or heard of any elevator owner buying or selling grain prior to 1885. There was no such custom.

Finally it is claimed that there has been a practical construction of the law by the warehouse commissioners, permitting the practice complained of. There was a little buying and storing of grain by warehousemen from time to time, but it was so insignificant as to call no attention to it until in recent years. It is said, however, that since the practice became common the warehouse commissioners, charged with the administration and enforcement of the law, did not question the legality of the practice. There was nothing in the nature of affirmative construction, and the most that can be said is that the warehouse commissioners failed to appeal to the attorney general to institute a suit, and failed to prosecute the offenders. That fact does not amount to practical construction. If the commissioners were derelict, it would not bind the public, and indifference on their part could not have that effect.

Neither are the public barred by laches. The stockholders who were made defendants occupy such a relation to their corporations that they cannot be permitted to use the property which they have devoted to public use to carry on their individual business with substantially the same effect and the same deleterious result to the public interest as if done by the corporation. These persons were made defendants as stockholders, and the only relief sought against them was in that relation. The charges and findings against them were on account of the existence of that relation, and, as we interpret the decree, the permanent injunctions are against them as stockholders. They are permanent only so long as the relation and interest on which they are based shall exist.

The decree of the Circuit Court is affirmed.

NEW YORK COURT OF APPEALS.

Edward H. FOLEY *et al.*, *Respts.*,
v.

MANUFACTURERS' & BUILDERS' FIRE
INSURANCE COMPANY of New York,
Appt.

(152 N. Y. 131.)

An owner has an insurable interest to the extent of its value in a building in process of construction at the time of a fire under a contract requiring the delivery of the completed building within a specified time, not yet expired, although the loss in the absence of insurance would fall on the contractor, and not on the owner.

(March 2, 1897.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a judgment of the Onondaga County Circuit in favor of plaintiffs in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

NOTE.—*Insurable interest in unfinished building during its construction by a contractor.*

It is not necessary to constitute an insurable interest that a party should have either a legal or equitable title in the property insured; but any interest may be insured if the peril against which the insurance is made would bring upon the insured by its immediate and direct effect a technical loss.

Materialmen, contractors, builders, and owners have an insurable interest in a building that is being constructed. There seem to be but few cases on the question as to the insurable interest of the owner, probably for the reason that most buildings being constructed are at the contractor's risk, and in nearly all the cases the policies are taken out by the builder.

The case of *FOLEY v. MANUFACTURERS' & BUILDERS' F. INSURANCE CO.* holds that where a contractor agrees to furnish material and to complete buildings on the foundations on certain lands within a specified time, to be paid after completion, the owner has an insurable interest, although he may not be bound to pay the contractor in case of destruction before the building is finished. In this case the court said that the fact that improvements on the land may have cost the owner nothing, or that if destroyed by fire he may compel another person to replace them without expense to him, or that he may recoup his loss by resort to a contract liability of a third person, does not affect the liability of an insurer, and the company cannot compel the owner to put the loss on the contractors, nor resort to the building contract to diminish the liability for an actual loss.

And a builder who is entitled to a mechanic's lien for work on a building has an insurable interest in the same. *Stout v. City F. Ins. Co.* 12 Iowa, 371, 79 Am. Dec. 539; *Harvey v. Cherry*, 70 N. Y. 440.

And so have materialmen. *Franklin F. Ins. Co. v. Coates*, 14 Md. 285.

In this case the claim for a mechanic's lien under the statute had not been filed. A recovery was allowed to the extent of the mechanic's lien. And mechanics having a lien on a building have an insurable interest in such building. *Carter v. Humboldt F. Ins. Co.* 12 Iowa, 287, 43 L. R. A.

The facts are stated in the opinion.

Messrs. Hiscock, Doheny, & Hiscock, for appellant:

Plaintiffs were only entitled to recover of defendant one half of the damages caused to the foundations, etc., constructed by themselves, plus at the utmost one half of the amount at the time of the fire paid by them to the contractor.

Plaintiffs are not entitled to any speculative damages or profits, and they are not entitled to collect damages for an interest in the property outside of what they actually possessed, and which damages being retained by themselves would be profits, or, being turned over to their contractor, would protect from loss a person and interest which were not covered by the policy at all.

*Porter, Ins. *221; May, Ins. §§ 2, 7, 11; Planters' & M. Ins. Co. v. Thurston*, 93 Ala. 255; *Illinois Mut. F. Ins. Co. v. Andes Ins. Co.* 67 Ill. 362, 16 Am. Rep. 620.

Under the contract which plaintiffs made with the contractor the title to the houses

In the Iowa cases the mechanics commenced a proceeding after the fire, and established their lien by a judgment in the district court. In the latter case the court said that the lien of the mechanic intended to be a security for the price and value of the work performed attaches to the land and building erected thereon from the commencement of the time that the labor is being performed and the materials furnished, and does not have to be established to be insurable.

A builder having a lien which may be enforced against the equity of redemption has an insurable interest, and if he has a valid lien at the time of the loss it is immaterial whether he subsequently performs acts on which his lien may thereafter depend. *Royal Ins. Co. v. Stinson*, 103 U. S. 25, 26 L. ed. 473.

The amount of the insurable interest in this case was held to be such a sum as the builder could have obtained a judgment for against the equity of redemption on that property.

Where a builder contracts to furnish material and erect a house, and the owner and builder make an application for insurance, and a policy is issued in the name of the owner, with a clause "contractor's insurance for thirty days" with the intention to insure the contractor for thirty days, and after that time to insure the owner for three years, such a policy may be enforced for the benefit of the builder. *German F. Ins. Co. v. Thompson*, 43 Kan. 567.

In this case it was intended to insure the interest of the contractor, and the question in the case really turns upon the question of parol evidence to explain an ambiguous policy.

The contractor has an insurable interest to the full value of the building, where the contract provides that the contractor is not liable for loss or damage to the building caused by fire, but that the building is to be kept insured with builder's risks until the written acceptance of the building by the architects, and the policy is to be paid for by the contractors, and the contractor does not insure in favor of the owner, but insures in his own name, as his liability to the owner is such that he must rebuild or pay the damages. *Cushing v. Williamsburg City F. Ins. Co.* 4 Wash. 538.

In *Southern Ins. & T. Co. v. Lewis*, 42 Ga.

remained in the latter until they were entirely completed and the contract fulfilled and the houses had been accepted or were ready for acceptance by plaintiffs.

Andrews v. Durant, 11 N. Y. 35, 62 Am. Dec. 55; *Tompkins v. Dudley*, 25 N. Y. 272; *Commercial F. Ins. Co. v. Capital City Ins. Co.* 81 Ala. 320, 60 Am. Rep. 162; *Lawing v. Rintles*, 97 N. C. 350.

The property destroyed belonged to the contractor and the damages by its destruction are his.

Lawing v. Rintles, 97 N. C. 350; *Security Ins. Co. v. Farrell*, 2 Ins. L. J. 302.

This case seems to be within the principles of those which permit an insured mortgagee to recover only to the amount actually unpaid on his mortgage; or an insured bailee, carrier, or commission merchant to recover only to the amount of actual interest.

Wood, Ins. § 473; *Hadley v. New Hampshire F. Ins. Co.* 55 N. H. 110; *Putnam v. Mercantile Marine Ins. Co.* 5 Met. 386; *Savage v. Corn Exchange F. & Inland Ins. Co.* 36 N. Y. 655.

Mr. W. P. Goodelle, with **Messrs. Riggs & Walker**, for respondents:

The contract itself (the policy) between

the parties provides in express terms that, in case of loss or damage, such loss or damage shall be ascertained or estimated according to the actual cash value of the property destroyed.

The defendant agrees to make good to the plaintiffs, not all their loss, but all the loss or damage which shall happen by fire to the property, and that loss or damage to be ascertained or estimated, not according to what plaintiffs have actually paid or expended on it, but "according to the actual cash value of the property."

State Mut. F. Ins. Co. v. Updegraff, 21 Pa. 513; *Kernochan v. New-York Bowery F. Ins. Co.* 17 N. Y. 428; *De Forest v. Fulton F. Ins. Co.* 1 Hall, 84; *Excelsior F. Ins. Co. v. Royal Ins. Co.* 55 N. Y. 359, 14 Am. Rep. 271; *Clover v. Greenwich Ins. Co.* 101 N. Y. 277.

The insurance here was not an insurance against loss on the amount plaintiffs had or should have paid on the property, but an insurance on the property itself.

Kernochan v. New-York Bowery F. Ins. Co. 17 N. Y. 428; *Clover v. Greenwich Ins. Co.* 101 N. Y. 277.

If the plaintiffs had an insurable interest

587, it was held under Ala. Code, § 2753, providing that to sustain any contract of insurance it must appear that the insured has some interest in the property or event insured, and such as he has represented himself to have, that contractors had an insurable interest in a store erected by them on B's land under a parol contract to grant them this land in consideration that they were to build for B a new house on an adjoining lot, which was in process of completion when the store was destroyed by fire.

And builders contracting to build a house have an insurable interest. If the right to compensation depends upon the completion of the house, that is, if by contract or custom they are not to be paid until the house is finished. *Protection Ins. Co. v. Hall*, 15 B. Mon. 411.

In this case the court said that as the house was not finished and the plaintiffs were at work for its completion when the insurance was obtained, if an arrangement by which particular lots were to be taken in payment by the contractors had been changed by the appropriation of these lots to the payment for other work, there was an inchoate lien on the work at the time of the insurance, but being in parol was unenforceable, and that the existence of such an agreement as to the mode of payment should have been communicated to the insurers to enable them to determine whether they would make the insurance. The effect of the failure to communicate such fact depends entirely upon its materiality to the risk. The court further said that if the plaintiffs had received a conveyance of any of the land in payment for their work done on the house to which the policy relates, or if they had an enforceable contract for such conveyance, the insurance company was entitled to a deduction to the extent of the value of the land fixed in the contract.

In *Mosser v. Donaldson* (Pa.) 9 Cent. Rep. 153, it was said that materialmen furnishing lumber, having a right to assert a mechanic's lien, may insure their interest in the building.

A policy expressing the interest of the assured to be that of "mortgagee" was reformed and held to cover a "mechanic's lien" where that was the intention of the parties. *Longhurst v. Star Ins. Co.* 19 Iowa, 864.

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In this case the court said that in granting a policy upon a mechanic's lien the company admits that it is an insurable interest.

A builder contracting to furnish materials and build a house at a stipulated price, payable in instalments as the work progresses, has an insurable interest where the house is not finished or delivered. *Commercial F. Ins. Co. v. Capital City Ins. Co.* 81 Ala. 320, 60 Am. Rep. 162.

In this case the builder was to receive for building the house \$2,065, and he insured the same for \$2,000. The owner also took out a policy for \$2,000 in another company, and the contractor assigned his policy after the fire to the owner, who transferred the policy to the second company, who brought this action.

The court said that the contractor's insurable interest depends on the question whether he was bound to rebuild the house in the event of its destruction before completion and delivery, or, failing to do so, he was bound to refund the money paid on the contract for building.

And contractors have an insurable interest in a building where they contract to erect a building and it is burned, and they are obliged to replace the same, and do restore it to its original condition. *Sullivan v. Spring Garden Ins. Co.* 34 App. Div. 128.

In this case the policy insured A as owner, and B and C as contractors "as interest may appear." "Builder's risk granted to complete the above-described building." The owner made no claim under the policy.

And a contractor employed to move a building has an insurable interest in the house. *Planters' & M. Ins. Co. v. Thurston*, 93 Ala. 255.

In *Eichelberger v. Miller*, 20 Md. 332, it was said that the contractor had an insurable interest on lumber sent to his shop and burned while being prepared, and he might have protected himself from loss by obtaining a policy of insurance thereon, and not having done so he must bear the loss, where he agreed to do all the work on a dwelling house about to be erected, to be paid for as the work progressed and as fast as the lumber was put in the house.

The court said that the insurable interest of the contractor is the value of his work performed on the material.

I. T.

at the time the insurance was effected and also at the time of the loss, the value of that interest, in the insured property, is not material, and they are entitled to recover the whole amount of damages to the property not exceeding the sum insured.

Strong v. Manufacturers' Ins. Co. 10 Pick. 43, 20 Am. Dec. 507; *Borden v. Hingham Mut. F. Ins. Co.* 18 Pick. 523, 29 Am. Dec. 614; *Milttenberger v. Beacom*, 9 Pa. 199.

The plaintiffs were, at the time of the fire, the absolute and legal owners of the houses, and their insurable interest was the full value of the buildings.

Foley v. Farraquut F. Ins. Co. 71 Hun. 369; *Cone v. Niagara F. Ins. Co.* 60 N. Y. 619; *Riggs v. Commercial Mut. Ins. Co.* 125 N. Y. 7, 10 L. R. A. 684; *Cross v. National F. Ins. Co.* 132 N. Y. 133; *Excelsior F. Ins. Co. v. Royal Ins. Co.* 55 N. Y. 359, 14 Am. Rep. 271.

If the insured has an insurable interest, the underwriter is bound by his contract with him and must pay the full amount of the loss or damage to the insured property. - May, Ins. § 116, pp. 196, 197.

Analogous to our contention is the principle involved, in case of a warehouseman, who procures insurance in his own name on the goods of his customers.

The only interest the insured has in the goods so insured is his lien for charges thereon; yet in case of loss he is entitled to recover from the insurance company the full value of the goods destroyed, not, of course, exceeding the amount named in the policy, and is not limited to his charges or actual interest.

Stillwell v. Staples, 19 N. Y. 401; *De Forest v. Fulton F. Ins. Co.* 1 Hall, 84; *Waters v. Monarch F. & L. Assur. Co.* 5 El. & Bl. 870; *Waring v. Indemnity F. Ins. Co.* 45 N. Y. 606, 6 Am. Rep. 146.

A sheriff having goods in his possession under process has an insurable interest to the full value of the goods, although he is not bound to insure.

White v. Madison, 26 N. Y. 117.

The contract between the plaintiff and the contractor is of no concern to the defendant; it neither lessens nor increases its liability on its contract of insurance.

Clover v. Greenwich Ins. Co. 101 N. Y. 277; *Strong v. Manufacturers' Ins. Co.* 10 Pick. 43, 20 Am. Rep. 507; *Bicknell v. Lancaster City & County F. Ins. Co.* 58 N. Y. 677; *King v. State Mutual F. Ins. Co.* 7 Cush. 7, 14 Am. Dec. 683; *Washington Mills Emery Mfg. Co. v. Weymouth & B. Mut. F. Ins. Co.* 135 Mass. 506.

By the terms of the policy, the indemnity was against the loss or damage which might come to the insured property, and it was that loss or damage which the underwriter undertook to make good.

Excelsior F. Ins. Co. v. Royal Ins. Co. 55 N. Y. 359, 14 Am. Rep. 271; *Continental Ins. Co. v. Aetna Ins. Co.* 138 N. Y. 24; May, Ins. § 116, p. 197; Porter, Ins. * 223.

Andrews, Ch. J., delivered the opinion of the court:

The sole question in this case is whether

the plaintiffs had an insurable interest equal to the full value of the incomplete buildings in course of construction on their lot when the fire occurred. It is the contention on the part of the defendant that as the houses were being constructed under a contract by which the contractors were to furnish the materials and build the houses (above the foundations), and to complete them by a time specified, which had not expired at the time of the fire, for a specified sum to be paid within ten days after their completion, the plaintiffs had no interest to protect in the structures while in their incomplete state, since their destruction by fire would be the loss of the contractors, and not of the owners, whose obligation to build and complete the houses, as the condition of payment, would continue after as before the fire. It may be admitted that the contractors would remain bound by the contract, notwithstanding the destruction of the buildings by fire, and that the owners would not be bound to pay for the work done or materials supplied up to the time of the fire. *Tompkins v. Dudley*, 25 N. Y. 272. The contention of the defendant rests upon a misconception of the insurer's contract, and as to the insurable interest of the plaintiffs in the structures. The defendant, by its contract, undertook to insure the plaintiffs against loss by fire, not exceeding the sum specified, to the "described property," the loss or damage to be ascertained "according to the actual cash value" of the property at the time of the fire. The parties by this contract made the value of the property insured, within the limit, the measure of the insurer's liability. It is an undoubted principle in fire insurance that there must be an insurable interest in the insured, or an insurable interest which he represents in the subject of insurance, existing at the time of the happening of the event insured against, to enable him to maintain an action on a fire policy. This flows from the nature of the contract of fire insurance, which is a contract of indemnity; and, where there is no interest, there is no room for indemnity. The plaintiffs had an interest in the subject of insurance, both at the inception of the contract and at the time of the fire. They owned the land upon which the structures were being erected. They themselves had constructed the foundations of the buildings, and, in describing the property insured, the foundations were specifically named. They were in possession of the premises, and the ownership of the fee of the land on which the contractors were erecting the buildings carried with it the ownership of the structures as they progressed, which, according to the general rule of law, became part of the realty by annexation. It is not claimed, nor could it upon the evidence be claimed, that there was any intention either on the part of the owners or the contractors to sever the ownership of the structures from the ownership of the land while the work was in progress, or that the contractors should retain title to the materials put into the buildings until their completion. The defendant

is compelled to admit that the loss sued for is within the exact terms of the policy. It is conceded that the recovery does not exceed the property loss occasioned by the fire, and, if counsel can be deemed to have denied that the legal ownership of the structures was in the owners of the land at the time of the fire, the denial is very indistinct, and certainly is not justified by the facts or the law. The defense comes to this: That as the plaintiffs, by their contract with third persons, have imposed upon them the risk and expense of furnishing complete structures, and have assumed no liability until the structures are completed, they had no insurable interest, and have sustained no loss. But the contract relations between the plaintiffs and the contractors is a matter in which the defendant has no concern. When the policy was issued, it could not be known whether the contractors would perform their contract. If they abandoned it, the owners would derive such advantage as would accrue from the partial construction of the buildings prior to such abandonment. It is possible that, if the defendant is compelled to pay the policy, the plaintiffs may, if they insist upon their rights against the contractors, get double compensation, unless they should be adjudged to hold the fund recovered for the contractors. But, however this may be, the owners had an insurable interest to the whole value of the buildings on their land; and the defendants neither can compel the plaintiffs to put the loss on the contractors, nor can they resort to the terms of the building contract to diminish the liability for an actual loss within the terms of the policy.

The fact that improvements on land may have cost the owner nothing, or that, if destroyed by fire, he may compel another person to replace them without expense to him, or that he may recoup his loss by resort to a contract liability of a third person, in no way affects the liability of an insurer, in the absence of any exemption in the policy. See *Clover v. Greenwich Ins. Co.* 101 N. Y. 277; *Kernochan v. New York Bowery F. Ins. Co.* 17 N. Y. 428; *Riggs v. Commercial Mut. Ins. Co.* 125 N. Y. 7, 10 L. R. A. 684; *International Trust Co. v. Boardman*, 149 Mass. 158.

The judgment should be affirmed.

All concur, except **Martin and Vann, JJ.**, not sitting.

Henry C. VALENTINE, *Respt.*,
v.

Warren M. HEALEY *et al.*, *Appts.*

(158 N. Y. 369.)

Temporary retention of leased premises by a firm of tenants, under a permit from one of the firm who is a tenant in common of the premises, owning an undivided one fourth, will not have the effect of renewing the lease,—especially when the lessees had a right to assume that their copartner

NOTE.—As to tenant holding over, see also *Rosenblatt v. Perkins* (Or.) 6 L. R. A. 257, and *Goldsbrough v. Gable* (Ill.) 15 L. R. A. 294. 43 L. R. A.

had authority to give the permit because he had made the lease to the firm in the first place, and his cotenant had adopted it and thus recognised his authority to make it in his behalf.

(January 10, 1899.)

A PPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of the New York County Circuit in favor of plaintiff in an action brought to recover rent. *Reversed.*

The facts are stated in the opinion.

Messrs. Elihu Root and Robert Thorne, for appellants:

A tenant in common has a legal right at all times to enter upon and occupy and possess each and every part of the common property, and the exercise by him of that legal right imposes upon him no obligation to pay for use and occupation, even though he occupy the whole, much less can it raise against him by the operation of a naked presumption of law a liability to pay rent.

Henderson v. Eason, 9 Eng. L. & Eq. 337; *Woolever v. Knapp*, 18 Barb. 265; *Wilcox v. Wilcox*, 48 Barb. 327; *Dresser v. Dresser*, 40 Barb. 300; *Rich v. Rich*, 50 Hun, 199; *Le Barron v. Babcock*, 46 Hun, 598, 122 N. Y. 157, 9 L. R. A. 625.

A tenant in common occupying the entire premises himself is under no obligation to pay rent or to account to his cotenant.

Henderson v. Eason, 9 Eng. L. & Eq. 337; *Woolever v. Knapp*, 18 Barb. 265; *Freeman, Cotenancy & Partition*, 2d ed. § 248.

Upon the expiration of the lease, Healey, by virtue of his legal right as a co-owner in fee of the land, could continue to use and occupy his property without incurring any liability or penalty by so doing.

Mumford v. Brown, 1 Wend. 53, 19 Am. Dec. 461; *McKay v. Mumford*, 10 Wend. 351; *Dresser v. Dresser*, 40 Barb. 301; *Le Barron v. Babcock*, 122 N. Y. 157, 9 L. R. A. 625.

The presence of the defendant Zabriskie does not alter in any sense or degree the legal aspect of the case. The occupation was by Healey, the co-owner.

Freeman, Cotenancy & Partition, 2d ed. § 253; *Austin v. Ahearn*, 61 N. Y. 6.

The general rule as to holding over obtains only where the tenant holds over and remains in possession wrongfully.

McAdam, Land. & T. 2d ed. § 21, Supp. § 21; *Pickett v. Bartlett*, 107 N. Y. 277; *Schuyler v. Smith*, 51 N. Y. 309; *Austin v. Ahearn*, 61 N. Y. 6.

Messrs. William Allen Butler and Adrian H. Joline, for respondent:

The holding over by Healey & Company after the expiration of the term of the lease created a liability to pay rent for another year.

Haynes v. Aldrich, 133 N. Y. 287.

The liability thus created by the holding over of Healey & Company after the expiration of the term of the lease was not affected by the fact that Warren M. Healey was a member of the limited partnership of Healey & Company, the lessees.

Curtis v. Hollingshead, 14 N. J. L. 403; *Robertson v. Corsett*, 39 Mich. 777; *Cross v. Burlington Nat. Bank*, 17 Kan. 336; *Parsons*, Partn. 4th ed. §§ 1, 3, 4, 46.

The rule is well settled in England that a tenant in common may maintain an action for use and occupation against a cotenant where the obligation to pay rent was created by a lease.

Leigh v. Dickeson, L. R. 12 Q. B. Div. 194.

One tenant in common cannot do any act which will prejudice the rights of his cotenants, nor give a license to perform any act on the common property which will bind his cotenant, or to make a lease which will bind his cotenant.

Murray v. Haverty, 70 Ill. 318.

Haight, J., delivered the opinion of the court:

This action was brought to recover a quarter's rent of premises Nos. 311-319, West Forty-Third street, in the city of New York, alleged to be due and owing from the defendants to the plaintiff. It appears that the plaintiff and defendant Warren M. Healey are the tenants in common and owners of the premises; the plaintiff owning an undivided three fourths, and the defendant Healey an undivided one fourth. The defendants were general partners, and one William Williams was a special partner, constituting the firm of Healey & Co. On the 30th day of May, 1891, the defendants leased the premises from the plaintiff and Healey for the term of one year from the 1st day of May, 1891, at the yearly rent of \$8,500, payable quarterly, with the privilege to the defendants of continuing the lease for two years more upon giving notice in writing to each of the owners on or before the 1st day of February, 1892, and not otherwise. The lease was in writing, and was signed by the defendant Healey and Healey & Co., but was not signed by the plaintiff. The notice to renew the lease was not given, and the defendants continued to occupy the premises for a few weeks after the expiration of the year. This action is prosecuted upon the theory that the holding over by Healey & Co., after the expiration of the term of the lease, created a liability to pay the rent for another year, under the rule that, where tenants hold over after the expiration of the term, the law will imply an agreement to hold for a year upon the terms of the prior lease, if the landlord elects to so regard it. *Haynes v. Aldrich*, 133 N. Y. 287, 289. The defendants, in their answer, admitted that after the 1st day of May, 1892, they continued and remained in the occupation and possession of the premises, but they denied that they thereby elected to continue their tenancy for another year, and alleged that prior to the 1st day of May, 1892, they notified, in writing, Valentine and Healey, the owners, that they elected to discontinue their tenancy on the expiration of the term, and declined to renew the lease, and that they remained in the occupation of the premises under a new and an express agreement entered into with Warren M. Healey, 43 L. R. A.

one of the owners. Upon the trial, the defendants offered in evidence two letters bearing date April 29, 1892,—the day before the lease terminated,—which are as follows:

Warren M. Healey, Esq., 1478 Broadway.

Dear Sir:—

We desire to inform you that as indicated by our failure to exercise the option expressed in your lease to us for the past year, and as verbally stated to you yesterday by our representative, Mr. Thorne, that we shall not renew said lease. We understand that the premises have not been rented for the coming year, and shall be pleased to continue to occupy the same for a few weeks from the first of May next, in order to suit our convenience in moving, paying *pro rata* rent for such use and occupation.

Very truly yours,

[Signed]

Healey & Co.

New York, 29 April, 1892.

Messrs. Healey & Co., 1478 Broadway.

Gentlemen:—Your letter of even date to hand. You are at liberty to continue to occupy the premises numbers 313 to 319 West 43d street at a *pro rata* rent for the period of such occupancy. This privilege is accorded you only with the understanding and agreement that such occupancy is to be terminated on a week's notice from either party, in order that we may take advantage of any opportunity that may offer to rent the premises for another year.

Very truly,

[Signed]

Warren M. Healey.

Healey testified that the first of these letters was received by him from Healey & Co., and identifies the second letter as written by himself and delivered to Healey & Co. The letters were excluded by the trial court, and an exception was taken by the defendants. After the plaintiff rested, the defendants moved for a dismissal of the complaint upon the ground that the defendant Healey, being an owner in fee of one fourth of the premises, had a legal right at any and all times to occupy each and every part of the common property, and that his exercise of that legal right in the absence of any evidence tending to show infringement of the rights of his cotenants or a legal ouster, could not raise against him, by a presumption of law, any liability. This motion was denied, and an exception was taken. Upon the conclusion of the evidence the court directed the jury to render a verdict in favor of the plaintiff for the amount claimed by him. To this direction an exception was also taken by the defendants.

In the case of *McKay v. Mumford*, 10 Wend. 351, Nelson, J., in delivering the opinion of the court, says: "As to a tenant who has no title, except by the lease under which he enters, if he continues after its expiration, his possession, in contemplation of law, is in subordination to the landlord's rights, because the law will not presume him disloyal. But no such presumption exists against the tenant in common. The fact of his not leaving possession does not author-

ize the inference that he still intends to hold under the lease; on the contrary, the presumption is that he holds under his own title, which gives him a right to the possession and enjoyment of the whole estate, liable, however, to account to his cotenant at law." This rule was recognized by the general term in this case. 86 Hun, 259. But that court distinguished that case from this. Healey is not the sole lessee. The lease ran to a firm of which he was a member. In this respect the cases are distinguishable; but we fail to see why Healey, at the termination of the lease, may not assume his authority over the premises as an owner and a tenant in common. As such tenant in common he had the right to take and occupy the whole of the premises, and preserve them from waste or injury, so long as he did not interfere with the right of his cotenant to also occupy the premises. Had the letter of Healey & Co. of April 29, 1892, been received in evidence, it would have shown conclusively that the company did not intend to hold over and renew the lease, but that they sought permission to remain in the premises for a short time, to suit their convenience in moving; and if the letter of Healey of the same date had been received in evidence it would have shown that he not only gave his consent to the company to hold over, but that he assumed his relation to the premises as owner. It would also have explained the admission in the answer that the firm continued in possession after the expiration of the lease and established the facts that justified such action on the part of the tenants.

There is another view of the case which we think may properly be adopted. It may be, and doubtless is, the law, that a tenant in common cannot bind a cotenant, without his consent, by a contract or a lease with reference to the property of which they are the owners; but in this case, as we have seen, the lease was executed by Healey, and was not executed by the plaintiff, but for a whole year the plaintiff accepted the rent and acquiesced in the lease made, and by the bringing of this action has adopted it as his lease, basing his right to recover of the defendants upon it on the ground that they are presumed to have taken the premises for another year upon the same terms and conditions expressed in the lease. It appears to us that the plaintiff, by thus adopting the lease, has recognized the authority of Healey to make it in his behalf. It ran for one year, with the privilege of two years, at the option of the defendants, and, under the circumstances, the other members of the firm had the right to assume that Healey had the authority to treat with them with reference to the leasehold premises. Under this view the letters excluded were proper evidence in the case. Had they been received, they would have shown that the retention of the premises by the defendants was under a permit given by one of the owners, whose authority to act for the other owner they had the right to assume by reason of his adoption of the lease under which they had previously occupied the premises.

The judgment should be reversed, and a
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new trial granted, with costs to abide the event.

Gray, Bartlett, Martin, and Vann, JJ., concur.

O'Brien, J., dissenting:

The question in this case is whether a partnership firm which goes into possession of real property under a lease from the owners is exempt from the general rules of law governing the relations of landlord and tenant, by reason of the circumstance that one member of the firm happens to be the owner of a small, undivided share of the property as a tenant in common. It is not a case of one tenant in common leasing to another, but a case where all the co-owners unite in a demise of the whole property to a distinct legal entity, known in law as a "limited partnership," of which one of the owners is also a member. The courts below have held that in such a case the obligations of the lease, and the rules of law applicable to the relations of landlord and tenant, are not changed or in any way affected by the circumstance that the owner of the small share in the realty demised is, at the same time, a member of the legal entity or artificial person to which the demise is made. This decision, in my opinion, was clearly right, and no one would ever question it but for the introduction into the discussion of principles that have nothing whatever to do with the law of landlord and tenant, since they apply only to the relations of common owners of estates.

This is a case between landlord and tenant, and not between tenants in common, and it is only when we confuse the one with the other, or attempt to apply to the former relation rules of law applicable solely to the latter, that there can be any doubt about the case. The facts are all admitted on the record, and they are so clear and simple that it is impossible to be misled by any suggestion outside of the controversy. The plaintiff is the owner of an undivided three fourths of certain real estate in the city of New York, and the defendant Healey is the owner of the other fourth. The plaintiff and the defendant, Healey, as such owners, united in a written lease to the defendants, composing the firm of Healey & Co., for one year from the 1st of May, 1891, and at a yearly rental of \$8,500, payable quarterly, as follows: To the plaintiff, as owner of three fourths, the sum of \$1,593.75, and to the defendant Healey, as the owner of the remaining fourth, \$531.25, on the first day of each quarter. The firm of which the defendant Healey was a member entered into possession of the premises pursuant to this lease, and remained therein until after the 1st of May, 1892, thereby electing, as the plaintiff claims, to continue their tenancy for another year. The defendants failed to pay to the plaintiff the instalment of rent which became due, as claimed, on the 1st of August, 1892, and this action was brought by the plaintiff to recover that sum. These facts are all alleged in the complaint, and the answer admits the execution of the lease, its terms, and the

fact that the defendants continued in possession after the expiration of the term. But they denied that they thereby elected to continue the tenancy for another year, which, of course, was nothing more than the denial of a legal conclusion arising upon conceded facts.

The only defense to the action is that Healey, the co-owner with the plaintiff, permitted his firm to remain in possession after the expiration of the year, and it is claimed that he not only had the right to do that, but to continue in possession by virtue of his right as a tenant in common, although it is conceded that he and his firm went into possession only by virtue of the terms and conditions of the lease. It was one of the conditions and covenants of the lease that the parties of the second part—that is, the defendants—would quit and surrender the demised premises at the expiration of the term. The contention on the part of the defendants virtually asserts that, although they went into possession under this lease, they were entitled, in virtue of Healey's co-ownership, to violate this covenant, and thus remain in possession for an indefinite period, against the will of the plaintiff, who owned three fourths of the property. There can be no doubt that, where lands are held by different parties in common as tenants in common, unity of possession and right of possession is a distinguishing feature of those relations. The possession of one tenant in common is the possession of the other. One tenant in common cannot bring an action of trespass against another for entry upon and enjoyment of the common property. The growing crop put in by one tenant in common, who took possession exclusively without contract, goes in severalty as the property of each, on partition made while the crop is growing. The rules of the common law governing the rights of tenants in common are quite well understood. But they have no application to this case. The unity of possession and right of possession which attaches to an estate held in common may, of course, be severed or suspended by agreement of the parties. A deed in fee by one tenant in common to another severs this unity forever. So, too, a lease, which is nothing more than a conveyance of an estate for years, severs or suspends the unity of possession and right of possession, and all relations as co-owners, at least for the time being, and, when such a lease is made, the parties bear to each other all the relations, and are subject to all the obligations, and entitled to all the rights, of landlord and tenant. The lease was made in this case. The two owners in common were the landlords. The tenant was the legal entity or partnership, of which the defendant Healey was a member; and the circumstance that he was such a member did not change the effect of the lease in the slightest particular. *Freeman, Cotenancy & Partition*, §§ 29-33, 86, 88, 89, 164, 198, 268; 4 Kent, Com. p. 370; *O'Hear v. De Goesbriand*, 33 Vt. 593. All this is very clear, if we consider the relations of the co-owners to each other and to the property before and after the execution

of the lease. Before the lease was executed, either or both were entitled to possession, and neither could lawfully exclude the other. But this situation was completely changed after the lease. Then the plaintiff, although he was the owner of an undivided three fourths of the property, could not enter upon it or enjoy it without becoming a trespasser. His rights were, then, governed solely by the lease. He could demand rent. He could institute summary proceedings under the statute regulating the rights and duties of landlord and tenant. In a word, during the existence of the lease, his peculiar rights as a tenant in common were suspended, and the unity of possession and right of possession had been severed, and, for the time being, abrogated by his own agreement. This was equally true of the defendant and his firm. Although he owned but an undivided one fourth of the property, yet he or his firm was entitled to the exclusive possession as against his co-owner. He could maintain an action of trespass, not only against the other owner, but any stranger, which, of course, he could not do in virtue merely of his co-ownership. In a word, his rights and powers over the property as a tenant in common were suspended during the existence of the lease, and his firm was then in possession as tenant, entitled to all the rights as a tenant, and subject to all the obligations and incidents of that relation. His relations to the plaintiff as a lessee continued until the lease was terminated; and it could not be terminated in any other way, so far as the defendant is concerned, except by fulfilling the covenant of the lease, which was to surrender up possession at the expiration of the term. This the firm refused to do, and, by so refusing, it is said that they have thrown off all their obligations as a lessee under a written lease, and without the plaintiff's consent have assumed the rights of a tenant in common; that is, the right to remain in possession notwithstanding the lease, so long as the tenancy in common continues.

No one can question the rule of law that, where a tenant holds over after the expiration of the term, the law will imply an agreement to hold for another year, and that the landlord is entitled to demand rent accordingly. *Haymes v. Aldrich*, 133 N. Y. 287. The defendants in this case continued in possession after the year expired, and unless they had in law the right to remain in possession, in defiance of their covenant to surrender, then there is no defense to the action. They assumed, by the lease, all the obligations of tenants to the landlord, and one of these obligations was to pay the rent stipulated for another year in case they remained in possession after the term expired. I am not able to understand how this obligation is changed by the circumstance that Healey, one of the co-owners, was a member of the firm that took the lease. His right of possession as co-owner was suspended by the lease, and could not revive until all of its covenants were fully performed by the surrender. Healey was not the landlord or

the tenant. The owners, as a unit, were the landlords, and the firm, as such, was the tenant. It might just as well be urged that if this lease, instead of running to the firm of which Healey was a member, ran to a corporation in which he was a shareholder, that circumstance would change the legal effect of holding over by the corporation. It is plain that Healey could not, by act or word, change the obligations of the lease as against the plaintiff. It is just as plain that he could not, by act or word, change the legal effect of holding over by his firm, or change the legal character of the act of the firm in continuing the possession, after the term expired. The law declares that this act is an election on the part of the tenant to attorn to the landlord for another year, and entitles the landlord to so regard it. Healey had no more power to change the legal effect of the act than any other member of the firm. He could not be a lessee one day, and a tenant in common the next, as his interest might require. The firm being bound by the lease, he was also, and not until after all of its covenants and conditions had been performed by surrender of the possession could he resume his relations to the property as a tenant in common.

This anticipates the principal defense to the action, which, as disclosed by the record, was a very transparent device that ought not to mislead any court. It appears that on the 20th of April, 1892, just as the year was about to expire, Healey, in his individual name, addressed a letter to his firm in which he consented that the firm might remain in possession after the year expired. Thus the writer, though bound, by the covenants of the lease, to surrender the possession at the end of the year, has, by writing a letter virtually to himself, succeeded, as is claimed, in abrogating the lease and abolishing the relation of landlord and tenant. The letter, when offered in evidence, was excluded by the court under the plaintiff's objection, and to this ruling there was an exception which it is said is ground for reversing the judgment. All that the letter proved was Healey's permission to his firm to remain in possession, and, unless that permission changed the legal character and effect of holding over or continuing in possession, it was utterly immaterial. If he could change the obligations of the lease and the law of landlord and tenant in this respect, he could of course in every other respect. He could, when possession had been obtained under the lease, write a letter to himself, or to his firm, permitting them to occupy the property at a reduced rental, or without any rent at all. The moment that we concede the principle that Healey could do something to change the relations of the parties after the possession under the lease which his partners could not do, the most absurd consequences must follow. The only just and consistent rule in such cases must be that when a tenant in common unites in a lease, as the parties here did, their rights and obligations are governed by that lease while it is in force, and the lease is continued or abrogated

in such cases in the same way and by the same acts that leases are continued and abrogated in all cases. The presence of one of the joint owners in the firm to which the demise was made cannot take this case out of the general law of landlord and tenant. The plaintiff, by the lease, surrendered to the firm to which the demise was made as a firm, and not to any individual member thereof, his right to the possession as a tenant in common so long as that lease remained in force. Thus, while he lost the right to the possession, he acquired the right to demand the stipulated rent. The right of his co-owner was affected by the lease in precisely the same way. His individual right to the possession as a tenant in common was suspended for the demised term, and his firm, as such, acquired the right to the exclusive possession. The duration of the lease was fixed by its terms and by the law, and one of the parties could not change it without the consent of all. The legal effect of that instrument was to vest in the firm, as such, the exclusive possession and enjoyment of the premises for one year, in case they were surrendered at the end of that time, but if they were not, and the firm still retained the possession, then for an additional year, at the option of the plaintiff. It was a legal right which the plaintiff acquired by the contract to treat the defendants as tenants for another year when they continued the possession, and Healey could not change or destroy that right any more than the plaintiff could change or nullify any right which the firm acquired by the demise. Healey could no doubt waive his right to his share of the rent, or give it to his firm, if he chose to do so, but he could not relieve the firm from their obligations to pay to the plaintiff his share, either before the year expired, or after, if they remained in possession, and he elected to treat them as tenants. The firm, being a tenant under the lease, could not, through Healey, one of the members, change the terms or obligations of that contract any more than it could if Healey was not a member, or any more than the plaintiff could, to the prejudice of the tenant. The letter of Healey to his firm, or to himself, attempted to do all this. It was an attempt on his part to extend the right of the tenant under the lease to remain in possession without incurring the legal consequences which the law attaches to that act. He had no more power or right to do that than the plaintiff would have to resume possession as tenant in common after receiving a quarter's rent on the second year, and, if the owner of three fourths of the common estate could not change the legal rights of the parties under the lease, it is difficult to see how the owner of one fourth could. What Healey said to his firm and to himself was virtually this: "We will remain in possession after the year notwithstanding our covenant to surrender, and by virtue of my relations to the property as tenant in common I absolve you and myself from all the legal consequences of the act; and, although we have

obtained the exclusive possession under a lease, we can now continue to hold it indefinitely, without regard to the lease or its obligations, but as tenants in common." The learned trial court very properly held that proof of such a transparent device to nullify a solemn contract was not admissible.

The only ground of defense presented at the trial was that Healey had at all times, as tenant in common, the right of possession, and that he could, under that right, keep his firm in possession indefinitely. Both sides moved for the direction of a verdict, and neither party asked to have any question presented to the jury. The court directed a verdict for the plaintiff, thus determining all questions of fact, if any, as well as the questions of law, against the defendants. They are now precluded from raising any questions in this court, except such as arise from undisputed or admitted facts. They must stand or fall upon the proposition urged at the trial, which, in effect, was that although the unity of possession and right of possession were severed by the lease and suspended for the whole period of its duration, yet Healey retained the right to extend the term of the demise at his own will and without the consent of the plaintiff, and could absolve his firm, which was the tenant, from all the legal consequences of holding over. If that proposition is law, then this action was well defended. In my opinion, such a proposition is utterly indefensible, and hence I conclude that the plaintiff was entitled to recover, and that the judgment below is right. We have no right in this court to draw inferences of fact from the evidence for the purpose of reversing a judgment, though we may in order to sustain it. Nor have we any right to assume that this is a hard case, where the harshness of the law should be tempered by the spirit of equity. There is nothing in the record before us to show that this is a hard case, if that were of any consequence. So far as we know, or can know from the record, the defendants remained in possession of the premises during the whole quarter for which the plaintiff recovered rent, and, if that be so, the judgment compelled them to pay only the agreed rent for the premises which they have possessed and enjoyed. If they have moved out, and the plaintiff has resumed possession or relet the premises, their obligation to pay rent has ceased, since the plaintiff could not recover double rent. If they have moved out and left the premises vacant and unrented, it is their own fault, since, if Healey could, while they were in possession under the lease, extend the right of possession, he certainly could, after moving out, sublet or relet the premises. In any aspect in which the case is viewed, no reason can be found for disturbing the judgment, and it should therefore be affirmed.

It may be proper, before closing, to notice the grounds upon which the prevailing opinion rests. It is based upon two inferences, —one of fact and the other of law: (1) That since the plaintiff's signature does not appear from the printed copy of the lease 43 L. R. A.

contained in the record to be attached, and that of both Healey and his firm do so appear, then it may be that Healey executed the lease for the plaintiff as his agent; and (2) being agent for the plaintiff to make the lease, he had authority also, as agent for the plaintiff, to bind him by giving his firm permission to remain in possession after the year expired. The inference of agency or actual authority from the plaintiff is based solely upon the absence of his signature from the copy of the lease as printed in the record, which may be due to a blunder of the printer or scrivener. This inference of fact is made, not only against the findings of the trial court that no such authority in fact or in law was possessed by Healey, but against the admission of the pleadings that both of the common owners united in making the lease: and that, too, not for the purpose of sustaining the judgment, but of reversing it. If the lease had not been printed in the record at all, the plaintiff's case would stand admitted upon the record, as it does now. It is hardly necessary to add that a fact admitted by the pleadings cannot be contradicted or qualified by equivocal inferences from the proofs in any case, and much less is it permissible in this court, for the purpose of reversing a judgment based not only upon the admission, but upon the findings of the trial court which negative the existence of such fact. The proposition of law that an agent, to execute a lease for a definite term, has power to bind his principal by a renewal or extension of the time, will, I venture to say, be found equally difficult to maintain.

It may finally be observed that the circumstance that the plaintiff's signature does not appear upon the copy of the lease in the record has not the slightest significance, and is not even referred to in the defendants' brief, and was not mentioned at the argument. We might as well, upon the same reasoning, reverse a judgment upon a promissory note appearing in the record without signature, when the execution and delivery were admitted by the pleadings.

Parker, Ch. J., concurs.

William D. PALMER, *Respt.*,
v.
LARCHMONT ELECTRIC COMPANY,
Appt.

(158 N. Y. 231.)

1. Poles for electric-light wires are not additional burdens upon the fee

NOTE.—This case presents a new question. It distinguishes between electric-light wires and telephone and telegraph wires with respect to constituting an additional burden upon the fee of a highway.

As to the burden of telegraph or telephone wires on highways, see *note* to *People v. Eaton* (Mich.) 24 L. R. A. 721. See also *Eels v. American Teleph. & Tel. Co.* (N. Y.) 25 L. R. A. 640; *Cater v. Northwestern Teleph. Exch. Co.* (Minn.) 28 L. R. A. 310; *Postal Tel. Cable Co. v. Eaton* (Ill.) 30 L. R. A. 722; and *Magee v. Overshiner* (Ind.) 40 L. R. A. 370.

of a country highway in a town which has granted the right to maintain the wires and contracted for lighting the streets with the electric lights, as light may be necessary for the safe use of the streets.

2. The determination by town authorities of the necessity of electric light in a highway cannot be questioned in a proceeding by an abutting owner to compel the removal of the wires and poles from in front of his premises.

(*Martin and Vann, JJ., dissent.*)

(February 28, 1899.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Special Term for Westchester County in favor of plaintiff in an action brought to compel defendant to remove electric-light poles from the highway in front of plaintiff's property. *Reversed.*

The facts are stated in the opinion.

Mr. William Samuel Johnson, for appellant:

The poles of the defendant electric company, since they are necessary to the lighting of the public highway, are lawfully placed in the street in front of plaintiff's land, and cannot be ejected therefrom.

An electric-light pole can be placed in the public streets of an incorporated village without consent of or compensation to the owner of the fee of the street, where the pole is used to effect the purpose of lighting the public street.

Consumers' Gas & Electric Light Co. v. Congress Spring Co. 61 Hun, 133; *Tuttle v. Brush Electric Illuminating Co.* 18 Jones & S. 464; *Electric Constr. Co. v. Heffernan*, 34 N. Y. S. R. 436; *Johnson v. Thomson-Houston Electric Co.* 54 Hun, 469.

It was error for the trial court to exclude evidence showing that the district furnished with electric lights by defendant is a large and populous village.

Witcher v. Holland Waterworks Co. 66 Hun, 619; *Van Brunt v. Flatbush*, 128 N. Y. 50.

Mr. William Porter Allen, for respondent:

Ejectment is the proper form of remedy.

Eels v. American Teleph. & Teleg. Co. 143 N. Y. 133, 25 L. R. A. 640.

Defendant is attempting to maintain a new and exclusive easement over plaintiff's land in addition to that of the public to pass and repass.

Williams v. New York C. R. Co. 16 N. Y. 97, 69 Am. Dec. 651; *Eels v. American Teleph. & Teleg. Co.* 143 N. Y. 133, 25 L. R. A. 640; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Fobes v. Rome, W. & O. R. Co.* 121 N. Y. 505, 8 L. R. A. 453.

Palmer avenue is a rural highway, and not an urban street, and the town of Mamaroneck cannot be considered a thickly populated community, but is a purely rural district.

The objections to the offers to prove were made because the offers were not the proper method of presenting the matters that defendant desired to prove.

43 L. R. A.

There are few judges of experience that will receive an offer of proof.

Coulson v. Whiting, 12 Daly, 408; *Hosley v. Black*, 28 N. Y. 438; *Pepin v. Lachenmeyer*, 45 N. Y. 27.

The poles and overhead wires were not necessary to the lighting of the public highway.

Reining v. New York, L. & W. R. Co. 128 N. Y. 157, 14 L. R. A. 133; *Craig v. Rochester City & B. R. Co.* 39 N. Y. 404; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146.

Defendant has unlawfully disseised the plaintiff.

A company cannot even lay gas pipes in a country highway without the consent of or compensation to the owner of the fee.

Bloomfield & R. Natural Gaslight Co. v. Calkins, 62 N. Y. 386; *Eels v. American Teleph. & Teleg. Co.* 143 N. Y. 133, 25 L. R. A. 640.

Haight, J., delivered the opinion of the court:

This is an action in ejectment to compel the defendant to remove its poles and wires from Palmer avenue, in front of the plaintiff's premises. The plaintiff is the owner of lands at the corner of Palmer and Rushmore avenues, in the town of Mamaroneck, Westchester county, and his fee extends to the center of the highways, subject to the easements of the public therein. The defendant is an electric corporation, organized under the transportation corporations law of this state, having for its objects the manufacture and use of electricity, for producing light, heat, or power, and in lighting streets, avenues, public parks and places, and public and private buildings of cities, villages, and towns within this state. On the 14th day of March, 1894, it obtained a grant from the town board of the town of Mamaroneck, giving it the right to construct and maintain suitable lines of wire for the purpose of conducting electricity to such points within the corporate limits of the town as may seem fit to the company, subject, however, to certain rules and restrictions specifically mentioned, among which were the requirements that the wires should be insulated, conducted upon poles of a specified size and uniformity, made straight and attractive in appearance, on which wires should be strung not less than 18 feet from the ground. The grant contained the further condition that the company shall furnish to the town \$100 worth of light, free of charge, each and every year, and for every \$1,000 worth of light bought by the town from the company an additional \$100 worth of free light shall be furnished, the lights to be placed in such locations as shall be designated by the town board. Pursuant to this grant, the town contracted for certain lights at the rate of \$22.50 per light per year; and thereupon, pursuant to the grant and contract, the defendant constructed its line of wire through Rushmore and Palmer avenues, locating a light on the corner of those avenues in front of plaintiff's premises, and erected on Palmer avenue, in front of his premises, two poles,

on which the wires were strung, and which the evidence shows were necessary to enable the company to perform its contract with the town. This action was prosecuted to recover the possession of the lands occupied by these poles, and for damages.

The care, management, and control of the public ways devolve upon the local municipal government in which they are located; and it is the duty of the local government to maintain them in such condition that the public, by the exercise of due care, may pass over them in safety. In the darkness of the night, in crowded thoroughfares, light is an important aid, largely tending to promote the convenience, as well as the safety, of the traveling public. It is not only one of the uses to which the public ways may be devoted, but, in the case of crowded thoroughfares, a duty devolves upon the municipality of supplying it. In such cases it is one of the burdens upon the fee which must be borne as an incident to the public right of traveling over the way, and is deemed one of the uses for which the land was taken as a public highway. *Johnson v. Thomson-Houston Electric Co.* 54 Hun, 469; *Consumers' Gas & Electric Light Co. v. Congress Spring Co.* 61 Hun, 133; *Witcher v. Holland Waterworks Co.* 66 Hun, 619, Affirmed 142 N. Y. 626; *Hequembourg v. Dunkirk*, 49 Hun, 550; *Sun Printing & Pub. Asso. v. New York*, 152 N. Y. 257, 265, 37 L. R. A. 788; *Van Brunt v. Flatbush*, 128 N. Y. 50, 56.

As we understand the opinion of the learned court below, its views are in accord with our own as applied to public highways in cities and incorporated villages; but it reached the conclusion that the rule was different with reference to country highways, and that the density of population ought not to be made the test in determining the line in respect to easements which separate the urban from the rural districts. 6 App. Div. 12. That court was also of the opinion that this case was controlled by the case of *Eels v. American Teleph. & Teleg. Co.* 143 N. Y. 133, 25 L. R. A. 640. Our views are somewhat different. We think the *Eels Case* is clearly distinguishable from that under consideration. In that case ejectment was brought to remove the poles of a telegraph and telephone company which were not used in any sense for a street purpose. It is urged that the wires might be used for the purpose of notifying the fire department of a municipality of the breaking out of a fire. Undoubtedly, and so far as they are used for that purpose, it clearly would be for a municipal purpose; but there is a broad distinction between a municipal purpose and a street purpose. The primary object of highways is for the public travel by persons and animals, and by carriages or vehicles used for the transportation of persons and goods, other than by railroads. Sewers drain the surface water from the highways, and thus relieve them from impairment and destruction. In this respect sewers are for a street purpose. In addition, they may drain also the abutting property and houses, and thus tend to promote the

public health. In this respect they are for a municipal purpose. Water supplied by mains through the highways may be used for cleansing and sprinkling the streets. In this respect it is for a street purpose. It may be used by the abutting owners for cleansing and for domestic purposes, and is also used for the extinguishment of fires. In this respect it is for a municipal purpose. Light is, as we have seen, an aid to the public in the night-time in traveling upon the highway. It is therefore used for a street purpose. All of the street purposes which we have referred to are clearly incident to the highway, and are deemed within the grant of lands for highway purposes whenever the necessity for these uses arises. Not so with telegraph and telephone wires. They in no way preserve or improve the streets, or aid the public in traveling over them.

We are thus brought to a consideration of the difference between urban and rural streets. That there is a distinction between such streets has long been recognized by the authorities; but a careful examination of the cases discloses the fact that the distinction arises out of the necessary requirements of the public in the use made of them. Dillon, in his work upon Municipal Corporations (vol. 2, § 688), says: In "the author's judgment, the uses to which streets in towns and cities may legitimately be put are greater and more numerous than with respect to ordinary roads or highways in the country. With reference to the latter all the public requires is the easement of passage and its incidents; . . . but, with respect to streets in populous places, the public convenience requires more than a mere right to pass over and upon them. They may need to be graded and brought to a level, and therefore the public or municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street or elsewhere, and may make culverts, drains, and sewers upon or under the surface." This same distinction was made in *Bloomfield & R. Natural Gaslight Co. v. Calkins*, 62 N. Y. 386, in which it was held that a gaslight company could not lay its pipes in a country highway without compensation to the owner of the abutting land, where its pipes were not used for the lighting of the highway through which the company sought to lay its pipes. But the owner of the fee in a country highway, taken, opened, and dedicated for a public use, is entitled to no further compensation after the territory has become thickly settled and the highway has become a street of an incorporated city. This was recognized in the *Eels Case*, and it is therefore apparent that, at the time the land was taken for a highway, it was impliedly dedicated to the uses which the public might in the future require. Light may not be necessary in an ordinary country highway, and yet there may be country roads in which the travel is so great as to make light a necessity in order to avoid collisions and injuries in the night-time. The inhabitants of

our large cities are in a measure supplied with food and other necessities of life from the surrounding country. Scarcely a city can be named in which there will not be found one or more great public highways leading into the country, which, day and night, are thronged with teams transporting the produce of the farm to the markets of the city. Towns, in some instances, have recognized the public necessity, and have caused some of these thoroughfares to be lighted. In many of our towns there are villages of considerable size remaining unincorporated, in which lights in the street would be of great convenience, and materially add to the safety of the public. May not towns properly supply these streets and thronged highways with light? If they may, they may properly contract with others to supply the light. The court below appears to have feared trouble with reference to the determination of the question of the necessity for light by the courts, and thought that each case would have to be determined on its own facts, and that the decision in each would vary with the varying minds and judgments of the courts and petit jurors; but we apprehend no difficulty in this regard. We think that question should be left to the determination of the parties specified by the statute. Indeed, it appears to us that the question under discussion is entirely controlled by the statute. The statute not only authorizes the incorporation of companies for supplying gas for the lighting of streets in cities, towns, and villages, but it also authorizes the incorporation of companies for the manufacturing and supplying of electricity for lighting streets, avenues, public parks, and places in cities, villages, and towns. It then provides that such corporations using electricity for light, heat, or power, may carry on the business of lighting "by electricity or using it for heat or power in cities, towns, and villages within this state, and the streets, avenues, public parks, and places thereof, and public and private buildings therein; and for the purposes of such business to generate and supply electricity, . . . and to lay, erect, and construct suitable wires or other conductors, with the necessary poles, pipes, or other fixtures in, on, over, and under the streets, avenues, public parks, and places of such cities, towns, or villages, for conducting and distributing electricity, with the consent of the municipal authorities thereof, and in such manner and under such reasonable regulations as they may prescribe." Transportation Corporations Law, §§ 60, 61. The town law provides that a town is a municipal corporation, comprising the inhabitants within its boundaries. § 2.

It will be observed that no distinction is made by the statute between cities, towns, and villages; that a corporation organized under the provisions of the act may, with the consent of the municipal authorities, under such reasonable regulations as they may prescribe, construct suitable wires or other conductors with the necessary poles, pipes, or other fixtures in, on, over, and under the streets, etc., of a town, as well as

that of the city or an incorporated village. Who can better determine the necessity for light in a highway than the inhabitants of the town through which it runs? Shall the courts assume the prerogative of saying that a town shall or shall not have light, when the statute provides that its municipal authorities shall determine the question? No citizen of the town is here complaining with reference to the action of the municipal authorities of the town of Mamaroneck in contracting with the defendant for light. If these town officers have exceeded their authority, and wasted the public moneys, the courts are open to correct the abuse and prevent the waste in a suit by a taxpayer; but no such person is here complaining of the action of the town authorities. The plaintiff is not complaining of the contract or of the supplying of his premises with light. He is seeking compensation for the ground occupied by the poles of the company in the highway in front of his premises. The authorities of his town having determined the necessity for the lights and contracted with the defendant to furnish it, and the light being for a street purpose, we think no burden is placed upon the fee that was not within the implied contemplation of the parties at the time the land was taken and dedicated to highway purposes.

Our conclusion is supported by authority. In the case of *Van Brunt v. Flatbush*, 128 N. Y. 50, Earl, J., refers to the question we have had under consideration in discussing the right to construct a sewer in the town of Flatlands. He says: "If the legislature had authorized a system of sewerage in the town of Flatlands, for the convenience, health, and welfare of the inhabitants of that town, and this sewer had been projected with lateral sewers, with the privilege of the owners of adjacent lots to connect their lots therewith, then we are inclined to believe, for reasons we need not now state, that the character of the avenue and of the locality was such, and the population is such, that the sewer could be built in the avenue without the consent of the fee owners, and without compensation to them." In the case under consideration, as we have seen, the legislature has authorized the municipal authorities of the town to contract for the providing of light for street purposes. Again, in the case of *Witcher v. Holland Waterworks Co.* 66 Hun, 619, an action was brought by an abutting owner to recover the possession of lands in a public highway, occupied by the defendant with water pipes and a hydrant. The village of Holland was unincorporated. A water pipe had been laid through the highway, and hydrants had been established, from which the water might be taken for street purposes. It was held in the general term that there was a public necessity for the water, and that, it being for street purposes, the plaintiff was not entitled to recover, and that conclusion was affirmed in this court. 142 N. Y. 626. And in the case of *People, Woodhaven Gaslight Co., v. Deehan*, 153 N. Y. 528, we held that a grant by the authorities of a town to a gaslight company to lay conductors for con-

ducting gas through the public highways of the town was valid.

There is no question of public policy that is adverse to our contention. It may be that the owners of the fee in highways should not be burdened with sewers, conductors, or wires in which they have no interest or right to use, but which are intended for the use of other localities; but sewers, conductors, and lighting wires intended for the use, benefit, and improvement of the highway through which they pass, and of the abutting owners thereon, which promote the comfort and safety of the traveling public, stand upon a different footing, and impose no burden upon the fee not intended by the grant for highway purposes. It may be that some prejudice exists against wires strung on unsightly poles; but the statute empowers the citizens of the locality, through their duly constituted authorities, to determine the manner and the regulations in and under which the wires should be constructed. They may specify, as was done in this case, the character of poles that shall be used, or they may require that the wires shall be placed in conduits under ground. The whole matter is left to their judgment and discretion. If the people of a town want light in their highways, and are willing to pay for it, no reason is apparent, founded upon public policy, morals, or law, why the courts should interfere to prevent it. If the highway be but a country road, lightly traveled, and no necessity exists for light, then a taxpayer has a right to object; but, until such objection is made, we think it may fairly be assumed that the necessity for the light exists. The statute has given to the authorities of a town the power to determine whether they will have light. The question of necessity must, in the first instance, be determined by such authorities, and in this case no person is in court seeking to review the determination made by the authorities of the town of Mamaroneck in contracting with the defendant.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur, except **Martin and Vann, JJ.**, dissenting.

FALL BROOK COAL COMPANY, *Appt.*,
v.

Robert C. HEWSON, *Respt.*

(158 N. Y. 150.)

One who puts a witness on the stand, but excuses him without asking him any questions that are material to the issues on trial, is not thereby precluded, if the witness is afterwards called and examined by the opposite party, from cross-examining him and discrediting him by proving his contradictory statements out of court.

(February 28, 1899.)

NOTE.—As to right to impeach one's own witness, see note to *Selover v. Bryant* (Minn.) 21 L. R. A. 418.
43 L. R. A.

A PPEAL by plaintiff from a judgment of a General Term of the Supreme Court, Fifth Department, affirming a judgment of the Yates County Circuit in favor of defendant in an action brought to recover the value of services rendered in storing apples. *Affirmed.*

Defendant placed some apples in plaintiff's cold storage building at Penn Yan. When they were taken out in the spring they were found to be in bad condition, having been frost bitten and being damp and rotten. Defendant claimed that when they were placed in the cold storage they were of very superior quality and in fine condition, having been carefully picked, selected, and packed. Plaintiff claimed that the apples were of inferior quality when placed in the cold storage, and that their bad condition in the spring was due to defects in the apples, and not to want of proper care.

The material points in the case sufficiently appear in the opinion.

Messrs. Harris & Harris, for appellant: Wilson was the defendant's witness, and remained so all through the case. The defendant produced and swore him, thus vouching for his trustworthiness. He was not a hostile witness, nor one whom the defendant was obliged to call, but he was put on the stand by the defendant voluntarily.

A party cannot show inconsistent statements made by his own witness for the purpose of impeaching him.

Coulter v. American Merchants' Union Exp. Co. 56 N. Y. 585; *Hankinson v. Vantine*, 152 N. Y. 20; *Nichols v. White*, 85 N. Y. 531.

In England and in some of the states this rule has been abrogated or modified by statute.

Stephen, *Digest of Ev.* Chase's ed. p. 329, note; *Selover v. Bryant*, 54 Minn. 434, 21 L. R. A. 418, note; 11 Am. L. Rev. p. 261.

But in New York the rule is firmly fixed. *Sisson v. Conger*, 1 Thomp. & C. 564; 1 Greenl. Ev. § 442.

Even where a plaintiff was under the necessity of calling the defendant in interest as a witness, for the sake of formal proof only, he not being party to the record, it has been held that he was thereby made a witness for all purposes, and might be cross-examined to the whole case.

1 Greenl. Ev. § 445; *Jackson, Wood, v. Varick*, 7 Cow. 238, 2 Wend. 166; *Fulton Bank v. Stafford*, 2 Wend. 483.

Mr. C. W. Kimball, for respondent:

The rule prohibiting a party from impeaching his own witness was not violated by permitting the witness Wilson to be contradicted.

Beebe v. Tinker, 2 Root, 160.

Parker, Ch. J., delivered the opinion of the court:

The defendant called as a witness one Wilson, who, after being sworn, testified as follows: "I reside in Penn Yan. I know the defendant. I did not work for him in the spring of 1893; I was at the cold storage at that time about ten minutes, in the fore part

of April." No other questions were asked him, nor did he give any further testimony, and the testimony quoted had no bearing whatever upon the issues on trial. It is suggested that he was called under a misapprehension; but, be that as it may, we shall assume merely, in passing on the question growing out of his being called and sworn, that, before any material question was asked, the party calling the witness excused him from the witness stand. When the plaintiff came to present evidence in rebuttal of the testimony adduced on the part of the defendant, it called Wilson to the stand, and he gave material testimony in favor of the plaintiff. The defendant, claiming the right to cross-examine him, asked him whether he had not, at specified times and places, made to other persons statements tending to contradict the testimony given by him upon the plaintiff's examination. Wilson denied having made them, and the defendant afterwards called witnesses who testified that Wilson had made the contradictory statements that he specifically denied having made. To this evidence the plaintiff objected, upon the ground that it was incompetent, in that the defendant, having first sworn and examined Wilson as a witness in his own behalf, could not be allowed to discredit him by giving testimony that he had made statements out of court differing from his statements as a witness in court. The exception to the ruling of the court admitting the evidence notwithstanding the objection presents one of the questions which, on this review, it is urged, call for a reversal of the judgment. Upon a motion for a new trial, this question was very carefully considered by Mr. Justice Rumsey, who reached the conclusion that no error had been committed, and the general term has affirmed the position thus taken. As the question is a novel one, we shall briefly state the reasons that persuade us that the view taken by the learned court was the correct one.

The rule is well settled in this state that a party cannot show inconsistent statements made by his own witness for the purpose of impeaching him. *Coulter v. American Merchants' Union Exp. Co.* 56 N. Y. 585; *Nichols v. White*, 85 N. Y. 531; *Hankinson v. Vantine*, 152 N. Y. 20, 27. This rule, which was originally established by authority, came to us from England, where, as in some of our sister states, it has since been either abrogated or modified by statute. Stephen, *Digest of Ev.* Chase's ed. p. 329, note; *Selover v. Bryant*, 21 L. R. A. 418, note (54 Minn. 434); 11 Am. L. Rev. p. 261. Greenleaf on Evidence (vol. 1, § 442) states the reason for the rule as follows: "When a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces; and having thus presented them to the court, the law will not permit the party afterwards to impeach their general reputation for truth, or to impugn their credibility by general evidence, tending to show them to be unworthy of belief, for this would enable him to destroy 43 L. R. A.

the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him." See also Wharton, *Ev.* § 549. The rule being established beyond change, save by legislative enactment, that one cannot impeach his own witness, the question presented here is whether Wilson became the defendant's witness, within the meaning of the rule. Would he have become such had his name been simply called without administering the oath? If not, would he have become such through the additional act of administering the oath? If the propounding of questions be also necessary, would an inquiry as to his name and residence have made him the party's witness in such a sense that he would be bound to support his character from the beginning to the end of the trial, or would that have happened only upon some question being asked him material to the issues on trial?

It often happens that a witness is intentionally but unadvisedly called, the counsel for the moment laboring under the impression that the witness has knowledge of some fact it is desirable to establish; but, before his examination has proceeded far enough to bring about an inquiry touching any material fact to the controversy, counsel is advised by an associate, or by the party, that the wrong witness has been called, and that some other person is possessed of the information he desires to have given to the court. In such a case it would clearly seem to be a hardship that an error thus committed, which quite frequently happens in the press of trial, should burden a party with the responsibility of having the person called treated as a witness for that purpose throughout the trial.

So far as the diligence of the counsel and our examination have disclosed, this precise question has not been before the court of last resort in any of the states except Connecticut where many years ago, in the case of *Beebe v. Tinker*, 2 Root, 100, a witness was called and sworn. As to the point regarding which the plaintiff had called him to testify, the court ruled that it was not relevant to the issue; and thereupon the defendant took the witness, and asked him several questions, the answers made by him being against the plaintiff. Thereupon the plaintiff offered to introduce witnesses to impeach, which was objected to on the ground that he was the plaintiff's witness. The report of the case concludes with: "The court admitted the witnesses to impeach his character, on the ground that, although the plaintiff introduced him, yet, as the defendant only improved him, in that respect he was to be considered as the defendant's witness." In England where the rule originated, the tendency of the courts seems to have been not to apply it unless the party has proceeded so far with the witness as to ask him some question bearing upon the issues on trial. In *Creedy v. Carr*, 7 Car. & P. 64, a witness was called for the defendant, and asked, "Are you the landlord of the house at which the fire occurred?" The witness an-

swered, "I am, sir." Thereupon the court asked the defendant's counsel, "What do you propose to prove more?" and he replied, "My lord, I will close my case here." The counsel for the plaintiff said, "I wish to cross-examine the landlord;" and the court said, "Oh, no; I stopped his evidence." Counsel: "He was asked a question, and he answered it, and I have therefore a right to cross-examine him." The court: "Not where the witness, as here, has been only asked an immaterial question, and his evidence is stopped by the judge." In *Wood v. MacKins*, 2 Moody & R. 273, a witness was called for the plaintiff and sworn in the usual way; but, before he had put any questions to the witness, counsel stated that he had been misinstructed as to what the witness was able to prove, and he should not examine him at all. The witness being about to retire, counsel for the defendant claimed the right to cross-examine him, but the court said: "Here the learned counsel explains that there has been a mistake, which consists in this, that the witness is found not to be able to speak at all as to the transaction which was supposed to be within his knowledge. This is, I think, such a mistake as entitles the party calling the witness to withdraw him without his being subject to cross-examination." In *Bracegirdle v. Bailey*, 1 Fost. & F. 536, the plaintiff was sworn and tendered as a witness for cross-examination, but was not examined in chief. The defendant's counsel asked several questions touching his conduct and life; but the court ruled that these questions could not be asked, inasmuch as he has proved nothing that you could cross-examine him on to discredit him. In *Rush v. Smith*, 1 Crompt. M. & R. 94, it was held that a witness called to produce documents, and sworn by mistake, and a question put to him that he does not answer, does not entitle the opposite party to cross-examine him.

The general view upon which these cases proceeded is that a party does not necessarily make a person his witness by merely calling and swearing him; and we are not able to discover any good reason for disagreeing with them. On the contrary, it seems to us that the rule is not properly applicable save in cases where a party attempts to elicit, from a witness called to the stand, testimony material to the issues upon trial; that, until such an attempt is made, the party has done nothing that can by any possibility affect the trial, either to his own benefit or to the harm of his opponent, and therefore he has not offered a witness in proof of his cause, and is not within the reason of the rule that burdens him with the necessity of supporting the character of the witness to the end of the trial. His mistake, however caused, has not harmed the other party, and the interests of justice can in no wise be promoted by permitting that other party to take such advantage of the mistake as will fasten upon his opponent the responsibility of vouching for the character of a witness actually hostile, and from whom he has not attempted to secure any proof in the cause.

The learned counsel for the appellant
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urges that his exception taken to that portion of the charge in which the court stated "that the plaintiff was not entitled to recover if the plant was not properly run" calls for a reversal of the judgment. The defendant admitted the making of the contract upon which the plaintiff sued, but alleged that the contract had not been properly performed by the plaintiff, and sought to recover his damages. In the charge to the jury the court did say that the plaintiff could not recover for the services, unless it convinced the jury by a fair preponderance of evidence that it did keep the apples in proper cold storage, etc. But as we read the exception, it was not intended to have, nor is it likely it had, the effect of calling the attention of the court to the fact that the counsel for the plaintiff claimed that there was error in the charge as to the burden of proof. The language of the exception apparently related solely to another portion of the charge, in which the court said that, if the jury should find "that the rotting was the result of the plant having been improperly run, it follows that the plaintiff has not performed its contract. It also follows that whatever damage has been thus caused to the defendant he should be compensated for in this action." This portion of the charge was not error, and the exception to which our attention is called pointed to this, and to no other, part of the charge.

The judgment should be affirmed with costs.

All concur.

John WESTON, as Surviving Partner,
Respt.,
v.

City of SYRACUSE, *Appt.*

(158 N. Y. 274.)

1. A waiver of strict performance of a sewer contract according to specifications is within the power of the common council of a city.
2. A right of action for damages against a city accrues on its wrongful refusal to accept a contract as completed and make assessments to pay the contractor, under a contract which provided that no payments should be made until the money was collected by assessments.
3. A resolution by which a common council undertakes to make a compromise with a contractor to whom something is equitably due, though perhaps nothing legally, on a contract imperfectly performed, does not constitute a legislative

NOTE.—As to liability of a city for failure to make assessments to pay contractor, see also *Barber Asphalt Paving Co. v. Harrisburg* (C. C. App. 3d C.) 29 L. R. A. 401.

As to the effect of fraud in procuring the enrolment of a bill and the signature thereto, see *Carr v. Coke* (N. C.) 28 L. R. A. 737.

As to the validity of a vote of a common council as affected by the personal interest of a member, see note to *Ft. Wayne v. Lake Shore & M. S. R. Co.* (Ind.) 18 L. R. A. 367.

act, but is part of the administrative duties of the council, which may be declared void for fraud and corruption.

4. **Corruption in the passage of a resolution** by a city council may be set up by the city in defense of an action which is based on the resolution.

(*Bartlett, J., dissents.*)

(February 28, 1899.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a judgment of the Onondaga County Circuit in favor of plaintiff in an action brought to recover the contract price for constructing sewer work for the defendant city. *Reversed.*

Statement by **Parker, Ch. J.:**

The plaintiff, the survivor of his deceased partner, Charles Utting, brought this action to recover a balance that he alleged was due upon a contract entered into between the firm of Weston & Utting and the city of Syracuse for the construction of what is generally known as the "Kennedy Street Sewer." The contract was executed in November, 1889, and shortly thereafter Weston & Utting commenced the construction of the sewer; and, during the few months following, the work so far progressed that 1,453 feet of the sewer was constructed. Then a change in the city government took place, which resulted in a change of city engineers; and the new engineer, after some investigation, reported to the common council that the sewer was not being constructed in accordance with the contract. Thereupon the common council availed itself of the clause in the contract providing for such a contingency, and suspended the work upon the claim that the contractors were not performing the work as per agreement. The common council then, by an appropriate committee, assisted by the engineer, commenced an investigation of the sewer so far as completed, and of the manner of its construction. The sewer was visited by this committee, and some of its members, in company with the deputy city engineer, passed through the sewer, and thereafter reported the result of their investigation to the common council.

On the 29th day of July, 1890, the common council, having received the report, passed the following resolution: "Resolved, that the contractors, Weston & Utting, having the contract for building the Kennedy street sewer, be required to complete the part of the sewer already built in accordance with the terms of the contract, except that the contractors need not be required to change the grade of the work as it now exists, and that the invert portion shall remain as now laid. And the contract for said work is hereby amended and modified to that extent, the remaining portion of said sewer to be constructed in accordance with the terms of said contract without modification." After the passage of the resolution, and before its approval by the mayor, the contractors entered into another contract, by which they

agreed, in addition to fulfilling the obligations imposed upon them by the resolution, to correct, if required, all sags that might exist in the bottom of the sewer. Pursuant to that resolution, the contractors went on and completed the balance of the sewer in accordance with the terms of the contract, as is conceded on all sides. In the meantime, resolutions were passed by the common council extending the time for the completion of the work under the contract, no objection thereto being offered by any of the members of the common council. October 20, 1890, a partial estimate was submitted to the common council by the city engineer for work done on the sewer, amounting to \$3,141.50; and the common council, by a unanimous vote of all the members responding to the call of the roll, directed that a warrant be drawn for such amount. This was done, the mayor's signature attached, and the warrant paid. From time to time thereafter, down to January 5, 1892, other partial estimates for work done on the sewer were submitted to the common council, aggregating over \$13,000, and such amounts were always paid by like direction of the common council. July 25, 1892, the commissioner of public works, through the city engineer, made and submitted to the common council a final estimate and account of the work done by the contractors, covering the whole distance of the sewer, and including extra work to the amount of \$803.19, incurred in connecting the sewer with Oakwood Cemetery, which, after crediting payments already made, showed a balance due to the contractors of \$9,433.41. The estimate was headed "Final Account. City Engineer to John Weston and Charles Utting, Dr." Among other things, it contained the following certificate: "I hereby certify that, for the distance of 1,453 feet from Onondaga creek, the work was done in accordance with the resolution adopted by the common council the 29th of July, 1890. The next 1,000 feet were done in accordance with the contract and specifications, except in the matter of grade. At the beginning of the north end, the sewer is about 2 feet above the grade established by the original map, and at the end of 1,000 feet it is at said grade. The remaining portion of the sewer was completed in accordance with the contract and specifications." Subsequently, the common council passed a resolution directing that payment be made in accordance with the estimate, but the resolution was vetoed by the mayor; and thereafter, and on December 12, 1892, the common council passed a resolution affecting the 1,453 feet of the sewer first constructed, in which resolution it was recited that notice had been given to the contractors to take the necessary steps within three days to put their work in a condition to fulfil the terms of their contract, but that, notwithstanding such notice, the contractors did not, within the said three days, nor at all, take such measures as, in the opinion of the city engineer, were necessary to insure the satisfactory completion of said work, and it was "resolved, that said contract be, and the same

is hereby, declared abandoned by said contractors, said Weston & Utting; and further resolved, that the commissioner of public works forthwith notify such contractors to discontinue all work under said contract." The city authorities having refused to accept the contract as completed, but, on the contrary, having formally declared it not completed, and the contract abandoned by the contractors, and having refused to take any steps whatever under it to make an assessment upon the property benefited, in order to raise the money with which to pay the expenses of constructing the sewer as provided by the contract, the plaintiff brought this action. He claims that, notwithstanding it was provided in the contract that no payment should be made until the cost was assessed upon and collected from the assessable taxpayers liable for local taxation for the construction of sewers, the defendant has been guilty of a breach of contract, and therefore he is entitled to recover the damages caused to him by their failure to make performance. Upon the trial it was insisted by the defendant, and testimony was offered tending to prove, that the contractors failed to comply with the contract in other respects than those mentioned in the resolution of July 29; and it is made to appear that after the passage of the resolutions declaring that the contractors, Weston & Utting, had abandoned the contract, the authorities had caused a portion of the sewer to be rebuilt. Evidence tending to show faulty construction was given. On the other hand, testimony was presented tending to support the contention of the plaintiff that all the variations from the contract were made with the knowledge of the city engineer in charge of the work, and done with his approval and by his direction; and it was insisted that such approval and direction were founded upon actual necessity in some respects, and good judgment in others. The court decided that, as to the variations in the construction of the sewer referred to in the resolution of July 29, the common council had waived strict performance, and modified the contract to that extent, and that they had also waived such defects as had come to the knowledge of the common council before passing this resolution, although the defects were not mentioned therein; and he submitted to the jury the question whether, in all other respects, there was a substantial performance of the contract by the contractors, and the verdict in favor of the plaintiff constituted an affirmative answer to that question. The judgment entered thereon was affirmed at the general term.

Other facts appear in the opinion.

Mr. Charles E. Ide, for appellant:

The attempted modification of the contract by the common council was unauthorized, and their act in that regard *ultra vires*; and furnished no excuse for the non-performance of the contract according to the plans and specifications.

The contract in question was for a local improvement petitioned for by the property

owners, the cost of which was to be raised by local assessment. The work could be let only after competition and bids must be received and the contract awarded on the plans and specifications exhibited at the letting.

Laws 1885, chap. 26, §§ 139, 155, 156, as amended Laws 1888, chap. 449, Laws 1889, chap. 475.

The property owners have the right to insist that the work thus petitioned for shall be made to comply with the plans and specifications shown at the letting.

People, Ream Pav. Co., v. Union Street Bd. of Improvement, 43 N. Y. 227; *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *State, Shaw, v. Trenton*, 49 N. J. L. 339; *Nash v. St. Paul*, 11 Minn. 174.

The contract provided for changes and how they could be made by the engineer, namely, by his express sanction in writing. That course was not followed.

This was in direct violation of the contract, and such directions by the engineers, if given, could furnish no ground for a non-compliance with the contract by the contractor.

Dillon v. Syracuse, 29 N. Y. S. R. 912.

The failure to obtain the requisite certificate of the engineer was fatal to a recovery.

People, Ready, v. Syracuse, 65 Hun. 321, and 144 N. Y. 63; *Dillon v. Syracuse*, 29 N. Y. S. R. 912. *Tone v. New York*, 70 N. Y. 157.

The action was prematurely brought in that the amount of the contract price had not been assessed and collected.

Hunt v. Utica, 18 N. Y. 442; *People, Ready, v. Syracuse*, 65 Hun. 321; 1 Dill. Mun. Corp. 4th ed. § 483; *Tipton v. Jones*, 77 Ind. 307.

The acts of the common council or individual members of it are subject to inquiry and impeachment for fraud at the instance of persons injured thereby.

1 Dill. Mun. Corp. 4th ed. §§ 311, 312.

Mr. George H. Sears, for respondent:

The action of the city in declaring the contract abandoned constituted a refusal by the city to take proceedings to raise funds to perform the obligations of the contract.

Reilly v. Albany, 112 N. Y. 30.

Where a municipality neglects its duty of collecting a tax provided for the payment of work done at its request, it becomes directly chargeable with the indebtedness.

Lyon v. District of Columbia, 9 Mackey, 484; *Smith v. Buffalo*, 44 Hun, 156; *Commercial Nat. Bank v. Portland*, 24 Or. 188; *Cummings v. Brooklyn*, 11 Paige, 596; *Sage v. Brooklyn*, 89 N. Y. 189; *McCormack v. Brooklyn*, 108 N. Y. 49.

When the complaint avers the making of a contract, fair on its face, and the answer admits such averment, the illegality of the contract cannot be insisted on to defeat the recovery, unless such illegality is set up in the answer.

Schreyer v. New York, 7 Jones & S. 1; *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696; *Paige v. Willet*, 38 N. Y. 28; *Goodwin v. Massachusetts Mut. L. Ins. Co.* 73 N. Y. 496. See also note on *Illegality as a defense*, 13 Abb. N. C. 388.

A successful motion cannot be made at close of plaintiff's evidence to dismiss the complaint, even though illegality was disclosed in the plaintiff's testimony.

Valton v. National Fund L. Assur. Co. 20 N. Y. 35.

If the common council had the right, originally, to contract for the sewer they could afterwards modify or change any part of the same, not involving prescribed details.

Moore v. Albany, 98 N. Y. 405; *Meech v. Buffalo*, 29 N. Y. 198; *Voght v. Buffalo*, 133 N. Y. 463; *Fitzgerald v. Walker*, 55 Ark. 148; *Kingsley v. Brooklyn*, 78 N. Y. 200; *Re Jones*, 10 Ops. Atty. Gen. 422; *Hasbrouck v. Milwaukee*, 21 Wis. 218; *Mulholland v. New York*, 113 N. Y. 631

Growing out of its authority to create debts and incur liabilities a municipal corporation has power to settle disputed claims against it to the extent of modifying or annulling a contract, and it will not be invalidated for want of consideration.

1 Dill. Mun. Corp. 4th ed. § 477.

A compromise can be made although the claim compromised is *ultra vires*.

1 Beach, Pub. Corp. §§ 638-694.

After the defendant, having permitted the contractor to proceed with the work after the passage of the resolution of July 29, to complete nearly four fifths of the sewer at an expense of about \$16,000; to do extra work to the amount of \$803.19 in connecting sewer with Oakwood Cemetery; and then go back, point up and take up, and relay some 40 feet of the first portion of the sewer, and the city to derive the benefit of the work, the defendant is estopped from raising the question of power in the common council to pass the resolution of July 29.

State Bd. of Agri. v. Citizens Street R. Co. 47 Ind. 407, 17 Am. Rep. 702; *East St. Louis v. East St. Louis Gaslight Co.* 98 Ill. 415, 38 Am. Rep. 97; *Turner v. Cruzen*, 70 Iowa, 202; *Re Jones*, 10 Ops. Atty. Gen. 406; *Hasbrouck v. Milwaukee*, 21 Wis. 217.

The evidence is full and undisputed that the sewer was constructed by the plaintiff in respect to all its details under the supervision of, and in exact accordance with the directions of, the defendant, through its inspector and city engineer.

This, together with the certificate of the city engineer, is conclusive upon the city, and the defendant is estopped from setting up the defense of nonperformance.

People, Ready, v. Syracuse, 65 Hun, 321; *Dillon v. Syracuse*, 29 N. Y. S. R. 612; *Brady v. New York*, 132 N. Y. 415; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 264; *Mulholland v. New York*, 113 N. Y. 631; *People v. Stephens*, 71 N. Y. 550; *Kingsley v. Brooklyn*, 78 N. Y. 200; *Riley v. Brooklyn*, 46 N. Y. 446; *Cartwright v. Mount Vernon*, 21 N. Y. S. R. 311; *Messenger v. Buffalo*, 21 N. Y. 196.

There can be no force in the objection that the resolution of July 29, 1890, was procured by bribery, and the offers of the defendant to give evidence of bribery were properly denied.

Where a contract is secured of a municipal 43 L. R. A.

corporation by bribery, it is not necessary that it should ratify the contract; having entered upon its performance, it cannot escape liability for the work done or breach subsequently committed, in the absence of proof that the contract was disaffirmed by it upon the discovery of the fraud.

Devlin v. New York, 4 Misc. 106.

Where officers of a municipal corporation are invested with legislative powers for the passage of any ordinance within their authority their motives in reference thereto will not be inquired into.

1 Dill. Mun. Corp. § 313; *Jonas v. Loving*, 55 Miss. 109, 30 Am. Rep. 508; *Paine v. Boston*, 124 Mass. 486; *Fresport v. Marks*, 59 Pa. 257; *Baker v. State*, 27 Ind. 485.

Parker, Ch. J., delivered the opinion of the court:

On this review it must be taken as established by the verdict of the jury that the plaintiffs substantially performed their contract with the defendant, except as to the construction of the first 1,453 feet of the sewer, the work upon which was done prior to the investigation by the common council. That investigation resulted in a resolution waiving performance so far as the work done was not in conformity with the plans and specifications, and modifying the contract to the extent that it should be in conformity with the work already done. The trial court decided that the resolution of July 29, 1890, effected that result. The appellant concedes that such was the purpose of the common council, but nevertheless insists that it was beyond the power of that body to waive performance of any of the requirements of the contract or specifications, and that in holding otherwise error was committed. The result of our examination of the charter of the city of Syracuse leads us to the conclusion that it does not place any limitations upon the powers of the common council in respect to such acts as the common council undertook to perform by means of the resolution in question. Aside from certain limitations that we need not specify, all details are left to the common council, and not made the basis of the consent of the property owners. The modification attempted, therefore, was within the power of the common council, under the ruling of this court in *Meech v. Buffalo*, 20 N. Y. 198, *Moore v. Albany*, 98 N. Y. 396, and *Voght v. Buffalo*, 133 N. Y. 463.

The appellant next contends that the failure to obtain the certificate of the engineer entitled the defendant to a dismissal of the complaint. We think the certificate obtained was in compliance with the contract as modified by the resolution of July 29, 1890. The engineer could not certify that the work was performed in accordance with the original contract and specifications, because such was not the fact; but he did certify in effect that the work done after the 29th day of July, 1890, was in accordance with the contract and specifications, while the work done prior to that date was in conformity with the resolution adopted by the

common council, by which an attempt was made to modify the contract. It was, in effect, therefore, a certificate that the work had been performed in accordance with the original contract as modified by the resolution of July 29, 1890, and was sufficient.

The appellant also insists that the action was prematurely brought, because no part of the contract price has been assessed or collected. The contract provides: "No payment shall be made to the party of the first part under this contract until the cost of such work shall have been ascertained and assessed upon and collected from the taxpayers liable to local taxation for the same; . . . and, as soon thereafter as the cost of said work shall have been collected from said taxpayers, the party of the first part shall be entitled to receive the amount due on said final account. . . ." This clause in the contract is not an unusual one, nor is it, or at least an equivalent provision, a stranger to the courts. As long ago as the action of *Hunt v. Utica*, 18 N. Y. 442, the court had under consideration a contract of this character. After its completion, and on the 16th day of November, the claim for compensation was allowed by the common council, "payable when collected by assessment." On the 7th of December following, the common council made the necessary assessment, and directed that measures be taken for the collection thereof. On January 26th the assignee of the contractor commenced an action to recover the contract price. At that time no part of the assessment had been paid, but five days later the treasurer issued a warrant for its collection, which was in the hands of the collector at the time of the commencement of the action. It was held that the plaintiff could not recover. The decision of the court in that case has not been questioned in any subsequent case, and the decision of many succeeding cases has been governed by the principle enunciated in that case, *viz.*, that where a way of payment is prescribed by statute or by contract that way must be strictly pursued. *People, Ready, v. Syracuse*, 144 N. Y. 63; *Swift v. New York*, 83 N. Y. 528, 533; *Howell v. Buffalo*, 15 N. Y. 512, 519; *Baldwin v. Oswego*, 1 Abb. App. Dec. 62, 68; *Beard v. Brooklyn*, 31 Barb. 142, 149; *Dannat v. New York*, 66 N. Y. 585.

Such a provision as to work of this character is usual and reasonable; for, as the municipal authorities have no right to make such improvements at the expense of the taxpayers generally, it follows—First, that no money is raised by general taxation that is available for the payment of such expenses; and, second, that it is necessary to make the avails of the special assessment meet the obligations of the city under the contract. All this is known to the contractor when he makes his bid and enters into the contract, and presumably he has provided suitable compensation to himself for the loss of the use of the sums due under his contract until a reasonable time shall have elapsed in which to levy the assessment and make collection. If he finds, as in the case of *People, Ready, v. Syracuse*, 144 N. Y. 63, that the city has not

proceeded with reasonable diligence to collect the assessment, and turn over the proceeds to him, he may and should proceed by mandamus to compel such action on its part. But where a municipality disables itself from performing the contract by such action on its part as makes void, and therefore uncollectible, an assessment, for the purpose of providing compensation, or refuses to perform the contract on its part, as in *Reilly v. Albany*, 112 N. Y. 30, then an action against the city for the damages sustained by reason of its failure to perform the contract on its part may be maintained. It has been suggested that the two cases last referred to are in conflict, but they are not. The *Ready Case* points out that, prior to the breach of the contract by the municipality, the contractor's remedy is to apply for a mandamus to hasten municipal action in the absence of due diligence; while the *Reilly Case*, with equal clearness, marks out the path to be pursued by the contractor, where the other party, to wit, the municipality, either designedly or accidentally puts itself in a position where it will not or cannot perform the contract on its part. In such a case the remedy is against the city for breach of the contract. As we must regard the facts as found by the verdict of the jury, this case comes under the rule in *Reilly's Case*, for the plaintiffs have fully performed the contract as modified by the resolution of July 29, 1890, and are entitled to compensation therefor. But the defendant, instead of recognizing the plaintiffs' rights in the premises, and proceeding with reasonable diligence to levy the assessment, collect, and turn it over to the plaintiffs, has declared by resolution that the contractors have not only not performed, but have abandoned, the contract, has let to other contractors the rebuilding of a portion of the sewer constructed by these plaintiffs, and has refused to take any steps looking to the making of an assessment upon the property benefited for the purpose of raising the money with which to pay the plaintiffs, as provided by the contract. The plaintiffs' right, therefore, to pursue the defendant for a breach of the contract, is established.

We are thus brought to the last, but not the least, of the interesting questions presented by the applicant, which is that the court ought to have permitted the defendant to prove that the passage of the resolution of July 29, 1890, was corruptly procured. The importance of this question in this particular case is readily apparent. It is not pretended that the contract was substantially performed as to the construction of the first 1,453 feet of the sewer. The certificate of the engineer, which the contract says must be given in order to entitle the plaintiffs to the compensation provided for by the contract, does not assert that, as to the portion of the sewer above referred to, the contract was performed. On the contrary, the certificate is to the effect that performance in that respect is in accordance with the contract as modified by the resolution of July 29, 1890. If that resolution be void and of no effect, then the plaintiffs have not estab-

lished their right to recover in this action; for they have not only failed to prove the making of the necessary certificate by the engineer, but they have failed to prove substantial performance on their part.

The question is also an important one in its public aspects, for, so far as we have observed, it has seldom been brought to the attention of the courts. The counsel for the respondent insists that the question was not before the court in such a manner as required it to pass upon the point involved. Let us inquire of the record whether he is right or not. The answer alleges, among other things, "that the said resolution, purporting to modify said contract, passed by the common council on the 29th day of July, 1890, as set forth in said complaint, was passed collusively, corruptly, and fraudulently, and is the result of a corrupt bargain, in and by which it was agreed that a large sum of money should be paid by said contractors for a vote in favor of said resolution, which said money was paid, and that said resolution, by reason thereof, is null and void and of no effect as a modification of said contract." During the progress of the trial the counsel for the corporation asked several questions which brought to the attention of the court and the counsel for the plaintiffs the defense relied upon by the city, and which we have in part quoted. The court was inclined to the view that the resolution was a legislative act, and could not be thus attacked, whereupon the defendant's counsel, for the purpose of raising the question in the briefest form, said: "I desire to show that Mr. Weston [plaintiff] procured a vote of one member of the common council by corrupt means: that a sum of money was paid by the plaintiff, and accepted by a member of the common council, in consideration of his vote for the adoption of that resolution; and that the vote of such member was obtained and cast by him in consideration of the payment of such sum of money." This offer was denied, and the evidence excluded by the court, the defendant excepting. It is not, of course, claimed that, if the resolution was in fact procured to be passed by bribery, it would, nevertheless, constitute a valid and effective modification of the contract. That it would be void as against public policy is too clear to admit of discussion; but the contention rather is that the courts are without power to inquire into the matter. The reason assigned is that the act of the common council in passing this resolution was legislative in character, and hence the motives that induced the members to vote for its passage, whether honest or corrupt, are not the subject of judicial investigation. It is true that the legislative department of the state government is sovereign, and hence the motives that induce its action cannot be the subject of judicial investigation. The Constitution also empowers the legislature, by general laws, to confer upon boards of supervisors of the counties of the state such powers of local legislation and administration as the legislature may from time to time deem expedient. Const. art. 3, § 27. It has

been held that the action of a board of supervisors in undertaking to establish a fire district in a town, under § 37 of the county law, is legislative in character, and therefore not subject to review by certiorari, because the affidavits verifying the petition did not state that the petition complied with the requirements of the statute. *People, O'Connor, v. Queens County Supers.* 163 N. Y. 370.

In *People, Wakeley, v. McIntyre*, 154 N. Y. 628, it was held that, within the limits of the power delegated to supervisors by the legislature under the authority conferred upon it by the section referred to, each board of supervisors is clothed with the sovereignty of the state to legislate as to all details, precisely the same as the legislature might have done in the premises. While that is so, there are many duties devolved upon boards of supervisors by the legislature which are not legislative in character, but are administrative, and in some instances quasi judicial in nature, and not at all impressed with the character of sovereignty. Among other duties they are required to audit and allow claims against the county. If they arbitrarily refuse to audit a claim the court may, by mandamus, require them to take action thereon. *People, Johnson, v. Delaware County Supers.* 45 N. Y. 196, 199. So, where the board of supervisors audit and allow to a public officer a sum in excess of that legally due him, the court will, by mandamus, and upon the application of a taxpayer, require the board to reconsider, revoke, and annul the audit as to such excess. *People, Lawrence, v. Westchester County Supers.* 73 N. Y. 173. While the acts of boards of supervisors or boards of town auditors, in auditing the accounts within their jurisdiction, are, in the absence of fraud and collusion, final and conclusive, and not the subject of attack in a collateral proceeding, they may, nevertheless, be attacked in such a proceeding in an action brought by a taxpayer, under chapter 161 of the Laws of 1872. *Osterhoudt v. Rigney*, 98 N. Y. 222.

Many cases might be cited where boards of supervisors have been compelled to act by mandamus, where they have failed to perform the duties which the law enjoined upon them, as well as cases where their actions, involving legal errors as distinguished from discretionary matters, have been reviewed by certiorari, and also where the audit has been attacked in a collateral action brought under the "Taxpayers' Statute," so called. But it would serve no good purpose, as the cases already cited are sufficient to call attention to the fact that there are many administrative duties of boards of supervisors that are not impressed with the character of sovereignty. So, too, the legislature may confer upon common councils of cities authority to pass municipal ordinances. Such as are passed in pursuance of such authority have the force of law, and are as obligatory as if enacted by the legislature itself. *Buffalo v. New York, L. E. & W. R. Co.* 152 N. Y. 276. But, like boards of supervisors, a common council has many administrative duties that are not legislative in character, performance

of which, at times, has to be compelled by the courts. Not infrequently in the case of special assessments for local improvements, such as the case at bar, actions are successfully prosecuted by taxpayers to set aside assessments against property, on the ground that the assessments are illegal and void. In *Miller v. Amsterdam*, 149 N. Y. 288, in pursuance of legislative authority, the common council undertook to, and did, pave a certain street, and, to defray the expense thereof, made an assessment against the property specially benefited; but the statute under which the common council attempted to act provided that the street could be paved only upon a petition therefor of the owners of a majority of the lineal feet fronting on the street. The petition presented, and upon which the common council acted, turned out not to have the requisite number of consents. This court held that the action of the common council was without jurisdiction, and affirmed the judgment setting aside the assessment against the property of the plaintiff, upon the ground that it was void. If the common council in *Miller's Case*, in the institution of proceedings to pave the street, had been acting in a legislative capacity, and was sovereign in that which it did, then, necessarily, it would not have been open for inquiry by the courts whether it had acquired jurisdiction to legislate at all by the petition of the requisite number of lotowners. But it was not sovereign. It had no authority to act at all in the absence of a petition signed by the owners of a majority of the lineal feet fronting on the street, and therefore its proceedings were not in accordance with the directions of the charter; and, in attempting to act as it did, its proceedings were the subject of direct review by certiorari, or to attack in a collateral action such as was made. If the action taken by a common council under the statute to pave a street be not sovereign and free from direct review or collateral attack in the courts, no more is the action of a common council, under a similar statute, to build a sewer; and it is yet more absurd to claim that the resolution by which the common council undertook to effect a compromise and settlement with a contractor to whom something was equitably due, though, perhaps, nothing legally, because of his failure to perform the contract in all respects, constituted a legislative act.

Having established by authority (to which very many citations in point in this state might be added) that the resolution in question constituted a part of the administrative duties of the common council, we come next to the question whether such a resolution, if passed by means of fraud and corruption, can be declared of no effect by the courts. This question is answered in the affirmative by *Talcott v. Buffalo*, 125 N. Y. 280. That was an action by a taxpayer to prevent waste of or injury to the property of the municipality, the claim being that the common council of the city of Buffalo had passed the resolution over the mayor's veto, providing for the substitution of electric lights for gas, and that, in pursuance of it, 45 L. R. A.

the proper officers had entered into a contract with the electric-light company, by which it had been agreed to pay an exorbitant price; and it was charged that the acts of the common council and its officers in the matter were illegal. The court held that, inasmuch as the action taken by the common council was clearly within its power and discretion, such an action could not be maintained without any charge or allegation of fraud, collusion, corruption, or bad faith. While upon this proposition there was a dissent, all were agreed that under the "Taxpayers' Act," so called, the complaint would not have been demurrable had it alleged that the acts complained of were without power, or that they were the result of corruption, fraud, or bad faith amounting to fraud. That action, it is true, was brought under and by virtue of the provision of the statute giving to taxpayers the right by action in a proper case to interfere with the conduct of municipal officers. The title of the act first passed (Laws 1872, chap. 161) was "An Act for the Protection of Taxpayers against the Frauds, Embezzlements, and Wrongful Acts of Public Officers and Agents." It has since been amended and supplemented by various enactments, which need not now be referred to. This statute did not take away any right of action that the municipality had; and, to avoid any possible opportunity for such a suggestion, the last sentence of the statute provided that it should not be so construed as to take away any right of action from any county, town, or municipal corporation. The history attending the passage of this act, and of chapter 49 of the Laws of 1875, is a matter of common knowledge, and was well stated by Judge Andrews in *People v. New York & M. B. R. Co.* 84 N. Y. 565, 569, as follows: It "was passed in view of the fact that the city of New York had been grossly defrauded by the acts of municipal officers and others acting in collusion with them, and that large sums had been taken from the municipal treasury in the perpetration of the frauds committed. These sums the city or county, one or both of them, might sue for and recover; but resort to this remedy was embarrassed by the fact that the city and county governments were to a considerable extent under the control of the guilty participants in the fraud."

The effect of the legislation is to enable a taxpayer of the municipality, threatened with injury from its officers, and in certain cases the state, to accomplish by action not more than the proper municipal authorities can at all times accomplish, but such results as the municipal authorities can and should, but, because of carelessness or wilful purpose, will not. If it be the fact that the passage of this resolution was brought about by bribery of the members of the common council, a taxpayer, under the authority of *Talcott's Case*, 125 N. Y. 280, could have maintained a suit against the city to enjoin it from paying to the contractors the amount claimed by them to be due under their contracts, for the reason that the statute confers upon him the authority to thus interfere for

the protection of the municipal corporation; and that which he can accomplish by such a suit, the officers of the municipal corporation, whose duty it is to protect the corporate property from waste and injury, may bring about by a defense to an action brought by the contractor. It is urged by the respondent that the defendant is estopped by the conduct of its officers subsequent to the discovery by the common council of the alleged acts of bribery. But the difficulty with this contention is that it does not appear that the officers of the defendant knew of the alleged bribery at the time of the several acts which the plaintiffs rely upon to create an estoppel. It does appear that, before the commission of some of the acts, the common council caused an investigation of the charge of corruption to be made; but it is not shown that one of the outcomes of the investigation was the disclosure of the alleged acts of bribery that the defendant upon the trial offered to prove, and therefore it cannot be said that the action taken by the common council was with full knowledge of the situation.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur, except **Bartlett, J.**, dissenting, and **Martin** and **Vann, JJ.**, not sitting.

Dwight H. OLMSTEAD, Trustee, etc., of
Noah T. Pike, Deceased, *Appt.*,
v.

Brainard G. LATIMER *et al.*, *Respts.*

(158 N. Y. 313.)

1. A surety is not discharged by an agreement for the extension of the time of payment, when that is invalid for want of consideration.
2. The extension of the time for payment of a mortgage, made by a written agreement which is not based on any new consideration, is invalid.

(February 28, 1899.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Second Department, modifying a judgment of a Special Term for Kings County in favor of defendants in a proceeding brought to enforce the alleged liability of defendants for a bond debt of their ancestor. *Reversed.*

Statement by **Parker, Ch. J.**:

In August, 1878, one John G. Latimer executed his bond with a mortgage on a lot and building on Atlantic street, Brooklyn, to secure the sum of \$18,000, borrowed by him. The plaintiff subsequently acquired that bond and mortgage. In 1884 Latimer died intestate, seised of the mortgaged premises,

NOTE.—For performance of existing contract obligation as consideration for new promise, see note to *Abbott v. Doane* (Mass.) 34 L. R. A. 33.

43 L. R. A.

leaving a widow and four brothers (the three defendants and one James D. Latimer) his only heirs at law. Letters of administration were issued on the estate of John G. Latimer, and upon settlement of the estate it appeared that the personal estate was exhausted by the payment of the debts and expenses of administration, leaving a deficiency in the amount due for administrator's fees. The deceased left real estate of considerable value, all of which was, prior to the commencement of this action, sold by the three defendants Latimer, as heirs at law, for the aggregate sum of \$57,500, the value of the widow's dower in which was estimated at \$8,426, leaving the net value of the lands sold in the hands of each of the defendants at the time of the trial at \$12,268.50, outside of the mortgaged premises. The latter were conveyed, during the years 1888 and 1889, to Frederick B. Latimer, by bargain and sale deeds, each reciting the consideration of \$1. After Frederick had acquired all the interest of his brothers in the mortgaged premises, he and the plaintiff executed the following agreement:

We agree that the time for the payment of the bond and mortgage for \$18,000 on 201 and 203 Atlantic avenue, Brooklyn, made by John G. Latimer to the executors of Noah T. Pike, and recorded in the register's office of Kings county in Liber 1425 of Mortgages, page 17, August 24, 1878, being the date thereof, shall be, and hereby is, extended to May 1, 1895, subject to the same terms and conditions, including tax, insurance, and interest clauses, as at present.
Dated New York, October 15, 1891.

Dwight H. Olmstead, Executor & Trustee
under Will of Noah T. Pike.

F. B. Latimer.

In April 1892, a fire occurred in the buildings on the mortgaged premises, by which they were partially injured. In an attempt to restore the buildings they collapsed, and became a total loss. By this accident the value of the mortgaged premises fell below the amount of the mortgage. Thereafter the plaintiff instituted this action to foreclose the mortgage, and hold the defendants, as heirs at law of the original bondsmen and mortgagor, liable for any deficiency. The trial court held the defendant Frederick liable for 16-75 of any deficiency, and the other defendants not liable. From this decree the plaintiff and the defendant Frederick appealed to the appellate division; the former seeking to hold all the defendants, the latter to be relieved from liability. The court modified the judgment by increasing the liability of the defendant Frederick to one quarter of any deficiency that may arise on the foreclosure sale, and in all other respects affirmed the judgment.

Mr. Charles D. Ridgway, for appellant:

The defendants are necessary parties to the action, and may be held for any deficiency which may arise on the sale of the mortgaged premises.

Code, § 1843; *Collin's Petition*, 6 Abb. N. C. 227; *Glaciue v. Fogel*, 88 N. Y. 434; *Collier v. Miller*, 62 Hun, 99; *Rogers v. Patterson*, 79 Hun, 484.

The fact that Frederick B. Latimer, after he had received a deed for the mortgaged premises from his brothers, obtained an extension of the time of payment of the bond and mortgage from the plaintiff from May 1, 1892, to May 1, 1895, does not discharge any of the defendants from the payment of the bond to the extent of the value of the real estate descended to them.

So far as the value of the lands of the decedent remaining in their hands was concerned defendants were not jointly, but severally, liable.

Belmont v. Ooman, 22 N. Y. 438, 78 Am. Dec. 213; *Smith v. Cornell*, 111 N. Y. 554; *Chilton v. Brooks*, 72 Md. 554.

The principle of suretyship is only invoked to prevent a fraud or a wrong, but never to perpetrate one.

No case can be found which decides that the relation of principal and surety exists between a grantor and a grantee when the grantor is not a mortgagor and has not paid anything for the mortgaged premises, but who is by law, because of his possession of funds of the obligor, personally liable for the debt.

Wadsworth v. Lyon, 93 N. Y. 201, 45 Am. Rep. 190; *Hauselt v. Patterson*, 124 N. Y. 361.

The relation of principal and surety did not exist between the several defendants because by the Revised Statutes they were required to pay the mortgage debt out of their own property. They were each primarily liable, not jointly but severally, for his share of the debt.

Palmer v. Purdy, 83 N. Y. 145.

Admitting the relation of principal and surety did exist between Frederick B. Latimer and the other defendants after the execution of the deeds, still there was no valid extension of the mortgage, and consequently no discharge of the other defendants.

Halkiday v. Hart, 30 N. Y. 474; *Lowman v. Yates*, 37 N. Y. 601; *Gahn v. Niemcewicz*, 11 Wend. 312; *Vilas v. Jones*, 10 Paige, 76; *Reynolds v. Ward*, 5 Wend. 501; *Draper v. Romeyn*, 18 Barb. 166; *Kellogg v. Olmsted*, 25 N. Y. 189; *Babcock v. Kuntzsch*, 66 N. Y. S. R. 47.

There was no positive duty incumbent upon plaintiff to have prosecuted the foreclosure of the mortgage with active diligence. He had a right to rely upon the bond for payment, and the defendants are not discharged by mere delay.

Goldsmith v. Brown, 35 Barb. 484; *Mercantile Ins. Co. v. Hinman*, 34 Barb. 410; *Schroeppe v. Shaw*, 3 N. Y. 446.

Any of the defendants could have paid the debt of his ancestor in order to relieve his own lands and been subrogated to the rights of the plaintiff, or he might have demanded a foreclosure of the mortgage in order to protect himself. But until he has done this he cannot complain.

Marshall v. Davies, 78 N. Y. 414; *Blake v. Move*, 32 N. Y. S. R. 917; *Hunt v. Purdy*, 82 N. Y. 486, 37 Am. Rep. 587.
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Mr. Francis L. Noble, with Messrs. Charles J. McDermott and Paul R. Towne, for respondents:

The right of a creditor of a deceased intestate to maintain an action against the heirs at law of such decedent to recover for the debts of said decedent is regulated by statute.

Code Civ. Proc. §§ 1837-1860.

This liability is a joint liability, and an action against the heirs must be brought jointly against them all.

Code Civ. Proc. § 1846.

The unsecured creditors acting through the administrators could have compelled a foreclosure of this mortgage before the mortgagee could have made any claim to diminish the general fund of the personal estate for the payment of such mortgage debt.

Johnson v. Corbett, 11 Paige, 265; *Hauselt v. Patterson*, 124 N. Y. 349.

This being so, the personal representatives stand in the relation of sureties toward the mortgaged premises.

The liability of an heir at law, however, is secondary to that of a personal representative.

1 Rev. Stat. 2 Banks, 9th ed. 1822, 749, § 4.

In case of the death of the mortgagor the order of the liability is this: (1) The mortgaged premises; (2) the personal estate; (3) the heirs at law.

Wilbur v. Warren, 104 N. Y. 192; *Hauselt v. Patterson*, 124 N. Y. 349; Code Civ. Proc. § 1848.

The written extension of the mortgage given by the plaintiff to the defendant Frederick B. Latimer is a valid extension.

After breach of a sealed agreement it may be modified by an executed parol agreement for a sufficient consideration.

Dodge v. Orandall, 30 N. Y. 304.

Such extension does not alter the agreement or terms of a sealed contract, but is a new contract to hold the original contract in abeyance.

Homer v. Guardian Mut. L. Ins. Co. 67 N. Y. 481; *San Remo Hotel Co. v. Brennan*, 64 Hun, 611.

No new consideration was necessary to give validity to the agreement to extend the time for performance. The waiver is sufficient for that purpose.

Burt v. Saaton, 1 Hun, 551; *Clark v. Dales*, 20 Barb. 42.

But if such new consideration were necessary it exists in this case. The payment of interest by one not previously bound to pay the same is a good consideration for the agreement to extend the time for payment of the principal.

Grinnan v. Platt, 31 Barb. 328; *Jester v. Sterling*, 25 Hun, 344.

The agreement for the extension had expired and the contract was an executed one before this action was commenced.

Fuller v. Kemp, 138 N. Y. 231, 20 L. R. A. 785; *Thomson v. Poor*, 147 N. Y. 402.

Even where no personal liability exists an extension of time for the payment of the mortgage operates to release one personally liable for the debt who does not consent to

such extension to the extent of the value of the land at the time the agreement to extend the same was made.

Paine v. Jones, 76 N. Y. 274; *Murray v. Marshall*, 94 N. Y. 611; *Spencer v. Spencer*, 95 N. Y. 353.

The interest which James D. Latimer took in the lands of John G. Latimer, though by descent it afterwards passed to the defendants, cannot be reached in this action.

Fink v. Berg, 50 Hun, 211; *Platt v. Platt*, 105 N. Y. 496; *Rogers v. Patterson*, 79 Hun, 483.

Parker, Ch. J., delivered the opinion of the court:

The defendants Latimer, as heirs at law of the mortgagor, were respectively liable, under § 1843 of the Code, for the debts of the said mortgagor decedent to the extent of their interest in the real property that descended to them from him. The premises covered by the mortgage were primarily liable to pay the mortgage debt. As there was no personal estate, the defendants were secondarily liable, and they were properly made parties in the action of foreclosure by virtue of § 1627 of the Code, which provides that "any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action; and if he has appeared, or has been personally served with the summons, the final judgment may award payment by him" of any deficiency. The judgment, as it comes to us, decrees that the defendant Frederick B. Latimer shall pay one quarter of the deficiency, but it has been held that the effect of the conveyance of the premises to the defendant Frederick by his brothers in the years 1888 and 1889, together with the fact that he informed the plaintiff of such conveyance, and thereafter made an agreement to extend the time of payment of the bond and mortgage, had the legal effect of making Frederick the principal debtor, and his brothers, sureties, and hence that the effect of the agreement extending the time of payment operated to release the sureties from all liability to the plaintiff on account of the indebtedness evidenced by the bond. Assuming, but not deciding, that the effect of the conveyance, and that which subsequently happened, was to change the obligation of the defendants other than Frederick towards the plaintiff from that of principals to that of sureties, we come to the question whether the agreement to extend the time of payment was invalid for want of consideration.

There are several decisions in this court in which the question has been considered, and they are in harmony with one another. In *Kellogg v. Olmsted*, 25 N. Y. 189, the action was on a promissory note by the transferee of the payee. The answer alleged that, after the note became due, it was mutually agreed between the holder thereof, the payee, and the defendants "that, in consideration that the defendants would keep the principal sum of the said note until the 1st day of April, 1857, and pay the same, with interest, on that day, he, the said Covil [payee] would extend the time of payment of the principal

of said note until the 1st day of April, 1857; that the said defendants then and there assented to such proposition, and then and there agreed to and with said Covil to keep said principal sum of said note until the 1st day of April, 1857, and to pay the same with interest on that day." On the trial of the action the referee excluded evidence offered by the defendants to establish the defense so specially set up, and exceptions were taken thereto that presented the question to this court. It was held that an agreement by a creditor to postpone payment of a debt until a future day certain, without other or further consideration than the agreement of the debtor to pay the debt, with interest, is void for want of consideration; the court citing, in support of its position, *Miller v. Holbrook*, 1 Wend. 317; *Gibson v. Renne*, 19 Wend. 390; *Pabodie v. King*, 12 Johns. 426; *Reynolds v. Ward*, 5 Wend. 501; *Fulton v. Matthews*, 15 Johns. 433, 8 Am. Dec. 261. A dissenting opinion was written by Judge Davies, who, two or three years later, wrote the principal opinion in *Halliday v. Hart*, 30 N. Y. 474. In that case the action was brought to recover against the maker and two indorsers on a promissory note. The indorsers defended on the ground that the plaintiff had, for a valuable consideration, and in writing, extended the time of payment for a period of some months, and claimed that the effect of such extension was to discharge the sureties from liability. The authorities bearing upon the question were very carefully considered, and the court decided that a partial payment by the maker on account of an overdue note is not a valid consideration for a promise of forbearance as to the residue, so as to discharge the indorsers. A concurring opinion was written by Judge Hogeboom, in which he says: "The sureties were not discharged. There was no valid agreement for the extension of the time of payment. There was no payment of any sum which the party paying was not obliged to pay. The performance of an unqualified legal obligation by payment of part of a sum due upon a note is not a valid consideration for the extension of payment of the remainder."

The next case in this court was *Lowman v. Yates*, 37 N. Y. 601. The action was upon a bond given by Ely as principal, with Parmenter as surety, conditioned that Ely should, before a given date, take up and deliver to the plaintiff two mortgages, executed by him, amounting to \$10,000. The action was brought against the personal representatives of the surety, the principal having died. The defense relied upon was that the plaintiff, without the surety's consent, took from the principal four negotiable promissory notes, to be applied upon the bond for the payment in the aggregate of about \$7,000 of principal, three, three and a half, four, and five years after date, and indorsed the same upon the bond, thereby extending the time of payment, and discharging the defendant as surety. The court, recognizing the principle that a creditor by a valid and binding agreement between himself and the principal debtor, extending the time of payment with-

out the consent of the surety, thereby discharges the latter from liability, said that, in order that an agreement shall accomplish that result, it must have a sufficient consideration, so as to prevent the prosecution of the debt by the owner, and to prevent the surety from compelling him to enforce it. It was claimed by the plaintiff that he was induced to enter into the agreement, and take notes extending the time of payment, by the fraudulent representations made by the principal debtor, and it was held that the court properly left it to the jury to determine whether the notes were imposed on the plaintiff by fraud, and, if so, that their receipt by the plaintiff under the agreement did not operate to extend the time of payment of so much of the amount of the bond as their face value represented. It was also held that the judge properly charged that, in any event, the extension of the time of payment did not discharge the surety as to the residue of the bond beyond the amount of the notes. In *Parmelee v. Thompson*, 45 N. Y. 58, 6 Am. Rep. 33, one of the makers of a promissory note after maturity paid to the payee a sum equal to the amount due thereon, and took possession of the note. Subsequently he brought suit against another maker, who gave evidence tending to show that while the payee held the note an action was brought thereon in the supreme court, and that it was agreed between the defendants and the plaintiff therein that the suit should be discontinued, the defendant to pay the costs, and have until the ensuing December to pay the note; that the costs were paid, and the suit discontinued, after which the plaintiff became the owner of the note, and brought the action before the expiration of the time agreed upon, and the trial judge held that there was no valid agreement to extend the time of payment. The judgment was affirmed in this court, the opinion being written by Judge Allen, in which he said: "It is competent for the parties by a parol agreement to enlarge the time of performance of a simple contract.

But a promise to extend the time of payment, unless founded on a good consideration, is void. A payment of a part of the debt, or the interest already accrued, or a promise to pay interest for the future, is not a sufficient consideration to support such promise,"—citing *Miller v. Holbrook*, 1 Wend. 317, *Gibson v. Renne*, 19 Wend. 390, and *Kellogg v. Olmsted*, 25 N. Y. 189.

In *Powers v. Silberstein*, 108 N. Y. 169, the action was brought upon a promissory note made by the firm of Joy & Bowman, and indorsed by the defendant Silberstein, who alone answered, setting up as a defense that the note was indorsed by him for the accommodation of the makers, and that the time of payment was extended by an agreement, made without his consent, between the makers and the plaintiff. The plaintiff had judgment in the trial court, which was affirmed at the general term, but reversed in 43 L. R. A.

this court on the ground that there was evidence tending to establish that the plaintiff, after the maturity of the note, agreed with the makers, Joy & Bowman, to forbear the collection of it if they would continue plaintiff's son in their employment, and that Joy & Bowman consented, and did retain him in their service, upon this consideration. In the course of the opinion the court cited *Lowman v. Yates*, 37 N. Y. 601, upon the proposition that a mere indulgence by a creditor of the principal debtor will not discharge the surety, and that the agreement for an extension, made without the consent of the surety, must be upon a valid consideration, such as will preclude the creditor from enforcing the debt against the principal; but argued that the plaintiff did not deny that the employment of his son was an inducement to the original loan, or that the subject of his continuing employment was referred to in his conversation with the makers of the note after maturity; and that, taken in consideration with the fact that the loan was allowed to remain standing for three years after the maturity of the note, presented a question for the jury as to whether there was an extension of the time upon a good consideration.

Our attention has not been called to any authority in this court in hostility to the position taken in the decisions we have referred to. The rule laid down by them has been followed in many cases in the trial courts, and among them may be found the comparatively recent cases of *Manchester v. Van Brunt*, 46 N. Y. S. R. 506, and *Babcock v. Kuntzsch*, 85 Hun, 615, 66 N. Y. S. R. 47. The reasons assigned by the learned justice who wrote for the appellate division in favor of overthrowing the doctrine of these cases, while presented with marked ability and clearness, are not at all new. They were advanced in the dissenting opinion by Judge Davies in *Kellogg v. Olmsted*, 25 N. Y. 189, the first case in which the question received attention in this court, so far as we are advised. Whether the reasoning of the prevailing or dissenting opinion seems the better, it is not profitable to inquire, for the question was settled by the decision of this court, and has by later adjudications become so firmly grounded that it may not now be questioned.

The judgment should be reversed as to the defendants Henry A. and Brainard G. Latimer, and that of the special term modified by striking out the direction to the referee to pay costs to Brainard G. and Henry A. Latimer, and so further modified as to adjudge that the defendants Frederick B. Latimer, Henry A. Latimer, and Brainard G. Latimer each pay to the plaintiff one quarter of any deficiency that may arise on the sale of the mortgaged premises under said judgment, and as thus modified affirmed, with costs.

All concur.

IOWA SUPREME COURT.

IOWA SAVINGS & LOAN ASSOCIATION,
Appt.,
v.

Lawrence HEIDT et al.

(.....Iowa.....)

1. The necessary expenses of perfecting a loan may be taken out of the money loaned to a member by a loan association.
2. A deduction of a specified part of the dues paid to a loan association for necessary expenses of management is lawful.
3. The exaction of an arbitrary sum in addition to interest from a borrower, when there is no competition, is not authorized by Code 1873, title 9, chap. 6, allowing premiums bid for the right of precedence in taking loans.
4. Charging full legal interest on a sum made up of the money actually paid over to the borrower and the necessary expenses of perfecting the loan does not constitute usury.
5. A fine of 5 cents for the first default on each share, and 10 cents for each subsequent default by a member of a loan association, is not exorbitant.
6. Statutes exempting building and loan associations from the operation of the usury law are not unconstitutional as class legislation.
7. A curative act which merely takes away the privilege of pleading usury does not change the agreement, but only removes a bar to its enforcement, and is not an unconstitutional impairment of a vested right.

(January 24, 1890.)

APPEAL by plaintiff from a decree of the District Court for Polk County in its favor for an amount less than demanded in a suit brought to foreclose a mortgage and cancel certain shares of stock held by defendant in the plaintiff association. *Modified.*

Statement by **Waterman, J.:**

Action in equity to foreclose a mortgage on real estate, and to cancel certain shares of stock held by defendant in plaintiff association. Defense usury, which was sustained by the trial court. An accounting was had. A judgment of forfeiture was given in favor of the school fund, and plaintiff was awarded a decree for the sum of \$72.80, without either interest or costs. It appeals.

NOTE.—For fines in building and loan associations, see note to *DuPuy v. Eastern Bldg. & L. Asso.* (Va.) 35 L. R. A. 215.

For fixed premiums or fixed minimum of premiums in such associations, see note to *McCaughey v. Workman's Bldg. & Sav. Asso.* (Tenn.) 35 L. R. A. 244.

For effect of statutes to cure defects in contracts, see note to *Lowe v. Harris* (N. C.) 22 L. R. A. 379; also *Smott v. People's Perpetual Loan & Bldg. Asso.* (Va.) 41 L. R. A. 589; and *Lindsay v. United States Sav. & L. Co.* (Ala.) 42 L. R. A. 733.
43 L. R. A.

Messrs. Bailly & Ballreich, for appellant:

The contract as made was not usurious.

The contract was a mutual arrangement by which the defendant as a member shared in the profits derived from the premium and interest paid by himself and other borrowers, and the time of maturing his stock was thereby hastened. If the contract was usurious then he was both a payer and receiver of usury, and entitled to no relief at the hands of the court.

Hawkins v. Americus Nat. Bldg. & L. Asso. 96 Ga. 206; *Goodrich v. Atlanta Nat. Bldg. & L. Asso.* 96 Ga. 503; *Granite State Provident Asso. v. Monk* (N. J. Eq.) 30 Atl. 872; *Natchez Bldg. & L. Asso. v. Shields*, 71 Miss. 630.

If the contract as made was usurious, it was cured and legalized by the laws passed by the 26th and 27th general assembly.

26th Gen. Assem. chap. 85; *Higgins v. Mendenhall*, 42 Iowa, 675; *Parsons v. Carey*, 28 Iowa, 431; *Harrencourt v. Merritt*, 29 Iowa, 71; *Sohn v. Waterson*, 17 Wall. 596, 21 L. ed. 737; *Lewis v. Lewis*, 7 How. 778, 12 L. ed. 910; 27th Gen. Assem. chap. 48.

It was competent for the legislature to cure and legalize usurious contracts.

Boardman v. Beckwith, 18 Iowa, 292; *State v. Squires*, 26 Iowa, 340; *Iowa Railroad Land Co. v. Soper*, 39 Iowa, 112; *Huff v. Cook*, 44 Iowa, 641; *Richman v. Muscatine County Supers.* 77 Iowa, 517, 4 L. R. A. 445; *Tuttle v. Polk*, 84 Iowa, 12; *Clinton v. Walliker*, 98 Iowa, 655; *Windshop v. Des Moines*, 101 Iowa, 343.

The plea of usury pertains to the remedy. The contract is not void, but is subject to certain penalties which will not be imposed except at the instance of the original contractor.

No citizen has a vested right in a course of practice or particular remedy, and the legislature may modify or change a remedy or substitute a new remedy.

McCormick v. Rusch, 15 Iowa, 127, 83 Am. Dec. 401; *Tilton v. Swift*, 40 Iowa, 78; *Kosuth County v. Wallace*, 60 Iowa, 508.

Usury laws are penal in their nature and the repeal of the law takes away the right to sue for the penalty or to interpose the provisions of the law as a defense to a contract made while the law was in force.

Ewell v. Daggs, 108 U. S. 143, 27 L. ed. 682; *McLaughlin v. Citizens' Bldg. L. & Sav. Asso.* 62 Ind. 264; *Parmelee v. Lawrence*, 48 Ill. 331; *Drake v. Latham*, 50 Ill. 270; *Hinman v. Goodyear*, 56 Conn. 210; *Johnson v. Utley*, 79 Ky. 72; *Bain v. Savage*, 76 Va. 904; *Magill v. Mercantile Trust Co.* 81 Ky. 129; *Cooley, Const. Lim.* p. 465; *Wade, Retroactive Laws*, § 153.

Messrs. Dudley, Coffin, & Byers, for appellees:

The contract is usurious because the premium was not a bid for precedence.

The statute is the exact measure of the powers, rights, and obligations of the parties.

Mechanics' W. M. Mut. Sav. Bank & Bldg. Asso. v. Wilcox, 24 Conn. 147; *Hammer-slowgh v. Kansas City Bldg. Loan & Sav. Asso.* 79 Mo. 80; *Hagerman v. Ohio Bldg. & Sav. Asso.* 25 Ohio St. 186; *Bates v. People's Sav. & L. Asso.* 42 Ohio St. 655; *Pfeister v. Wheeling Bldg. Asso.* 19 W. Va. 670; *Parker v. United States Bldg. Land & Loan Asso.* 19 W. Va. 744; *Haigh v. United States Bldg. Land & Loan Asso.* 19 W. Va. 792; *Citizens' Mut. Loan & Accumulating Fund Asso. v. Webster*, 25 Barb. 264; *Melville v. American Benefit Bldg. Asso.* 33 Barb. 103; *Birmingham v. Maryland Land & Permanent Homestead Asso.* 45 Md. 545; *Williar v. Baltimore Butchers' Loan & A. Asso.* 45 Md. 562; *Baltimore Permanent Bldg. & Land Soc. v. Taylor*, 41 Md. 418; *Jarrett v. Cope*, 68 Pa. 67; *Kupfert v. Guttenberg Bldg. Asso.* 30 Pa. 467; *Hawkeye Ben. & L. Asso. v. Blackburn*, 48 Iowa, 385; *Burlington Mut. Loan Asso. v. Heider*, 55 Iowa, 424.

The Code of 1873 refers to purely mutual building associations. It does not authorize any premium except one determined by competition, the consideration for which is the right of precedence, and not the use of the money loaned.

The premium must be a bona fide bid, made by one member for the right of precedence over his fellow members in obtaining a loan.

Endlich, Bldg. Asso. §§ 378, 392, 398; *Brown v. Archer*, 62 Mo. App. 277; *Mechanics & W. M. Mut. Sav. Bank & Bldg. Asso. v. Meriden Agency Co.* 24 Conn. 159; *Mechanics' & W. M. Mut. Sav. Bank & Bldg. Asso. v. Wilcox*, 24 Conn. 147; *Post v. Mechanics' Bldg. & L. Asso.* 97 Tenn. 408, 34 L. R. A. 201; *McCauley v. Workingman's Bldg. & Sav. Asso.* 97 Tenn. 421, 35 L. R. A. 244; *Bates v. People's Sav. & L. Asso.* 42 Ohio St. 670; *Stiles's Appeal*, 95 Pa. 123; *State, Atty. Gen., v. Greenville Bldg. & Sav. Asso.* 29 Ohio St. 92.

The contract is usurious because the interest was charged upon the gross amount of the loan.

The contract is usurious because the fines charged and paid were exorbitant and unconscionable.

Although the general rule obtains that the repeal of a penalty has retroactive effect in the absence of a saving clause, that rule is not in force in this state because we have just such a saving statute.

Seawell v. Hendricks, 4 Okla. 435; *National Bank v. Lemke*, 3 N. D. 154; *United States v. Reisinger*, 128 U. S. 398, 32 L. ed. 480; *Western U. Teleg. Co. v. Brown*, 108 Ind. 538; *State, Barton County, v. Kansas City, Ft. S. & G. R. Co.* 32 Fed. Rep. 722; *Com. v. Sherman*, 85 Ky. 686; *Jenness v. Cutler*, 12 Kan. 500; *Maynard v. Marshall*, 91 Ga. 840.

The doctrine that usury is in the nature of a penalty which cannot be enforced after the repeal of the law authorizing it applies only where there is no saving statute that provides that the repeal of a penalty shall not affect a penalty already incurred.

Jenness v. Cutler, 12 Kan. 500; *National* 43 L. R. A.

Bank v. Lemke, 3 N. D. 154; *Seawell v. Hendricks*, 4 Okla. 435.

This rule is confined to the penalty strictly, and is never extended to any matter that relates in any way to the obligation of the contract.

Hunter v. Hatch, 45 Ill. 178; *Seegar v. Seegar*, 19 Ill. 121; *Parmelee v. Lawrence*, 44 Ill. 405, 48 Ill. 331; *Drake v. Latham*, 50 Ill. 270.

That doctrine is squarely in conflict with better reasoned cases.

Pond v. Horne, 65 N. C. 84; *Whitaker v. Pope*, 2 Woods, 463; *Rqot v. Pinney*, 11 Wis. 85; *Lincoln v. Cross*, 11 Wis. 94; *Wood v. Lake*, 13 Wis. 94; *Lee v. Peckham*, 17 Wis. 383; *Morton v. Rutherford*, 15 Wis. 299; *Lincoln Bldg. & Sav. Asso. v. Graham*, 7 Neb. 173; *Livingston Loan & Bldg. Asso. v. Drummond*, 49 Neb. 200.

The repeal of the usury law does not take away the right to plead usury because it is a repeal of the usury law, but because it is a repeal of the usury penalty.

The change in our building and loan law is an instance where the penalty remains, but the law defining usury is modified.

Maynard v. Marshall, 91 Ga. 840; *Lincoln Bldg. & Sav. Asso. v. Graham*, 7 Neb. 173; *Livingston Loan & Bldg. Asso. v. Drummond*, 49 Neb. 200; *Reiser v. William Tell Sav. Fund Asso.* 39 Pa. 137; *Houser v. Hermann Bldg. Asso.* 41 Pa. 478.

The building and loan laws of the state are unconstitutional.

Monticello Mut. Bldg. L. & Homestead Asso. v. Smythe (Ill.) 9 Rep. 714; *Holmes v. Smythe*, 100 Ill. 420; *Citizens' Security & Land Co. v. Uhler*, 48 Md. 458; *Henderson Bldg. & L. Asso. v. Johnson*, 88 Ky. 191, 3 L. R. A. 289; *Henderson Bldg. & L. Asso. v. Zeiler*, 11 Ky. L. Rep. 702; *Simpson v. Kentucky Citizens' Bldg. & L. Asso.* 19 Ky. L. Rep. 1176; *Gordon v. Winchester Bldg. & Accumulating Fund Asso.* 12 Bush, 111, 23 Am. Rep. 713.

To be a premium the consideration for it must not be the use of the money loaned, but must be some right arising out of the membership relation.

Endlich, Bldg. Asso. 1st ed. §§ 378, 388; *Kupfert v. Guttenberg Bldg. Asso.* 30 Pa. 468; *Holmes v. Smythe*, 100 Ill. 420; *Vermont Loan & T. Co. v. Whitted*, 2 N. D. 82.

The so-called curative act is plainly special and class legislation.

Williar v. Baltimore Butchers' Loan & A. Asso. 45 Md. 546; *Lincoln Bldg. & Sav. Asso. v. Graham*, 7 Neb. 173; *Livingston Loan & Bldg. Asso. v. Drummond*, 49 Neb. 200; *Reiser v. William Tell Sav. Fund Asso.* 39 Pa. 137; *Houser v. Hermann Bldg. Asso.* 41 Pa. 478; *Parmelee v. Lawrence*, 44 Ill. 415, 48 Ill. 340.

The defendant is entitled to credit upon the principal for everything he has paid, and the plaintiff is entitled to the balance of the principal without interest or costs, and judgment should be entered for the benefit of the school fund for the interest at 8 per cent per annum upon this balance for the time the loan has run.

Code 1897, § 3041; *Lombard v. Gregory*, 81 Iowa, 569; *Brown v. Cass County Bank*, 86 Iowa, 527.

Representations by an authorized agent of a building and loan association of the number of monthly payments that will be required to pay off the loan is binding upon the association, and upon a suit to foreclose the mortgage no greater amount can be recovered.

Interstate Sav. & L. Asso. v. Cairns, 16 Wash. 215; *O'Malley v. People's Bldg. Loan & Sav. Asso.* 13 Misc. 688; *Neuman v. New York Mut. Sav. & L. Asso.* 17 App. Div. 72.

Waterman, J., delivered the opinion of the court:

Plaintiff is a building and loan association, having incorporated as such originally in 1889. On July 2, 1896, its articles were amended to comply with the requirements of chapter 85, Acts 26th Gen. Assem. Defendant was the owner of ten shares of stock in said association, and on February 15, 1891, he borrowed from it the sum of \$1,000, giving as security his shares of stock in pledge and the mortgage in suit. At the time of making the loan, plaintiff deducted from the amount of the loan the following sums: Attorney's fee for examining abstract, \$2.50; appraiser's fee, \$2; recording mortgage, \$1; abstractor's fee, \$9. The remainder, \$985.50, was paid to defendant. Defendant was to pay, according to the contract contained in his note and mortgage, the sum of \$17 per month until the maturity of his stock. This amount was made up as follows: 60 cents per share, instalments on his stock, \$6; 60 cents per share, premium for the loan, \$6; and 50 cents per share as interest on the money received, \$5. Out of the dues on stock the association deducted 7 cents from each 60 cents paid, for expenses of management, but only so much of this was used or kept as was necessary for actual expenses. From time to time the surplus of the expense fund was carried to the credit of the stockholders.

1. It is claimed that defendant did not receive the full amount of his loan, and this is correct. But the amounts deducted were necessary expenses in perfecting the loan. These sums were not retained by the association, but were paid to others, and were proper charges against defendant. *Hawkeye State Sav. & L. Asso. v. Johnston*, 106 Iowa, 218.

Some complaint is also made because of the deduction by the association of 7 cents out of each 60 cents of dues, for expense of management. We see no ground for a member's objection to this method. It is not claimed that more was used for expenses than was actually necessary. Now, it is apparent that these expenses had to be paid by the members. If a fund was not raised in this way, the amount would have to be taken from the earnings. In any event the burden would fall on the stockholders.

2. With these minor matters out of the way, we take up the next question in the case, which is the claim of usury. It is said

(1) that the contract is usurious, because the premium exacted was not bid for the right of precedence in taking the loan; (2) because interest was charged upon the face of the loan; and (3) because the fines and fees were exorbitant. It is true that the premium was a fixed sum, established by the by-laws of the association, and chapter 6, title 9, Code 1873, was in force when this loan was made. In that chapter such associations are given the right to receive "premiums bid by members for the right of precedence in taking loans," and then it is said the taking of such premiums shall not be held to be usury. We are of the opinion that, under that statute, it was not lawful for the association to exact from a borrower, where there was no competition, an arbitrary sum in addition to the interest on his loan, where the whole amounted to more than legal interest; and we may say, without setting out the computation, that we think it did in this case. In *Burlington Mut. L. Asso. v. Heider*, 55 Iowa, 424, and *Hawkeye Bcn. & L. Asso. v. Blackburn*, 48 Iowa, 385, each of which involved a construction of the statute we are now considering, while usury was pleaded, the question presented now was not raised. Except in name, the premium here does not differ in any way from interest. It is paid for the use of the money, and not for the privilege of getting the loan. As it is claimed that the acts of plaintiff in exacting from defendant the various sums it did as consideration for the loan were validated by subsequent legislation, it may be well for us to determine to just what extent curative acts were needed. We take up, therefore, defendant's further claims of usury.

3. It is said that the loan was usurious, because interest was charged on the face of the note, and not the amount actually paid to defendant. The two cases last cited are thought by counsel for appellee to support this claim. In those cases the premium charged for the loan was deducted at the time the loan was made, and was retained by the association for its benefit, and interest was collected upon the whole sum, including the amount of the premium; and this interest exceeded the rate fixed by law. The items which defendant claims should not have been included in the principal in the case at bar, and upon which interest was computed, are the \$2.50 for examining abstract and \$2 appraisal fee. Both of these were legitimate matters of expense, as we have already said. As we understand the record, while the \$2 fee was paid into the expense fund, it was the exact amount that was paid by the association out of that fund for the appraisal in the making of this loan; and the other fee was paid to an attorney for services actually rendered. The payment by the borrower of the necessary expenses of the lender, incurred in making the loan, in addition to the legal interest, will not constitute usury. *Smith v. Wolf*, 55 Iowa, 555. These amounts were not exacted as a bonus by the association, and it got no benefit whatever from their payment. This case is mate-

rially different from those upon which defendant relies.

4. Next, it is said that the fines charged were exorbitant. Doubtless, a fine may be so unreasonable and excessive as to be void. But these do not appear of that character. Impositions proportionately as heavy may have been approved in similar cases. See 4 Am. & Eng. Enc. Law, p. 1042, note 4. The statute authorized these penalties, and it fixed no limit to the amount that might be imposed. The amount fixed by the by-laws of the association was 5 cents for the first default on each share, and 10 cents for each subsequent default. This amount was not exceeded in defendant's case. He knew, or should have known, the terms of his membership when he purchased stock in the association, and we do not think he can be heard now to complain of an obligation which he voluntarily assumed.

5. As we have found that the contract was tainted with usury because of the exaction of the level or arbitrary premium, it now becomes necessary to determine whether it has been purged of this illegality by subsequent legislation. This loan was made in 1891. In 1896 the 26th general assembly passed an act (chap. 85) providing for the government, management, and operation of associations of this character. Section 9 of that act, so far as material, is as follows: "All building and loan and savings and loan associations upon receiving the certificate of the auditor shall have power . . . to assess and collect from members such dues, membership fees, fines, premiums, and interest on loans as may in the articles of incorporation and by-laws have been provided, and the same shall not be held to be usurious . . . to make loans to members on such terms and conditions as the articles of incorporation and by-laws provide. . . . In case of foreclosure the borrower shall be charged with the full amount of the loan made to him, together with the dues, interest, premium, and fines for which he is delinquent, and he shall be credited with the same value of his pledged shares as if he had voluntarily withdrawn the same." It is claimed by plaintiff that this section applied to contracts made prior to its passage, and validated acts already done. This law is not expressly made retroactive, and we should hesitate before giving it that effect, especially to the extent claimed by plaintiff. But in view of our holding upon another statute, which is set up, and which we shall next consider, it is not necessary that we decide this question.

6. Section 9, which we have set out, with some changes not material to be noticed here, went into the present Code as § 1898. The 27th general assembly, by chapter 48 amended this section, as follows: "The provisions of said section shall apply to and govern all contracts between building and loan and savings and loan associations and their members, made and entered into prior to the taking effect of the Code, and every such contract shall in all actions and proceedings be construed and enforced as in said 43 L. R. A.

section provided, and with the same force and effect as if made and entered into after the Code took effect anything in the statutes in force when such contracts were made to the contrary notwithstanding." We think this act was intended to make valid and enforceable all previous contracts for loans, which were within the terms of § 1898, as the contract in suit clearly was.

The next question is as to the legislative power to do this. As a general rule, it may be said the legislature can validate any act which it might originally have authorized. *Windsor v. Des Moines*, 101 Iowa, 343; *Clinton v. Walliker*, 98 Iowa, 655. A number of objections are made to the application of this rule to the case at bar. First, it is said that the building and loan law of the state is unconstitutional, because it is class legislation. Some of the arguments advanced in support of this claim assail rather the policy of such statutes than the power to enact them. In theory, these institutions are profit-sharing. The amounts directly paid for the use of money go indirectly to the benefit of the stockholders, through the increase in the value of their shares. Where the loans are confined to shareholders, we can see good reason for exempting such associations from the operation of the usury law. That the constitutional power exists to make this exemption, we think, is without serious doubt. *People's Bldg. & L. Asso. v. Billing*, 104 Mich. 186; *Vermont Loan & T. Co. v. Whithed*, 2 N. D. 82; *Archer v. Baltimore Bldg. & L. Asso.* 45 W. Va. —, 30 S. E. 241. See also on the general character of these institutions, and the reasons for special legislation in their favor, *Hawkins v. Americus Nat. Bldg. & L. Asso.* 96 Ga. 206; *Granite State Provident Asso. v. Monk* (N. J. Eq.) 30 Atl. 872; *Natchez Bldg. & L. Asso. v. Shields*, 71 Miss. 630. Next it is said the curative act is invalid, so far as this case is concerned, for to give it effect as against defendant would impair vested rights. The act in question was passed after the decree was rendered by the trial court in this case; and for this reason it is thought that defendant's rights had so accrued and vested as that they could not be disturbed or altered by such legislation. In *Clinton v. Walliker*, 98 Iowa, 655, the curative act was given application to a contract involved in a suit which was pending when the act was passed. The same holding was made in *Tuttle v. Polk*, 84 Iowa, 12. *Richman v. Muscatine County Supers.* 77 Iowa, 513, 4 L. R. A. 445, was a certiorari proceeding to test the validity of an assessment and levy of a tax for building a levee. In a former proceeding, the action of the board of supervisors had been set aside, and the assessment declared void, by the circuit court, and this holding was affirmed by this court. After this final judgment, the general assembly passed an act authorizing a new assessment. This was had, and proceedings were again instituted to test the validity of the tax levied under the curative act. This last is the case we have cited. It was urged by the petitioners that they had vested rights under the first decision, but the claim

was denied by this court. In *Huff v. Cook*, 44 Iowa, 639, defendant, a woman, claimed to have been elected to the office of county superintendent. In a proceeding to test her right to the office, the trial court held that she was ineligible because of her sex. She appealed. After the judgment below, an act was passed by the general assembly, which in effect declared that no person previously elected to such office should be disqualified from holding the same because of sex. It was held by this court that the bringing of an action vests no right to a particular decision, and that defendant being eligible, when final judgment was pronounced, it should go in her favor. See also *Iowa Railroad Land Co. v. Soper*, 39 Iowa, 112, 124. It is difficult to perceive what right of the plaintiff in the case at bar was disturbed by the curative act, other than a mere privilege of pleading usury; and this pertains only to the remedy, which, it is uniformly held, may be altered at the legislative will. *Kossuth County v. Wallace*, 60 Iowa, 508; *State v. Squires*, 26 Iowa, 340. So far as the payments made and fines imposed are concerned, they were in accord with the terms of defendant's contract. The effect of the subsequent legislation was not to change the agreement, but only to remove a bar to its enforcement. The cause being triable *de novo* in this court, there seems no legal objection to the entering of a decree in conformity with the law as it now exists.

7. It is further urged against the validity of the subsequent legislation that it allows a recovery which may be greater than the amount fixed by the contract in some cases; and it is said that, in the case at bar, plaintiff could recover more under the law than it could lawfully claim on its contract. But, so far as plaintiff is concerned, it is seeking nothing more than its contract calls for. Furthermore, we do not think the measure of recovery specified in the law is meant to be mandatory, in the sense that the parties may not make a contract more favorable to the debtor, by which they will be bound. The law fixes the maximum of recovery against a debtor, but we can see no reason why, within the limit specified, an agreement for a different settlement may not be made.

8. Plaintiff is entitled to a judgment for the sum of \$571.80 with interest at 8 per cent from November 1, 1895, the date of defendant's default. We find this amount by adding the dividends to the dues and premiums paid, which makes a total of \$428.20 and deducting this from the face value of the note. We have made no deduction from defendant's credits for expenses, because we are unable to determine what the actual expenses were. The amount plaintiff withheld from premiums for this purpose is given; but it appears that this was often too liberal an allowance, and left a balance to be carried to the loan fund. Plaintiff is entitled to charge defendant only for his share of the actual and necessary expense of management, and, as is said, we cannot determine what this would be. It is manifest from what has been 43 L. R. A.

said that the judgment in favor of the school fund is erroneous. Under the circumstances, we think an apportionment of the costs should be made. Following the rule applied in *Iowa Railroad Land Co. v. Soper*, 39 Iowa, 112, 124, the costs, both of the court below and of this court, will be equally divided between the parties.

Modified as we have suggested, the decree against defendant will be affirmed.

Bertha FEDER et al., Appts.,

v.

IOWA STATE TRAVELING MEN'S ASSOCIATION.

(.....Iowa.....)

Death resulting from a ruptured artery is not accidental, when it occurred while one was reaching over a chair to close window shutters, and he did not fall, slip, or lose his balance, and in fact nothing was done or occurred which he had not foreseen and planned, excepting the rupture of the artery.

(February 4, 1899.)

APPEAL by plaintiffs from a judgment of the District Court for Polk County in favor of defendant in an action brought to enforce payment of a benefit certificate. *Affirmed*.

The facts are stated in the opinion.

Messrs. Berryhill & Henry and George E. Hubbell, for appellants:

Under the contract in question the plaintiffs were entitled to recover ever though there may have been a diseased condition of Louis L. Feder, which might have had relation to his death.

Hamlyn v. Crown Accidental Ins. Co. [1893] 1 Q. B. 750; *North American Life & Acci. Ins. Co. v. Burroughs*, 69 Pa. 43, 8 Am. Rep. 212; *Lovelace v. Travelers' Protective Assn.* 126 Mo. 104, 30 L. R. A. 209; *National Masonic Acci. Assn. v. Shryock*, 36 U. S. App. 658, 73 Fed. Rep. 774, 20 C. C. A. 3; *Commercial Travelers' Mut. Acci. Assn. v. Fulton*, 45 U. S. App. 578, 79 Fed. Rep. 423, 24 C. C. A. 654; *Travelers' Ins. Co. v. Selden*, 42 U. S. App. 253, 78 Fed. Rep. 285, 24 C. C. A. 92.

The death of Louis L. Feder resulted from an accidental cause.

Such rupture is not the usual and ordinary result of such an act, and if it is not it is accidental within the meaning of the contract.

North American Life & Acci. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212; *Bostwick v. Stiles*, 35 Conn. 198; *Supreme Council, O. of C. F. v. Garrigus*, 104 Ind. 133, 54 Am. Rep. 298; *Barry v. United States Mut. Acci. Assn.* 23 Fed. Rep. 712, 131 U. S. 100,

NOTE.—On the question, What constitutes an accident within the meaning of an accident insurance policy? see note to *Fidelity & C. Co. v. Johnson* (Miss.) 30 L. R. A. 206; also *Modern Woodmen Acci. Assn. v. Shryock* (Neb.) 39 L. R. A. 826; *Kasten v. Interstate Casualty Co.* (Wis.) 40 L. R. A. 651; and *Western Commercial Travelers' Assn. v. Smith* (C. C. App. 8th C.) 40 L. R. A. 653.

33 L. ed. 60; *Ripley v. Railway Pass. Assur. Co.* Fed. Cas. No. 11, 854; *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. Rep. 157; *Western Commercial Travelers' Assn. v. Smith*, 56 U. S. App. 393, 85 Fed. Rep. 401, 29 C. C. A. 223, 40 L. R. A. 653; *Williams v. United States Mut. Acci. Assn.* 38 N. Y. S. R. 378; *Burkhard v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 205; *Jones v. United States Mut. Acci. Assn.* 92 Iowa, 652.

Messrs. Cummins, Hewitt, & Wright, for appellee:

There is not a single case which sustains the view taken by counsel for the plaintiffs.

McCarthy v. Travelers' Ins. Co. 8 Bias. 302; *Sinclair v. Maritime Pass. Assur. Co.* 3 El. & Bl. 478; *Dozier v. Fidelity & C. Co.* 46 Fed. Rep. 446, 13 L. R. A. 114; *Clidero v. Scottish Acci. Ins. Co.* 29 Scot. L. R. 303; *Southard v. Railway Pass. Assur. Co.* 34 Conn. 574; *American Acci. Co. v. Carson*, (Ky.) 30 S. W. 879; *Bacon v. United States Mut. Acci. Assn.* 123 N. Y. 304, 9 L. R. A. 617; *Tennant v. Travelers' Ins. Co.* 31 Fed. Rep. 322; *Lawrence v. Accidental Ins. Co.* L. R. 7 Q. B. Div. 216; *Winspear v. Accident Ins. Co.* L. R. 6 Q. B. Div. 42; *Fidelity & C. Co. v. Johnson*, 72 Miss. 333, 30 L. R. A. 206; *Jones v. United States Mut. Acci. Assn.* 92 Iowa, 652; *Menneiley v. Employers' Liability Assur. Corp.* 148 N. Y. 596, 31 L. R. A. 686.

Robinson, Ch. J., delivered the opinion of the court:

The certificate in suit was issued to one Louis L. Feder, and entitled him to all the benefits accruing from membership in the defendant by virtue of its constitution and by-laws. When the certificate was issued, an article of the constitution of the defendant provided that "whenever the death of a member of this association in good standing shall occur from any accidental cause (except while such member shall be under the influence of intoxicating liquors or narcotics)," and proofs thereof should be made, the proceeds of an assessment of \$2 on each member of the association, not exceeding the sum of \$5,000, should be paid to the beneficiary named in the certificate, or to his heirs or legal representatives: provided, however, that if, at the time of such death, the amount of money in the treasury of the association not otherwise appropriated should exceed the sum of \$5,500, payment of \$5,000 was to be made from the money in the treasury. On the 18th day of April, 1894, Feder died. At that time he was a member of the association in good standing, and this action is brought on the certificate, to recover the sum of \$5,000. The validity of the certificate is admitted, the death of Feder is not disputed, and notice and proofs of his death are shown. We are required to determine whether there was sufficient evidence tending to show that Feder's death resulted "from an accidental cause" to require the submission of the case to the jury.

The evidence tended to establish the following: The decedent, at the time of his death, was about twenty-six years of age, and had been in Denver, where his death

occurred, about nine months. He was suffering from consumption, and went to Denver, and resided there, on account of his health. He was benefited by the change of climate and medical treatment he received, and his health had been considerably improved, and was constantly improving, at the time of his death. During the day of his death he had been as well as usual, and in the evening was with two of his brothers in their office. Preparatory to leaving it the decedent went to a window to close the shutters. A chair stood in front of the window, and he stood on his toes, and reached over the chair towards the shutters, and, as he did so, blood began to flow from his mouth. He was placed on a lounge, and died within a few minutes. The cause of his death was hemorrhage from a ruptured artery, and the evidence would have authorized the conclusion that the rupture of the artery was not due to the disease from which he was suffering. There is no evidence that he fell, slipped, lost his balance, failed to catch the shutter when he reached for it, or that it moved at his touch more or less readily than he had expected it would move; in other words, there is no evidence whatever that anything was done or occurred which he had not foreseen and planned, excepting the rupture of the artery, and the consequences which resulted from it.

Did his death result "from an accidental cause"? Various definitions of the word "accident" are quoted by the appellants, and among them are the following: It is an "unexpected event which happens as by chance, or which does not take place according to the usual course of things." *North American Life & Acci. Ins. Co. v. Burroughs*, 69 Pa. 43, 8 Am. Rep. 212. "The equitable definition of the term 'accident' includes not only inevitable casualties, and such as are caused by the act of God, but also those that arise from unforeseen occurrences, misfortunes, losses, and acts or omissions of other persons, without the fault, negligence, or misconduct of the party" injured. *Bostwick v. Stiles*, 35 Conn. 198. "An event which takes place without one's foresight or expectation;" and it may include an injury received in a common-law affray, without the fault of the person injured. *Supreme Council, O. of C. F. v. Garrigus*, 104 Ind. 133, 54 Am. Rep. 298. "An event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and, therefore, not expected." *Schneider v. Provident L. Ins. Co.* 24 Wis. 30, 1 Am. Rep. 157. "An accident is the happening of an event without the aid and the design of the person, and which is unforeseen." *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L. R. A. 443. "An event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event." Webster, International Dict. See also, *Fidelity Casualty Co. v. Johnson*, 72 Miss. 333, 30 L. R. A. 206; *Carnes v. Iowa Traveling Men's Assn.* 106 Iowa, 281. The ordinary and popular meaning of the word "accidental" is

said to be "happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected." *United States Mut. Acci. Assn. v. Barry*, 131 U. S. 100, 33 L. ed. 60.

It is argued that the rupture of a blood vessel is not the usual result of an effort to close shutters; therefore, when it occurs, it is unusual, unexpected, and an accident. While it may be true that an accident is an event which takes place without one's foresight or expectation, and is undesigned, it is not true that every unforeseen, undesigned, and unexpected event is an "accident," within the ordinary and popular meaning of that term. Thus, a person might voluntarily and knowingly expose himself to a contagious disease, or to excessive heat or cold, or to sudden changes of temperature, or might adopt a strange diet or mode of living; but, if death resulted, it would not be due to an accidental cause, although wholly undesigned, unforeseen, and unexpected. So, if a person suffering from some weakness or disease should subject himself to conditions which would not injuriously affect persons in ordinary health, but would be dangerous to him, and injury result, it would not be due to an accidental cause. For example, if a person having a diseased heart should take violent exercise voluntarily, and death should result, the cause would not be accidental. *Southard v. Railway Pass. Assur. Co.* 34 Conn. 574. See also *Bacon v. United States Mut. Acci. Assn.* 123 N. Y. 304, 9 L. R. A. 617; *Sinclair v. Maritime Pass. Assur. Co.* 3 El. & El. 478. Although a result may not be designed, foreseen, or expected, yet, if it be the natural and direct effect of acts voluntarily done, or of conditions voluntarily assumed, it cannot be said to be accidental.

We do not think the cases relied upon by the appellant hold a contrary rule. In *Hamlyn v. Crown Accidental Ins. Co.* [1893] 1 Q. B. 750, it appears that a person sustained an injury to his knee in attempting to catch a rolling marble; but it was found that the injury resulted from an unnatural position or movement of the leg, which was not intended by the person injured. The injury considered in *North American Life & Acci. Ins. Co. v. Burroughs*, 69 Pa. 43, 8 Am. Rep. 212, was caused by the unintended slipping of a pitchfork in the hands of the person injured, in such a manner that it struck him in the bowels, and caused the injury. The case of *Burkhard v. Travellers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 205, involved the act of a person injured in stepping into a hole in a bridge, of which he had no knowledge. And in the case of *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. Rep. 157, it appears that the person insured, in attempting to get upon a moving train, fell under the cars and was killed; but it was not claimed that his fall was the result of his doing what he intended to do.

The certificate in suit made the defendant liable if the death of Feder resulted from an accidental cause. The evidence shows that the cause was the ruptured artery; but that was not accidental, if it was the natural re-

sult of an act voluntarily done by Feder. That he did anything but what he intended to do, in attempting to close the shutters, is not shown nor claimed. It is not even shown that he made any unusual exertion in what he did. Had the artery been ruptured while the decedent was sitting quietly in his chair, or while walking at a moderate pace, there would be no ground for claiming that the rupture was accidental; and we do not think that, because the act of closing the shutters may have required a little more exertion than would have been required to remain seated or to walk leisurely, the rupture was accidental. So far as is shown, it may have been, and probably was, due to a weakened or diseased condition of the artery. But, however that was, we are satisfied that there was no evidence which would have authorized the jury to find that the rupture was accidental, within the meaning of the certificate.

We conclude that the district court was right in directing a verdict for the defendant, and the judgment rendered is therefore affirmed.

Albert U. WYMAN, Receiver of Nebraska
Fire Insurance Company, Appt.

v.

Joel EATON et al.

(.....Iowa.....)

1. The right of a receiver appointed in another state to maintain an action is not absolute but rests in the discretion of the court.
2. A receiver of a corporation appointed in another state should not be allowed by an exercise of comity to sue for the enforcement of the liability of stockholders, when it would be in contravention of the rights of the citizens of the state and operate to their injury.
3. An order of appointment of a receiver which gives him authority to bring suits in other states is without efficiency to create such right without sanction in the states where the suits are brought.

(January 20, 1899.)

APPEAL by plaintiff from a judgment of the District Court for Pottawattamie County in favor of defendants in an action brought to enforce the liability of stockholders in an insolvent corporation. *Affirmed.*

Statement by Granger, J.:

As a statement of facts, we have taken the following substantially from those made by counsel: This was an action brought by Albert U. Wyman, the receiver of the Nebraska Fire Insurance Company, to enforce against the several defendants their constitutional liability under the Nebraska statute for their unpaid subscriptions to the capital stock of the company. This company was incorpo-

NOTE.—The rights of a receiver as to property outside of the jurisdiction in which he is appointed are considered at length in a note to *Gilman v. Hudson River Boot & Shoe Mfg. Co.* (Wis.) 23 L. R. A. 52.

rated on March 13, 1883, in conformity with the laws of the state of Nebraska, under the name of the Nebraska & Iowa Insurance Company, its name being subsequently, on February 28, 1890, changed to the Nebraska Fire Insurance Company, under which name it transacted business until its insolvency, in 1891, when an application for its dissolution by W. G. Madden, one of its stockholders, resulted in the appointment of the plaintiff, first as temporary, and then as permanent, receiver of the corporation, and a decree adjudging the dissolution thereof. The testimony shows that one J. T. Hart, of Council Bluffs, was largely instrumental in the organization of the company; that the subscribers to its stock and the original stockholders were citizens prominent in Omaha and in Council Bluffs; and that when this company, the Nebraska & Iowa Insurance Company, was organized, there was organized at the same time, mainly through the instrumentality of Mr. Hart, another insurance company, called the Iowa & Nebraska Insurance Company, and having its principal place of business at Council Bluffs, Iowa. The original intention of the organizers, as gathered from the testimony of Mr. Hart, and the contract of subscription, was to consolidate the two companies after their organization. This, however, was never done, the two corporations being operated separately in each state, although the stockholders were at first the same. The Iowa corporation did business until about May 29, 1885, when it was merged into a company known as the Western Home of Sioux City, and went into the hands of a receiver. The capital of each company was \$100,000, and the certificates of stock contemplated subscriptions to both companies, and were signed, as appears, by officers of each company. The stock was originally issued in this duplicate or combined form. These combined certificates were subsequently canceled, and were separately rewritten and issued. The contract of subscriptions of the several defendants to the stock of the two companies, and upon which it is claimed that the defendants herein are answerable for the unpaid 50 per cent thereof, is as follows: "We, the undersigned subscribers hereto, in consideration of each other's subscription to the capital stock for an insurance company in the state of Iowa and the state of Nebraska, to be organized in both states separately, and after the organization to be consolidated, to be known as the Iowa & Nebraska State Insurance Company, for the purpose of carrying fire and lightning, windstorm and tornado, insurance, business to be done under the laws of both states, do hereby subscribe and agree to pay and secure as provided by the laws of said states the several sums set opposite our respective names, if such an insurance organization is perfected, and on demand, to the secretary thereof, on or before the 12th day of March, 1883." Under this subscription, shares of stock of \$100 each were issued to the subscribing stockholders, one half of such shares being issued to them in the Iowa company, and one half in the Nebraska company. The defendants paid 50

per cent of their several subscriptions upon the stock of the Nebraska & Iowa Insurance Company at the time of its organization, as required by the laws of the state of Nebraska. Nothing more was ever paid upon the stock except in the manner indicated hereafter. The defendants in this action, who had been subscribers to the capital stock of the consolidated company, and to whom had been issued the joint certificates of stock in the Iowa and Nebraska companies, had surrendered their stock, and new stock had been issued to the parties purchasing from them. These purchasers, as the record shows, were in large part the original promoters of the company. Upon the organization of the company, one half of the capital stock subscribed being paid in cash, the promissory notes of the subscribers, payable on demand and secured, were given in payment of the other one half of the stock of the corporation. Prior to 1887, these defendants had transferred the stock issued to them, by a surrender of their stock, and reissuance of other certificates to the purchasers; the company accepting the surrender and recognizing the transfer, returning the stock notes of the defendants, and accepting the stock notes of the transferee in lieu thereof. This was done, as shown by the record, at a time when the corporation was solvent, and the transfers were made and new stock issued to solvent purchasers; all being done in good faith on the part of the corporation, the transferor, and the transferees. Practically, the entire stock passed into the hands of a syndicate composed in large part of original promoters of the consolidated corporation, but not including any of these defendants. From the date of these transfers, these defendants ceased to have any connection with or control over the corporation. The district court entered judgment for the defendants, and the plaintiff appealed.

Messrs. E. Wakeley, A. C. Wakeley, and Flickinger Bros., for appellant:

We do not understand that Iowa has denied the principle of comity in a proper case.

The liability here sought to be enforced is not penal, but purely contractual, and because contractual (even if a statutory liability) will be enforced in a foreign state.

The liability here sought to be enforced is not a liability for the debts of, but a liability to, the corporation.

Patterson v. Lynde, 106 U. S. 519, 27 L. ed. 265; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731; *Cook, Stock & Stockholders*, § 69; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203; *Webster v. Upton*, 91 U. S. 67, 23 L. ed. 386; *Howley v. Upton*, 102 U. S. 316, 26 L. ed. 180; *Whitman v. National Bank*, 51 U. S. App. 536, 83 Fed. Rep. 288, 28 C. C. A. 404.

Where contracts are made in one state, and are to be performed in another, they are to be governed by the laws of the place of performance as to validity, nature, obligation, and interpretation.

3 Am. & Eng. Enc. Law, p. 561; *Story*, Conf. L. § 280; *Patterson v. Lynde*, 112 Ill.

201; *Jessup v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 643; *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966.

The liability here sought to be enforced is a contract, not a penal liability.

Kleckner v. Turk, 45 Neb. 191; *Globe Pub. Co. v. State Bank*, 41 Neb. 175, 27 L. R. A. 854; *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14; *Cook, Stock & Stockholders*, §§ 218, 256; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123.

A suit in equity is the proper remedy in this case.

Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; *Latimer v. Citizens' State Bank*, 102 Iowa, 162; *Cook, Stock & Stockholders*, § 204; *Gianella v. Bigelow*, 96 Wis. 185.

The liability being a contract one, and its enforcement not being immoral or opposed to the public policy of Iowa, or to abstract justice, this court will, on the principles of comity, entertain the action, grant the relief prayed for, and in construing the constitutional provision adopt that construction given it by the highest court of this state.

Whitman v. National Bank, 51 U. S. App. 530, 83 Fed. Rep. 288, 28 C. C. A. 404; *Guernsey v. Moore*, 131 Mo. 650; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414; *Post v. Toledo, C. & St. L. R. Co.* 144 Mass. 341, 59 Am. Rep. 86; *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966; *McVickar v. Jones*, 70 Fed. Rep. 756; *Kimball v. Davis*, 52 Mo. App. 194; *Fairfield v. Gallatin County*, 100 U. S. 50, 25 L. ed. 545; *Fowler v. Lamson*, 146 Ill. 472; *Aldrich v. Anchor Coal & D. Co.* 24 Or. 38; *O'Regan v. Cunard S. S. Co.* 160 Mass. 356; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Selma, R. & D. E. Co. v. Lacey*, 49 Ga. 106; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 38 Am. Rep. 491; *Boyce v. Wabash R. Co.* 63 Iowa, 73, 50 Am. Rep. 730; *Morris v. Chicago, R. I. & P. R. Co.* 65 Iowa, 727, 54 Am. Rep. 39; *King v. Sarria*, 69 N. Y. 24, 25 Am. Rep. 128; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771.

The liability sought to be enforced is not penal.

Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Latimer v. Citizens' State Bank*, 102 Iowa, 162; *Gianella v. Bigelow*, 96 Wis. 185; *Guernsey v. Moore*, 131 Mo. 650; *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966; *McVickar v. Jones*, 70 Fed. Rep. 754; *Aldrich v. Anchor Coal & D. Co.* 24 Or. 32; *O'Regan v. Cunard S. S. Co.* 160 Mass. 356; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771.

The receiver can maintain the action.

Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 337; *Parsons v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 305; *Osgood v. Maguire*, 61 N. Y. 524; *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526; *Hurd v. Elizabeth*, 41 N. J. L. 1; *Buswell v. Supreme Sitting, O. of I. H.* 161 Mass. 224, 23 L. R. A. 846; *Pond v. Cooke*, 45 Conn. 126, 29 Am. Rep. 668; *Bagby v. Atlantic, M. & O. R. Co.* 86 Pa. 291; *Sercomb v. Catlin*, 128 Ill. 556; *Higbee v. Peed*, 98 Ind. 420.

A suit in equity like this accomplishes the 43 L. R. A.

whole purpose of the Nebraska Constitution as to exhausting corporate property.

Adler v. Milwaukee Patent Brick Mfg. Co. 13 Wis. 57; *Crease v. Babcock*, 23 Pick. 334, 34 Am. Dec. 61; *Harmon v. Page*, 62 Cal. 448; *Harper v. Carroll*, 66 Minn. 487.

Mr. Finley Burke, for appellees:

There is no right to enforce in the courts of one state a personal liability of stockholders (citizens of that state) in a corporation of a sister state, under the statutes of the latter state.

Erickson v. Nesmith, 15 Gray, 221, 4 Allen, 233; *Post v. Toledo, C. & St. L. R. Co.* 144 Mass. 341, 59 Am. Rep. 86; *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349; *Bank of North America v. Rindge*, 154 Mass. 203, 13 L. R. A. 56; *State, Nat. Bank, v. Sayward*, 86 Fed. Rep. 45; *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184; *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757.

In order to enforce, in a foreign jurisdiction, a right that is purely statutory, it is necessary that such right be created by the statute, and that a similar right exists under the laws of the state in which the action is brought.

Morris v. Chicago, R. I. & P. R. Co. 65 Iowa, 727, 54 Am. Rep. 39; *Boyce v. Wabash R. Co.* 63 Iowa, 70, 50 Am. Rep. 730; *Hyde v. Wabash, St. L. & P. R. Co.* 61 Iowa, 441, 47 Am. Rep. 820; 3 Am. & Eng. Enc. Law, pp. 521, 522, and notes.

A foreign receiver cannot sue in our courts. 6 Thomp. Corp. §§ 7334, 7335, 7337; *Booth v. Clark*, 17 How. 322-328, 15 L. ed. 164-166; *Ayres v. Siebel*, 82 Iowa, 347; *Parker v. C. Lamb & Sons*, 99 Iowa, 265, 34 L. R. A. 704.

Messrs. Harl & McCabe, Wright & Baldwin, J. Y. Stone, C. R. Marks, and Saunders & Stuart also for appellees.

Granger, J., delivered the opinion of the court:

It will be well to repeat that this action is by a receiver appointed to wind up the affairs of the Nebraska Fire Insurance Company, on the application of one of its stockholders, to recover from the defendants on their subscriptions to the original enterprise, wherein was contemplated the organization of two companies,—one in Nebraska, to be known as the Nebraska & Iowa Insurance Company, and one in Iowa, to be known as the Iowa & Nebraska Insurance Company; the two companies to be thereafter consolidated. The first-named company was organized under the laws of Nebraska, and located at the city of Omaha, in that state; and the latter under the laws of Iowa, and located at the city of Council Bluffs, in Iowa. The consolidation was never made, and the latter company was changed to that of the Western Home of Sioux City, and its place of business changed to Sioux City, Iowa, about May, 1885. The Nebraska & Iowa Company was changed to the Nebraska Fire Insurance Company, and continued to operate until 1891, when the insurance department of Nebraska withdrew its certificates authorizing the company to do business, and, on the application of one of its stockholders,

its insolvency was decreed; and the plaintiff is now engaged in winding up its affairs, and this action is in aid of that purpose.

The action has for a legal basis a provision of the Constitution of Nebraska, as follows (§ 4, art. 11): "Liabilities of Subscribers to Stock. In all cases of claims against corporations and joint-stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted, the original subscribers thereof shall be individually liable to the extent of their unpaid subscriptions, and the liability for the unpaid subscriptions shall follow the stock." Dismissing for the moment the effect of an arbitrary legal liability, which must be respected and enforced when known, there is not, in view of the entire record in this case, an equitable consideration favorable to a recovery against these defendants. The present liabilities of the Nebraska corporation cannot truthfully be said to have accrued in consequence of, or with reliance upon, the former connection of these defendants with the enterprise from which sprang the present company. These facts are important as aiding in the solution of a legal proposition, urged by appellees, to the effect that this action cannot be maintained in Iowa, because it is brought by a receiver of a Nebraska corporation to enforce a provision of the law of that state; the claim being that such a proceeding can only be had as a result of comity between the states, and that the basis of such an exercise is that the citizens of the state granting it shall not be thereby prejudiced or injured. Admitting, for the sake of argument, the rule that comity controls as to the authority of plaintiff to sue in this state, and, as we have in effect said, the record leaves us without doubt that its exercise should be denied, because it would be in contravention of the rights of our citizens, and operate to their injury.

Upon the question of the absolute right of plaintiff to sue in this state, we are not without precedent in our own decisions; and while, in announcing a rule, we have recognized the fact of a conflict of authority, we are not persuaded by the argument in this case that a change should be made, or the rule modified. Stress is given in argument to the fact that the order of appointment in Nebraska gives to the receiver authority to bring suits in other states. That authority is valuable as an aid to secure the right to do so in the state where the privilege is sought, and is judiciously granted; but it is without efficiency to create such a right independent of sanction within the state. The case of *Booth v. Clark*, 17 How. 322, 15 L. ed. 164, contains a somewhat exhaustive consideration of the question of the right of a receiver appointed in one state to bring a suit for the possession of property in another state, and it is there said: "He has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the

debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek." An underlying thought of the rule seems to be that, within the jurisdiction of one's appointment as receiver, he is amenable in his official capacity to the courts, and he may exercise his authority under the law of the jurisdiction; while, in a foreign jurisdiction, the law does no more than to make the person entertaining it amenable to its laws, and in no way recognizes the official capacity. As a citizen in a jurisdiction foreign to his residence, he has a legal status, and is amenable to, and may invoke the protection of, the law. As an officer of a court from a foreign jurisdiction, he has, and is entitled to, no legal recognition, except as the courts may, in their discretion, grant it, because he is without the official obligation that he assumed in his own jurisdiction, and which is essential to a proper and safe exercise of such power. In *Ayres v. Siebel*, 82 Iowa, 347, we denied the right of a trustee, appointed by the court in Indiana, to sue and recover on a contract in this state; and in *Parker v. C. Lamb & Sons*, 99 Iowa, 265, 34 L. R. A. 704, we denied such a right to a receiver, and cited the *Ayres-Siebel Case*. In *Parker v. C. Lamb & Sons*, we quoted approvingly from High, Receivers, § 239, as follows: "Upon the question of the territorial extent of a receiver's jurisdiction and powers for the purpose of instituting actions connected with his receivership, the prevailing doctrine established by the Supreme Court of the United States, and sustained by the weight of authority in various states, is that the receiver has no extraterritorial jurisdiction or power of official action, and, cannot, as a matter of right, go into a foreign state or jurisdiction and there institute a suit for the recovery of demands due the person or estate subject to his receivership. His functions and powers, for the purpose of litigation, are held to be limited to the courts of the state within which he was appointed; and the principles of comity between nations and states which recognize the judicial decisions of one tribunal as conclusive in another do not apply to such a case, and will not warrant a receiver in bringing an action in a foreign court or jurisdiction." These authorities are broad and conclusive, and, unless we are to set them aside, are conclusive of this case. Counsel have shown great zeal and tact in presenting authorities more or less in point, and we acknowledge somewhat of a conflict, as we have done in other cases; but the weight of authority we regard as in line with our holdings, and we are not disposed to disturb them. Beach on Receivers (§ 683) states the same rule, and cites *Booth v. Clark*, 17 How. 322, 15 L. ed. 164, from which we have quoted, and then says: "The rule thus laid down by the Supreme Court of the United States has been followed by other courts with essential unanimity, and can

hardly be said to be seriously questioned." In *Fitzgerald v. Fitzgerald & M. Constr. Co.* 41 Neb. 374, these authorities are approvingly cited and applied.

It remains for us to state as a conclusion that the plaintiff is not entitled to recover in the courts of Iowa, and the judgment of the District Court will be affirmed.

KENTUCKY COURT OF APPEALS.

Charles H. GIBSON, *Appt.*,

v.

George T. WOOD.

(.....Ky.....)

Previous residence in territory annexed to a city is to be deemed residence within the city for the purpose of computing the period of residence necessary to make a person eligible to a city office.

(February 21, 1899.)

A PPEAL by complainant from a judgment of the Circuit Court for Jefferson County in favor of defendant in a suit brought to enjoin defendant from taking or holding the office of commissioner of the sinking fund of the city of Louisville on the ground that he was ineligible to such office. *Affirmed.*

The facts are stated in the opinion.

Messrs. Helm & Bruce for appellant.

Messrs. John W. Barr, Jr., and Humphrey & Davis for appellee.

Haselrigg, Ch. J., delivered the opinion of the court:

The opinion of the chancellor so fully covers the law and the facts of this case that we adopt it as our opinion. It is as follows:

"In October, 1893, the plaintiff, Charles H. Gibson, was elected commissioner of the sinking fund of the city of Louisville for a term of three years, and until his successor shall have qualified. The plaintiff entered upon the duties of his office, and became president of said board. On October 15, 1896, the general council of the city of Louisville, duly assembled in joint session for the purpose, elected the defendant, George T. Wood, to succeed the plaintiff, Charles H. Gibson; casting eight votes for the plaintiff, three votes for J. M. McKnight, and twenty-five votes for the defendant. A proper certificate of election has been delivered to the defendant. He has given bond, and taken the oath of office, as required by law, and his bond has been approved by the general council. This action was begun November 9, 1896, for the purpose of enjoining and restraining the defendant from taking or holding the office of commissioner of the sinking fund of the city of Louisville, or from in any manner interfering with the plaintiff in the discharge of his duties as such commissioner. A temporary restraining order was

entered in accordance with the prayer of the petition. The case is now before the court upon an application for a preliminary injunction, as prayed for in the petition.

"It is claimed that defendant, Wood, was not at the time of his election, and is not now, eligible to hold the office of sinking fund commissioner of the city of Louisville by reason of his residence only. Section 261 of the city charter provides: 'No person shall be eligible to any office who is not at the time of his election a qualified voter of the city, and who has not resided therein three years preceding his election.' The evidence shows that the defendant, Wood, was born in the city of Louisville on December 26, 1855; that from his birth until the 10th day of July, 1893, he resided at No. 946 Third street, in the city of Louisville; that on July 10, 1893, he moved, with his family, to his present residence, on the northwest corner of East Broadway and Longest avenue, then in the town of Enterprise, a suburb of the city of Louisville, and about two squares east of the city boundary as fixed in 1869; and that he has continuously lived in his new home since July 10, 1893. In August, 1896, the town of Enterprise was annexed to, and became a part of, the city of Louisville, and is now designated as the thirty-fifth precinct of the first ward of said city. At the election held on November 3, 1896, the defendant, Wood, voted at said precinct. It appears that, while defendant had resided in his present home more than three years before his election in October, 1896, the territory upon which his residence is located had been a constituent part of the city of Louisville only about two months at the time of his election.

"In considering the eligibility of the defendant, therefore, are we to give him the benefit of his period of residence from the time he moved to his new home, in August, 1893, when it was located in the town of Enterprise, or shall he be restricted to the time that his home has been incorporated in the present limits of the city of Louisville? The question may be simply put as follows: When the territory occupied by the defendant's residence was incorporated into the city of Louisville, did he then acquire all the rights of a resident of the city of Louisville, and is he entitled to consider the period of his residence in Enterprise in determining his eligibility to this office? The industry of counsel has failed to produce any authority directly in point. Many instances, more or less analogous, have been used in illustration. The organization of the state of Kentucky is cited as bearing upon this question. Prior to February, 1791, the territory composing

NOTE.—For residence as affecting eligibility to office, see *Steusoff v. State*, Lacour (Tex.) 12 L. R. A. 364; *State*, Hartford, v. Craig (Ind.) 16 L. R. A. 688; and *Fox v. McDonald* (Ala.) 21 L. R. A. 529.
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the present state of Kentucky was known as the 'District of Kentucky.' The first Constitution, adopted in April, 1792, provided that representatives should be chosen on the first Tuesday in May following, and that no person should be eligible to that office who had not been a resident of the state or Kentucky for two years next preceding his election. The same provisions applied to the electors, except the period of their residence was raised to three years before the election. While the district was admitted into the Union as a state in February, 1791, and the election was held in May, 1792, when the state of Kentucky had been in existence as a state less than two years, still persons were considered eligible whose continuous residence in the district and in the state of Kentucky covered the constitutional period of eligibility. Strictly speaking, no person had resided in the state of Kentucky a period of two years, for the state had not existed as a state for that length of time, but people who had lived two years upon the territory which had been erected into the state of Kentucky were deemed eligible as representatives, within the meaning of our first Constitution. Likewise, § 114 of the present Constitution of Kentucky provides that no person shall be eligible as judge of the court of appeals who has not resided in the district in which he is elected two years next preceding his election. The act creating seven districts for the several judges of the court of appeals was passed in June, 1893, and Jefferson county was made a separate district, known as the 'Fourth Appellate District.' It was further provided that the judge of the fourth appellate district should be elected in 1894. If we apply the strict letter of the law, which requires a residence of two years in his district, then no one in this district was eligible for the office of judge of the court of appeals, for the district was not two years old. No one, however, has for a moment questioned the correctness of the practical construction given in that instance. Again, the Federal Constitution provides that no person, except a natural-born citizen or a citizen of the United States at the time of the adoption of the Constitution, should be eligible to the office of president. Texas was admitted into the Union in 1845. Can it be claimed that a person born in the republic of Texas prior to its admission into the Union is ineligible to the presidency of the United States for that reason? We do not believe such a construction can be reasonably contended for.

"An interesting case arose in Ohio. In 1867 the state of Ohio ceded to the Federal government a tract of land in Montgomery county, Ohio, to be used as a soldiers' home. As was usual in such cases, the state relinquished all jurisdiction and control over said tract of land, reserving only the right to serve process, in order that the home might not become an asylum for evildoers. The Federal government built its soldiers' home, and continued its jurisdiction thereof for about four years, during which time this territory was as distinct from the state of Ohio

as the District of Columbia is distinct from the state of Maryland. At the October election, in 1869, certain inmates of this soldiers' home voted for candidates for clerk of the court of common pleas of Montgomery county. In the contested election case of *Sinks v. Reese*, 19 Ohio St. 306, 2 Am. Rep. 397, it was held by the supreme court of Ohio that these inmates of the soldiers' home were not residents of the state of Ohio, and therefore were not entitled to vote. In the spring of 1871 the Federal government ceded the property back to the state of Ohio, although no affirmative action was ever taken by the state towards accepting the territory so ceded back to it. At the October election of the same year (1871) certain inmates of the home again voted for candidates for the office of coroner of Montgomery county. The laws of Ohio required a residence of one year in the state prior to the election as a prerequisite to the right to vote. In the contested election case of *Renner v. Bennett*, 21 Ohio St. 431, the question was presented as to whether these inmates were entitled to vote at the October election in 1871. The supreme court of Ohio had already decided in the case of *Sinks v. Reese*, 19 Ohio St. 306, 2 Am. Rep. 397, that from 1867 to the spring of 1871 these inmates of the soldiers' home were not residents of the state of Ohio, and had no right to vote in state elections. When the territory was ceded back to the state of Ohio, in the spring of 1871, these inmates of the soldiers' home immediately became residents of the state of Ohio, but had not been residents for the period of one year prior to the election in 1871. The question was therefore squarely presented whether, in considering the eligibility of these inmates of this soldiers' home to the right to vote in the state election, the court should take into consideration the time they had resided in this same spot while it was under the jurisdiction of the Federal government, and was not a part of the political government of the state of Ohio. The court held that the time should be counted, and in the course of the opinion used this language, viz.: 'These one hundred and five inmates of the asylum were therefore residents and citizens of Ohio at the time of the election. Were they residents of the "state" for the full year, within the meaning of the Constitution of Ohio? We think they were. In one sense, the state is a territory; in another sense, it is a political organization. These inmates have resided for the whole year in the same place. Territorially, they, and the asylum in which they reside, have been all the time in the state. Politically, or, if I may so speak, jurisdictionally, both have been temporarily out of the state. The expression is used in both senses. It is used in a territorial sense in the agreed statement filed in the case. In favor of the right of suffrage, we think it safe and proper to give it that meaning in the Constitution. In the primary and popular sense, the asylum is, and always has been, in Ohio. It has never ceased to be a part of the state of Ohio geographically, although the state jurisdic-

tion over it has been temporarily suspended. Suppose a township or a part of a township of one county temporarily attached to another county and reattached to the first; would the legal voters after each change have to begin *de novo* their twenty days' residence in the township and their thirty days' residence in the county? I think not. And yet the cases are supposed to be identical in principle with the one at hand. Both rest on the same provision of the Constitution, requiring a prescribed length of residence in the state, county, and township. If there is any difference between the principle involved in the two cases, it is in this: that while in the cases supposed the change of jurisdiction is in fact temporary, in the present case it was necessarily temporary; the jurisdiction having been granted for a temporary purpose, the reversion always remaining in the state. It seems to us it is sufficient that the voter, at the time of the election, has a "residence," in the political and jurisdictional sense of the term, within the proper political division, and has resided in the same place for the prescribed length of time, to fulfil this requirement of the Constitution. In such a case it is true, in the primary sense of the words, that there is no change of residence, but merely a change of jurisdiction. To say that there is a change of residence is to give the words a secondary meaning.

"In the case at bar the defendant, Wood, has done no act by which he should lose any of his political rights, either as a resident of the town of Enterprise or as a resident of the city of Louisville. The city of Louisville has seen fit to incorporate the town of Enterprise, and make it a part of the city of Louisville. In my opinion, when the city of Louisville annexed the town of Enterprise, it adopted the conditions then existing in the town of Enterprise, as to residence and citizenship, as a part of the city government, and former citizens of the town of Enterprise, who thus became citizens of the city of Louisville, were entitled to all their rights, as former citizens of Enterprise, in determining their eligibility to office in the city of Louisville. When the defendant and his territory become parts of the city of Louisville, they are entitled to all the benefits that belong to all the other property and citizens of the city of Louisville. To hold otherwise would be to bring persons into the city of Louisville, and to burden them with city taxation and all the burdens of our city government, without granting them all the privileges which it had granted to its other residents. It would put the burden on all residents alike, but would give different rights to different classes of citizens, by distinguishing the old resident from the annexed resident. It follows that the defendant was eligible to the office to which he was elected, and the temporary injunction must be denied.

"Shackelford Miller,
"Special Judge."

It follows that the plaintiff's petition did not state a cause of action, and, a demurrer thereto having been sustained, the same was dismissed.

The judgment is affirmed.
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Ann DUNN *et al.*, Appts.,
v.
COMMONWEALTH of Kentucky for the
Use of City of CATLETTSBURG.

(.....Ky.....)

An ordinance prohibiting any prostitute from being on the streets or alleys of a city between the hours of 7 o'clock P. M. and 4 o'clock A. M. without any reasonable necessity therefor is a valid exercise of the police power under a statute giving authority to "restrain and punish prostitutes."

(March 3, 1899.)

APPPEAL by defendants from a judgment of the Circuit Court for Boyd County convicting them of violating a city ordinance against prostitutes being on the streets of the city during certain hours of the night. *Affirmed.*

The facts are stated in the opinion.

Messrs. Dinkle & Montague for appellants.

Mr. John A. Burns, for appellee:

To convict under this ordinance the person must be of immoral or lewd character; she must be on the streets or alleys between the hours of 7 o'clock P. M. and 4 o'clock A. M. without a reasonable excuse for so being.

The appellants were proved to have been upon the streets without a reasonable excuse, and to have been women of lewd or immoral character.

Under the police power granted to municipalities this city has the right to enact such laws and ordinances as would inure to the good government and to the suppression of immorality and vice, and this ordinance is for no other purpose.

18 Am. & Eng. Enc. Law, p. 739, § 1.

Paynter, J., delivered the opinion of the court:

Section 3490, Ky. Stat., is part of the act for the government of cities of the fourth class, and as much of it as is pertinent to this inquiry reads as follows: "The board of council . . . shall have power within the city: (1) To pass ordinances not in conflict with the Constitution or laws of this state or of the United States. . . . (14) . . . To restrain and punish vagrants, prostitutes, rakes, and whoremongers." Conceiving it had the power, the board of council of the city of Catlettsburg passed an ordinance which reads as follows (§ 24): "Any prostitute being upon the streets or alleys of the city of Catlettsburg, Kentucky, between the hours of 7 o'clock P. M. and 4 o'clock A. M. following, standard time, except in instances of reasonable necessity, to be clearly shown by the party charged, shall be fined \$5 for each offense." The appellants are prostitutes, and went upon the streets between the hours of 7 o'clock P. M. and 4 o'clock A. M., without any reasonable necessity therefor. For this offense a warrant was issued for their arrest, and the

NOTE.—For municipal power with respect to houses of ill fame, see note to *State v. Karstendiek* (La.) 39 L. R. A. 521.

trial resulted in their conviction, and a fine of \$5 was assessed against each of them. The circuit court sustained the action of the police judge imposing the fine. The question for review is whether the ordinance in question is valid.

A municipality is but an agency of the state, and, whenever it passes an ordinance in the exercise of police power, it is the instrumentality of the state, and does so for the state. The general assembly has vested the board of council of the municipality of Caudetsburg with power to "restrain and punish prostitutes." The language used is broad and comprehensive enough to authorize the enactment of the ordinance under consideration. Did the general assembly have constitutional authority to vest the board of council with the power to enact the ordinance? Under our constitutional system, the ordinary police regulations have been left to the states. All that the Federal government can do is to see that the states do not, in attempting to exercise the police power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has vested in the national government, or deprive a citizen of rights guaranteed to him by the Federal Constitution. It is difficult to define the police power of a state. In speaking of the police power of the states, Mr. Cooley, in his work on Constitutional Limitations (p. 704), says: "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks, not only to preserve the public order, and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." Blackstone defines it to be "the due regulation and domestic order of the kingdom; whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." 4 Bl. Com. *162. In speaking of the difficulty in defining the extent of police power, in *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079, it was said: "Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate."

Courts and law writers have found it difficult to define the extent and boundaries of the police power. It certainly extends to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals. Every citizen has the constitutional guaranty of life, liberty, and enjoyment of his property; and 43 L. R. A.

they cannot be taken from him, except by due process of law. Social and conventional rights, however, are subject to such reasonable limitations in their enjoyment as will prevent them from being dangerous and hurtful to the body politic; and the lawmaking department of the government, under the power vested in it by the Constitution, can enact laws providing for such reasonable restraints and regulations as may be necessary and expedient to secure social order and public morals. It is the duty of the state, direct or through such agencies as it may provide, to protect the public health and morals. It has the power by law to declare what shall constitute an offense, and provide a punishment for it within the constitutional limitations. It is certainly within the legislative power to provide for the restriction or suppression of bawdy houses. Our social institutions and public conscience demand that they shall be regulated or suppressed. The unfortunate beings who live in such houses, and pursue their occupation, live from their acts of immorality, which are a violation of social order, and tend to the destruction of public morals. The board of council of a municipality is presumably familiar with their habits and method in the prosecution of their work of shame and degradation. It was known to the board of council that these unfortunate women did nothing for a livelihood except to make merchandise of themselves. The favorite time for their business is between nightfall and the next day's dawn. Their conduct is calculated to bring together disorderly and ill-disposed persons, and likely to result in a breach of the public peace. Therefore the lawmaking department of the municipality declared that they should keep off of the streets and alleys of the city during the hours in which they could most successfully prosecute their immoral work. We think this is a reasonable restraint, and it does not unreasonably abridge their personal liberty. By the terms of the ordinance, they are allowed to go upon the streets if there is a reasonable necessity for it. During the fifteen hours of the twenty-four, these habitual offenders against the moral, social, and penal laws are permitted to go wherever they please upon the streets and alleys of the city, which affords them ample opportunity for healthful exercise, and of attending to their reasonable wants.

Mr. Cooley, in his work on Constitutional Limitations (p. 745), says: "It is sufficient for us to have pointed out that, in addition to the power to punish misdemeanors and felonies, the state has also the authority to make extensive and varied regulations as to the time, mode, and circumstances in and under which parties shall assert, enjoy, or exercise their rights, without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property." It has been held by courts that, under the police power, municipalities can regulate the height of buildings in cities, prescribe the streets upon which persons driving a certain class of vehicles shall travel, and prohibit them from traveling upon other streets, and

regulate the hours at which public places, places of amusement, and saloons shall be closed. The legislatures of the states can enact laws to regulate the employment of children of certain ages, and prohibit women from engaging in certain kinds of employment. It has been held by some courts that a penalty can be imposed upon livery stable keepers for giving credit to pupils without the consent of the college authorities. It has been held, to protect laborers against oppression of their employers, that it is competent to forbid them being paid anything except legal-tender funds. Many illustrations of the exercise of police power, which has been sustained by the courts of the country could be given. These suggestions are merely to show the extent and comprehensiveness of the police power of the states, as interpreted by this and other courts of the country. Our attention has not been called to any case involving the exact question involved in this case. As cases arise in which the police power is attempted to be exercised, we must determine whether or not it has been constitutionally done. Our conclusion is that the legislature had vested the board of council with the power to pass the ordinance, and that, in doing so, it did not violate the Constitution of this state or that of the United States.

When the court had under consideration the case of *Mender Furniture Co. v. Newport*, 16 Ky. L. Rep. 829, its attention was not called to § 3519, Ky. Stat., which expressly gives this court jurisdiction of appeals from the judgments of circuit courts where fines of \$20 or less are imposed under ordinances the validity of which is questioned. If the court's attention had been called to this section of the statute, it would not have taken the view of the question of the appellant's right to an appeal which it took.

The judgment is affirmed.

S. P. GROSS, *Appt.*,

v.

KENTUCKY BOARD OF MANAGERS OF
WORLD'S COLUMBIAN EXPOSITION.

(.....Ky.....)

A board of managers of the World's Columbian Exposition which is created by statute and the members of which are appointed by the governor as an agency of the state, although it is not expressly named as a corporation, but is expressly given power to make contracts and furnished with certain funds, while the state expressly declares that it will not be responsible for any indebtedness of the board, is at least a quasi corporation.

NOTE.—For the general rule as to suits against state, see *Murdock Parlor Grate Co. v. Com.* (Mass.) 8 L. R. A. 309, and *note*. See also *Carr v. State*, Du Coetlosquet (Ind.) 11 L. R. A. 370.

As to nature of incorporated institutions belonging to the state, see *note* to *State, Little, v. Board of Regents* (Kan.) 29 L. R. A. 378, 43 L. R. A.

and may be sued for breach of contract without the consent of the state.

(*Paynter and Guffy, JJ., dissent.*)

(February 9, 1899.)

A PPEAL by plaintiff from a judgment of Circuit Court for Jefferson County in favor of defendant in an action brought to recover damages for breach of contract made by defendants with plaintiff for the furnishing of refreshments at the Kentucky building during the World's Columbian Exposition at Chicago. *Reversed.*

The facts are stated in the opinion.

Mr. B. F. Buckner for appellant.

Messrs. Simrall, Bodley, & Doolan for appellee.

Hobson, J., delivered the opinion of the court:

By an act approved January 19, 1893, entitled "An Act to Provide for the Collection and Exhibition of the Resources and Evidences of Progress of the State of Kentucky at the World's Columbian Exposition of One Thousand Eight Hundred and Ninety-three" (see Acts 1891-93, p. 433; the sum of \$100,000, or so much of it as might be necessary, was appropriated, out of any money in the treasury not otherwise appropriated, for providing a suitable display of the state's progress, etc., at this exposition. To carry out the work contemplated by the act a board was created, to be known as "The Kentucky Board of Managers of the World's Columbian Exposition," to consist of five members, appointed by the governor. Each of the board was required to give bond, and enter at once upon the discharge of his duties. One of the board was to be elected president; another, secretary; and when the board was not in session the president might administer its affairs, subject to its approval. The board was given power to employ necessary agents and employees. It was required to have a suitable building erected for the Kentucky headquarters, and this building, it was provided, "should contain the necessary restaurant and refreshment accommodations, the same to be let to the highest and best bidder, and the proceeds covered into the treasury of the Kentucky board of managers." The act did not contemplate the withdrawal of the \$100,000 by the board from the treasury, except as it was needed to cover its expenditures, but it at once drew out the whole sum. After this had been done, the general assembly, by a joint resolution, after reciting the fact that the total amount of the appropriation had been unnecessarily drawn, a considerable part of it remaining unexpended, declared "that the public and all persons interested may have full knowledge in the premises, that the state will not assume the payment or pay any expenses, charges, arrears, or indebtedness, if any, whatsoever that may remain unpaid after the expenditure of the appropriation heretofore made." See Acts 1891-93, p. 1568. The board, in order to provide the necessary restaurant and refreshment ac-

accommodations, contracted with appellant to carry on the restaurant at the headquarters building, he agreeing to pay it 10 per cent of the gross receipts. On November 7, 1893, appellant filed this suit against the board, praying judgment against it for \$5,000 for failing to comply with the contract it made with him, in various particulars set out in his petition. The board filed a demurrer to the petition, which the court below sustained, on the ground that it was only the agent of the state of Kentucky, and so could not be sued. This is the only question raised on this appeal.

The rule is well settled that the state cannot be sued, and that the same protection is extended to the officers of the state. But this rule does not apply to a corporation created by the state for certain public purposes. If appellee was made by the acts referred to a corporation or a quasi corporation, we see no reason why it should be exempted from the rule allowing suits to be brought against corporations on contracts they have made. So the question is presented whether appellee was invested by the legislature with the character of a corporation or quasi corporation. It is not necessary that the thing created by the legislature should be named by it a corporation. Its character depends upon the powers given it, and not upon the name by which the legislature may call it. Following a decision of this court the Supreme Court of the United States, in *Hancock v. Louisville & N. R. Co.* 145 U. S. 409, 36 L. ed. 755, said: "By the act of 1869 this prescribed portion of Shelby county was authorized to issue bonds and subscribe stock. The bonds when issued were not the obligations of Shelby county, nor of the individual taxpayers, and still there must be some debtor. That debtor was this portion of Shelby county. Giving to it power to issue bonds and create indebtedness is the creation of an entity with power to act, and if this entity has power to create a debt, it becomes subject to suit. That this entity was not, in terms, named a corporation is not decisive. It is enough that an artificial entity was created, with power to exercise the functions of a corporation. It was, though not named, a corporate entity." In the case at bar the legislature, by the joint resolution above referred to, expressly declared that the state would not assume any debts of the board. If the state was not the debtor, it must have been contemplated that there was some entity on whom the obligation of these contracts would rest. It is true that the state cannot be sued for a debt, but the legislature may be petitioned to make an appropriation for the payment of the claim. The object of this joint resolution was to have it understood that the state was to be in no way responsible for the obligations of this board, and to forestall all claims, "whether legally enforceable, or merely obligatory in good morals and on the public faith," as stated in the resolution, and to cut off all applications for their payment by the legislature. But it cannot be pre-

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sumed that it was contemplated that people who dealt with this board should have no one to look to for the enforcement of their just claims. The board was authorized to have a house built, and a restaurant run in it, to employ agents and assistants, and to take all necessary steps to have the state properly represented at that exposition. The commissioners clearly were not personally responsible for their obligations, the state expressly declared that it was not to be responsible, and the only reasonable conclusion is that the board of managers to whom the \$100,000 was committed to carry out the objects of the act was intended to be, to the extent of the funds put in its hands, at least a quasi corporation; and, as the power to make contracts is expressly conferred, the power to sue or be sued on these contracts was necessarily vested in the board, for the contracts were the obligations of the board, and not the obligations of the state. It is true that this board has been called, in an opinion by this court, an "agency of the state." It was an agency of the state, but it was also vested with corporate powers, and in its corporate capacity it may be sued for its corporate acts, just as any other corporation. It appears from the petition that a large part of the \$100,000 is unexpended, besides the proceeds of the restaurant received from appellant; and there is no reason why this money should not make good to appellant any loss that the board may have inflicted upon him by the breach of contract alleged in the petition. The board was not created to discharge any governmental function. The erection of a headquarters building and the running of a restaurant were matters of business, in which this board stood on the same plane as others engaged in like undertakings. In sending it to a distant state to carry on business, and absolving the state from all liability, the legislature must be presumed to intend that the funds in its hands should be subject to its obligations. In this respect the case at bar is totally different from *Williamson v. Louisville Industrial School of Reform*, 95 Ky. 251, 23 L. R. A. 200. There the state had established a charity, and the question was whether the fund on which it depended could be used to make good a tort of an attendant, and the charity in this way impaired or destroyed. The decision is rested on the ground that the trust fund could not be diverted from the use to which the legislature had devoted it. But here the trust has been performed, and a surplus left. The fund was devoted by the legislature to the carrying out of this business, and there will be no diversion of it, if applied to the payment of the claims arising out of the business which are justly due.

We have examined the World's Fair cases in other states cited by counsel. The point raised here was not involved in these or the other cases relied on for appellee.

The judgment of the court below is therefore reversed, with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

Paynter, J., dissenting (Filed February 15, 1899):

The court recognizes as elementary the principle that a state can be sued only when she has expressly given her consent. Notwithstanding the recognition of that principle, the court distinctly and manifestly disregards it. The fundamental error consists in assuming that, as the board of managers could make a contract with reference to the business which the act commissioned it to transact, therefore it was intended that the board, and not the state, should be bound thereby. Because the law authorizes the agents or officers of a state to make contracts for her, it does not follow that an action can be maintained against a state thereon. It is equally as erroneous to assume that, because the state cannot be sued, therefore her agents can be on her contracts. If the test of a right to sue a state was to be determined by the fact that her agents had made a contract authorized by law, then she could be sued on her contract thus made, as an individual can be on his obligations. To show that the court proceeded upon an erroneous hypothesis, and that its reasoning is not sound, it is but necessary to quote its language, which is as follows: "As the power to make contracts is expressly conferred, the power to sue or be sued on these contracts was necessarily vested in the board, for the contracts were the obligations of the board, and not the obligations of the state." The exhibit which the board was required to make under the act was for the state of Kentucky. The money with which the expenses of the exhibit and commission were to be paid belonged to the state, and the commissioners appointed to carry out the wishes of the state were officers and agents, and were required to give bond to the state for the faithful discharge of their duties. They were required to make reports to the governor of the state for his examination and supervision. In fact everything they were required to do under the act was for the state, and every dollar which they were authorized to expend belonged to the state. There was nothing in the duties of the board which indicated that it was incorporated or that it was to transact the business as an incorporated company. The members of the commission were simply the agents of the state, and carried on the business in the name designated by the act which made the appropriation. The act provides that "any excess of the state appropriation and the proceeds of the sales of such building materials, or any other property that may be proper to sell, shall be covered into the treasury and held and treated as part of the general fund of the state. This language shows that the commissioners were not to have a cent's interest in the fund which was appropriated, except their salaries and expenses, or that part which might remain after the World's Fair was over. The board was not to withdraw from the treasury any of it, except upon warrants drawn by the auditor of public accounts on the state treasurer, but in some way it got possession of the entire fund. Then it was that the legisla-

ture made the declaration that it would not be bound beyond the amount appropriated. If the general assembly had declared in the act that it was to be bound for all contracts which the commissioners made, that would not have given a right to one who entered into a contract with the commission to sue the state thereon, as the consent to be sued was not given. If the resolution to which the court called attention is to be given any significance in this case, it certainly has exactly the opposite meaning to the one given it by the court, as the inference to be drawn is that she was to be bound by contracts to the extent of the amount of the appropriation, to wit, \$100,000, but not beyond that amount. This would mean, if anything, that these were the state's, not the commissioner's contracts, to that extent. There is nothing in the language of the resolution which indicates that the legislature did or intended to relinquish its right to the fund. The resolution does not in the slightest degree tend to support the conclusion reached by the court. In *Norman v. Kentucky Bd. of Mgrs. of World's Columbian Exposition*, 93 Ky. 543, 18 L. R. A. 556, in speaking of the relation which the commissioners sustained to the state, the court said: "The commissioners selected to expend the money are merely the state's agents to do so and provide the exhibit for the benefit of its people." It necessarily follows that the contracts which the commissioners were authorized to enter into obligated the state, and not the board. If they were a corporation under the name of the board of managers, etc., it was none the less an agency of the state, without right to sue or be sued. There was no such right conferred by the act. There is no language employed in the act, and nothing in the nature of its duties, which indicates that the legislature intended to create the board a corporation.

The case of *Hancock v. Louisville & N. R. Co.* 145 U. S. 409, 36 L. ed. 755, does not sustain the court's conclusion that the board is a corporation. In that case certain persons were directed to do certain things, in the way of issuing bonds of a taxing district to a railroad company. Under the act the district became a stockholder of the railroad company, and the question arose as to the right of the district to vote its stock. The court held that under the act under which the bonds of the district were authorized to be issued to the railroad company, and its stock issued to the district, the district was created a corporation, although not designated so by the terms of the act. If such a question could and did arise in this case, as to whether the state had been created a corporation by the act under which the commission was created, then the doctrine of that case would be applicable. The county judge and others who acted for the taxing district in the *Hancock Case* were not declared a corporation, but the district itself was adjudged to be a corporation; so there is not the slightest analogy between that and the case under consideration. The right of Herr to sue the Kentucky Central Lunatic Asylum (97 Ky.

458, 28 L. R. A. 394) was adjudged because the charter expressly permitted it "to sue and be sued." It was said in *Tate v. Salmon*, 79 Ky. 543: "It has been repeatedly decided by this court that, in the absence of a law authorizing it, the state cannot be made a party defendant or garnishee, and is not suable in her own courts; that parties will not be allowed to invade this inhibition by ignoring the state in their suits, and proceeding directly against the public officer having the custody of the moneys sought to be reached." In the case of *Williamson v. Louisville Industrial School of Reform*, 95 Ky. 251, 23 L. R. A. 200, it appeared that it was a chartered corporation, with the usual powers to sue and be sued; and it was held to be an agency of the state, and for that reason it was held that it could not be sued.

The untenable position is assumed by the court, that, although you cannot sue the state without her consent, you can sue her agents without her consent, and appropriate money in their hands to the payment of the alleged claim against the state. If this were true, the doctrine that a state cannot be sued would become obsolete, because parties would sue the agents, and not the principal. The board is said to be a corporation distinct

from the state, bound for its obligations; yet its officers are the salaried officers of the state, make reports to the state of their acts, hold the funds of the state, and are commanded to cover the unexpended portion into the treasury of the state. The action is, to all intents and purposes, one against the state. It is the state's property, and not that of the commissioners, that is to be affected by the judgment. It is the right of the state that is assailed. It is true, the attack is not made against the state directly but through her officers. To proceed in this way is just as objectionable as if the action had been instituted directly against the state. Whoever deals with a sovereign state is aware that he must rely entirely upon the sense of justice and good faith of the state, and that her courts cannot interfere to enforce contracts, except wherein she has given her consent.

Many authorities could be cited to sustain the conclusion reached in this dissenting opinion, but it is deemed unnecessary to do so.

Guffy, J., concurs.

Rehearing denied.

WASHINGTON SUPREME COURT.

Frank SPRENGER, *Respt.*,
v.

TACOMA TRACTION COMPANY, *Appt.*

(15 Wash. 660.)

1. Evidence as to trouble which plaintiff had about the payment of fare on a railroad train is not admissible in an action to recover damages for alleged wrongful ejection from a street car.
2. Positive testimony by a street-car conductor that one suing for wrongful ejection from a car had not paid his fare cannot be bolstered up by asking him upon

his examination in chief the reason which led him to that conclusion.

3. The measure of damages for wrongful ejection from a street car is not limited to the price of a ticket for another fare which plaintiff had in his possession and might have used, where the conductor, instead of ascertaining definitely whether or not plaintiff had paid his fare, which might have been done by a few moments' investigation, charged him with attempting to beat the company, and thus placed him in a position where the use of another ticket would be an apparent admission of the charge.

(November 30, 1896.)

NOTE.—Duty of passenger to pay fare wrongfully demanded in order to avoid expulsion and lessen damages.

- I. Summary.
- II. Where the failure to have a proper ticket is the fault of the ticket agent.
- III. Where another conductor is in fault.
- IV. Where the conductor demanding fare is in fault.
- V. Where the passenger loses his ticket.
- VI. Conclusion.

I. Summary.

There is some conflict of authority as to the duty of a passenger having money to pay the fare demanded or leave the train when he is entitled to transportation. The following cases hold that it is not the duty of a passenger to pay fare wrongfully demanded, but that he may stand upon his rights: *SPRENGER v. TACOMA TRACTION COMPANY*; *Head v. Georgia P. R. Co.* 79 Ga. 358; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103; *Lake Erie & W. R. Co. v. Flx*, 88 Ind. 381, 45 Am. Rep. 43 L. R. A.

464; *Pennsylvania Co. v. Bray*, 125 Ind. 229; *Chicago, St. L. & P. R. Co. v. Graham*, 3 Ind. App. 28; *Lake Erie & W. R. Co. v. Mays*, 4 Ind. App. 413; *Lake Erie & W. R. Co. v. Arnold*, 8 Ind. App. 297; *Callaway v. Mellett*, 15 Ind. App. 366; *Ellsworth v. Chicago, B. & Q. R. Co.* 95 Iowa, 98, 29 L. R. A. 173; *Southern Kansas R. Co. v. Rice*, 38 Kan. 398; *Wilsey v. Louisville & N. R. Co.* 83 Ky. 511; *Louisville & N. R. Co. v. Breckinridge*, 99 Ky. 1; *Murdock v. Boston & A. R. Co.* 137 Mass. 293, 50 Am. Rep. 307; *Hufford v. Grand Rapids & I. R. Co.* 53 Mich. 118; *Zagelmeyer v. Cincinnati, S. M. R. Co.* 102 Mich. 214; *Krueger v. Chicago, St. P. M. & O. R. Co.* 68 Minn. 446; *Forsee v. Alabama G. S. R. Co.* 63 Miss. 68, 56 Am. Rep. 801; *Cherry v. Kansas City, Ft. S. & M. R. Co.* 52 Mo. App. 499; *Elliott v. New York C. & H. R. R. Co.* 53 Hun, 78; *Townsend v. New York C. & H. R. R. Co.* 6 Thomp. & C. 495; *Buck v. Webb*, 58 Hun, 185; *St. Louis, A. & T. R. Co. v. Mackie*, 71 Tex. 491, 1 L. R. A. 667; *Missouri P. R. Co. v. Martino*, 2 Tex. Civ. App. 634; *Gulf, C. & S. F. R. Co. v. Rather*, 3 Tex. Civ. App. 73; *Gulf, C. & S. F. R. Co. v. Wright*, 2

APPEAL by defendant from a judgment of the Superior Court for Pierce County in favor of plaintiff in an action brought to recover damages for alleged wrongful ejection from defendant's car. *Affirmed.*

The facts are stated in the opinion.

Messrs. Doolittle & Fogg, for appellant:

If an issue of fact be raised, whether a party has been guilty of an illegal and wrongful act, implying moral turpitude on the part of the accused, it is permissible to give in evidence such former act on his part as will show, or tend to show, his capacity, ability, or aptitude to do the thing complained of; that he has a dishonest disposi-

tion, or that his habit of rectitude and his moral sense are not sufficiently strong to preclude his doing a wrongful and immoral act of like kind and character with that with which he is charged.

Com. v. Merriam, 14 Pick. 518, 25 Am. Dec. 420; *Com. v. Lahey*, 14 Gray, 91; *Com. v. Pierce*, 11 Gray, 447; *Boddy v. Boddy*, 30 L. J. Prob. N. S. 23; *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110; *People v. O'Sullivan*, 104 N. Y. 484, 58 Am. Rep. 530; *People v. Dimick*, 107 N. Y. 32; *Brown v. State*, 26 Ohio St. 182; *State v. Ward*, 61 Vt. 185.

When there is a question whether a person said or did something, the fact that he

Tex. Civ. App. 463; *Yorton v. Milwaukee, L. S. & W. R. Co.* 62 Wis. 367; *Texas & P. R. Co. v. Dennis*, 4 *Tex. Civ. App.* 90; *Gulf, C. & S. F. R. Co. v. Sparger (Tex. Civ. App.)* 39 S. W. 1001.

And the same was said to be the rule in *Pullman Palace Car Co. v. McDonald*, 2 *Tex. Civ. App.* 322.

But other cases hold that it is the duty of the passenger to pay the fare demanded so as to avoid expulsion, or else to leave the train. *St. Louis & S. F. R. Co. v. Trimble*, 54 Ark. 354; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499; *Chicago & N. W. R. Co. v. Bannerman*, 15 Ill. App. 100; *Chicago, B. & Q. R. Co. v. Wilson*, 23 Ill. App. 63; *Chicago & A. R. Co. v. Roberts*, 40 Ill. 503; *Atchison, T. & S. F. R. Co. v. Hogue*, 50 Kan. 40; *Curtis v. Louisville City R. Co.* 94 Ky. L. Rep. 573, 21 L. R. A. 649; *Bradshaw v. South Boston R. Co.* 135 Mass. 409, 46 Am. Rep. 481; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238; *Standish v. Narragansett S. S. Co.* 111 Mass. 512, 15 Am. Rep. 66; *Lake Shore & M. S. R. Co. v. Pierce*, 47 Mich. 277; *Mahoney v. Detroit Street R. Co.* 93 Mich. 612, 18 L. R. A. 335; *Van Dusen v. Grand Trunk R. Co.* 97 Mich. 439; *Frederick v. Marquette, H. & O. R. Co.* 37 Mich. 342, 26 Am. Rep. 531; *White v. Grand Rapids & I. R. Co.* 107 Mich. 681; *Homiston v. Long Island R. Co.* 3 Misc. 342; *Sanford v. Eighth Ave. R. Co.* 23 N. Y. 343, 80 Am. Dec. 286; *Weaver v. Rome, W. & O. R. Co.* 3 *Thomp. & C.* 270; *Cincinnati, H. & D. R. Co. v. Cole*, 29 Ohio St. 126, 28 Am. Rep. 720; *Louisville, N. & G. S. R. Co. v. Gulnan*, 11 Lea, 98, 47 Am. Rep. 279; *Southern P. R. Co. v. Patterson*, 7 *Tex. Civ. App.* 451; *Peabody v. Oregon R. & Nav. Co.* 21 Or. 121, 12 L. R. A. 823; *Magee v. Oregon R. & Nav. Co.* 46 Fed. Rep. 734; *Gibson v. East Tennessee, V. & G. R. Co.* 30 Fed. Rep. 904; *Hall v. Memphis & C. R. Co.* 15 Fed. Rep. 57; *Poulin v. Canadian P. R. Co.* 6 U. S. App. 298, 62 Fed. Rep. 197, 3 C. C. A. 23, 17 L. R. A. 800.

And the same was said to be the rule in *Western Maryland R. Co. v. Stocksdale*, 83 Md. 245.

It will be seen from the succeeding divisions that the cases which require a passenger to pay fare demanded when he has already paid it include some which involve questions of the passenger's own fault or negligence. It may also be suggested here that a distinction may be made between the right of a passenger to transportation without further payment of fare, upon demanding it in the proper way, and his right to ride upon a particular train without having provided himself with any evidence of his right to transportation which a conductor is entitled to recognize.

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From the above cases it seems that in Georgia, Indiana, Iowa, Minnesota, Missouri, Washington, and Wisconsin, it is held not to be the duty of a passenger, if able, to pay fare unlawfully demanded, in order to avoid an expulsion, where he is already entitled to transportation; but that he may rest on his rights secured by his contract. But in Arkansas, Illinois, Maryland, Ohio, Oregon, and Tennessee, it seems that it is the duty of the passenger to pay the fare demanded or else leave the train. In Kansas, Massachusetts, Michigan, and New York, it seems to be held to be the duty of the passenger to pay if he is negligent in starting without taking every reasonable precaution to secure a proper ticket, or if he has notice of the infirmities of his ticket, or if he gets on a train without a transfer. The general rule in Texas is that the passenger need not pay fare twice to avoid being ejected, although there are exceptional cases. The Federal courts incline to hold that the passenger is required to pay fare illegally demanded or else leave the train. The rule imposing the duty of paying fare to avoid a wrongful expulsion is upheld on various grounds, *e. g.*, the general duty of the plaintiff to avoid increasing his damages; that it will tend to avoid breaches of the peace; that "to the willing mind there is no injury"; and that a little matter of 5 cents or 10 cents, or \$1.35 does not justify the passenger in asserting his rights.

Attention is called to *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. 60, 36 L. ed. 71, as being a leading case on the passenger's right, although it does not discuss the question of tendering fare to avoid expulsion. This case holds that a passenger entitled to ride has the right to resist being ejected; applying the principle that where a party does all that he is required to do under the terms of the contract into which he has entered, and is only prevented from reaping the benefit of such contract by the fault or wrongful act of the other party to it, the law gives him a remedy against the other party for such breach of contract.

This note is not intended to include cases which involve only the amount of resistance a passenger may make against an unlawful ejection; nor cases as to his right to recover for an unlawful ejection; but only such cases as discuss the duty of the passenger to pay fare demanded in order to avoid a wrongful expulsion and to cut down damages.

II. Where the failure to have a proper ticket is the fault of the ticket agent.

In some of the cases it is held that it is not the duty of the passenger to pay fare to avoid expulsion from the train where he has once paid for his ticket, and the ticket agent has made a mistake in regard to the same, so that the conductor refuses passage thereon.

said or did something of the same sort on a different occasion may be proved, to show the existence, on the occasion in question, of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is involved or is in issue, or is, or is deemed to be, relevant to that issue.

Stephen, Ev. chap. 3, art. 11; *Brown v. Porter*, 7 Wash. 327; *People v. O'Sullivan*, 104 N. Y. 484, 58 Am. Rep. 530; *State v. Ward*, 61 Vt. 181; *Com. v. Jackson*, 132 Mass. 16; *State v. Knapp*, 45 N. H. 148; *Reg. v. Francis*, 12 Cox C. C. 612; *Copperman v. People*, 56 N. Y. 591; *Reg. v. Cotton*, 12 Cox, C. C. 400; *Reg. v. Geering*, 18 L. J. M. C. N.

S. 216; *Reg. v. Garner*, 3 Fort. & F. 681; *Reg. v. Heesom*, 14 Cox, C. C. 40; *Reg. v. Roden*, 12 Cox, C. C. 630; *Wood v. United States*, 16 Pet. 342, 10 L. ed. 987; *Fawcett v. Nichols*, 64 N. Y. 383; *Friend v. Hamill*, 34 Md. 298; *Com. v. Robinson*, 146 Mass. 571; 1 Greenl. Ev. 15th ed. § 51a, note 1.

Proof of general conduct, tending to show animus of a party in commission of an act, may be given in evidence.

Lee v. Lee, 3 Wash. 236; 1 Greenl. Ev. 15th ed. §§ 42, 90; *People v. Dimick*, 107 N. Y. 32; *Brown v. State*, 26 Ohio St. 182; *State v. Ward*, 61 Vt. 185; *Best, Ev. § 11*; *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110; *Com. v. Merriam*, 14 Pick. 518, 25 Am. Dec.

Where a passenger, at the direction of the selling agent, signs a return ticket twice, when it should have been signed only once, and offers to sign it again at the return point in the presence of the agent, who refuses to attest the same, he need not pay the fare twice. *Head v. Georgia P. R. Co.* 79 Ga. 358. In this case the court says that the passenger may recover for "all sorts of damage."

So, the passenger need not pay fare again where the agent at the return point refuses to attest a round-trip ticket. *Missouri P. R. Co. v. Martino*, 2 Tex. Civ. App. 634.

And where the ticket bears the wrong date the passenger need not pay twice to avoid expulsion. *Ellsworth v. Chicago, B. & Q. R. Co.* 95 Iowa, 98, 29 L. R. A. 173; *Krueger v. Chicago, St. P. M. & O. R. Co.* 68 Minn. 445.

In the latter case a mileage ticket was dated to expire on the date of issue.

So, the refusal to pay fare to avoid a wrongful expulsion cannot be considered in mitigation of damages, where the agent assured the passenger when he sold an expired ticket that it was good. *Callaway v. Mellett*, 15 Ind. App. 366.

And a passenger need not pay fare again where a round-trip ticket does not give a reasonable time for the return trip, but expires before he can reach his starting point. *Texas & P. R. Co. v. Dennis*, 4 Tex. Civ. App. 90; *Gulf, C. & S. F. R. Co. v. Wright*, 2 Tex. Civ. App. 468.

So, where a ticket is punched when sold, and the agent explains that it is a good ticket for the passenger, it is not his duty to pay fare to avoid expulsion. *Murdock v. Boston & A. R. Co.* 137 Mass. 298, 50 Am. Rep. 307.

In this case *Bradshaw v. South Boston R. Co.* 135 Mass. 407, 46 Am. Rep. 481, was distinguished, as there the face of the ticket showed the passenger that it was not good.

And a passenger need not pay fare demanded where a ticket is partly canceled and the agent assures the passenger that it is good. *Hufford v. Grand Rapids & I. R. Co.* 53 Mich. 118. In this case the court said: "We are all of opinion that if the plaintiff's ticket was apparently good, he had a right to refuse to leave the car." The court said that if the ticket was not good he should have paid his fare when it was demanded; but that the question whether the ticket was fair on its face was a question for the jury.

On a subsequent appeal of this case in 64 Mich. 631, the court in its opinion held: "On the undisputed facts in this case, I think the plaintiff was entitled to go to Walton Junction upon the ticket he presented to the conductor."

A passenger need not pay his fare again to avoid expulsion if the agent makes a mistake and gives him the wrong kind of a ticket.

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As, where a second-class ticket is given to a passenger who pays for a first-class ticket. *St. Louis, A. & T. R. Co. v. Mackie*, 71 Tex. 491, 1 L. R. A. 667. The court said in regard to the duty of a passenger to keep down damages by paying extra fare, that "the rule invoked by the appellant has been applied to many cases, and is wholesome in its operation in a case in which it is applicable; but we are of the opinion that it ought not to be applied in the case before us."

So, where an agent by mistake sells a ticket on a diverging line, the passenger has the right to stand upon his contract as made with the ticket agent. *Gulf, C. & S. F. R. Co. v. Rather*, 3 Tex. Civ. App. 72.

And where a ticket agent represents to a passenger that the ticket sold gives the right to go to L. in order to connect for another point, and he is ejected at a connecting point before reaching L., it is not his duty to pay the fare demanded. *Louisville & N. R. Co. v. Breckinridge*, 99 Ky. 1.

Where a railroad company advertises excursion tickets and none are on sale, the payment of the fare by the passenger taking a receipt therefor and tendering the same to the same conductor returning, entitles the passenger to a ride, and he is not bound to pay the extra fare demanded in order to avoid unnecessary damages from expulsion. *Chicago, St. L. & P. R. Co. v. Graham*, 3 Ind. App. 28. In this case the court said that "if he had paid the extra demand, and been carried to his destination, perhaps he could only recover the excess, unless some element of special damages entered into the occurrence; but he is not bound to do this."

So, where the railroad company fails to have tickets to the place of destination on sale that are advertised, it is not the duty of the passenger to pay an improper demand of ten cents extra for not having a ticket in order to avoid unnecessary damages from expulsion. *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103.

And where the ticket office is not open for the sale of tickets, the railroad company cannot claim that it is the duty of the passenger to pay ten cents extra for failure to procure a ticket. *Forsee v. Alabama G. S. R. Co.* 63 Miss. 66, 56 Am. Rep. 801; *Gulf, C. & S. F. R. Co. v. Sparger* (Tex. Civ. App.) 39 S. W. 1001.

In *Atchison, T. & S. F. R. Co. v. Dickerson*, 4 Kan. App. 345, where it was contended that a passenger who was unable to buy a ticket because the office was not open could have escaped the humiliation and indignity by paying the excess, and then his measure of damages would be ten cents, and that he had no right to aggravate the damages by not complying with the demand of the conductor, it was said: "We are not partial to a rule that would require a person to submit to an extortion for the purpose of relieving

420; *Com. v. Hill*, 145 Mass. 310; *State v. Lee*, 91 Iowa, 499; *Lee v. Lee*, 3 Wash. 236; *Parkinson v. Nashua & L. R. Co.* 61 N. H. 416; *Plummer v. Ossipee*, 59 N. H. 55; *Baulee v. New York & H. R. Co.* 59 N. Y. 356; *Sutton v. New York, L. E. & W. R. Co.* 50 N. Y. S. R. 514; *Reichman v. Second Ave. R. Co.* 15 N. Y. S. R. 923; *Pyne v. Broadway & S. A. R. Co.* 46 N. Y. S. R. 662; *Texas Mexican R. Co. v. Douglas*, 73 Tex. 325; *Bower v. Chicago, M. & St. P. R. Co.* 61 Wis. 457.

It was permissible to show, by the conductor, what was his usual course of business in taking up fares, his purpose and motive in so doing as he did, and what led him to stop at the third woman on the right-hand seat, in taking up fares, before crossing over to take up those on the left.

the extortioner from the natural consequences of his acts; but we need not consider that in this case." In this case the passenger did not have enough money to pay the ten cents extra.

In *Atchison, T. & S. F. R. Co. v. Dwelle*, 44 Kan. 804, where it is held that if the railroad company fails to keep the office open, so that a ticket cannot be purchased, the passenger cannot be lawfully expelled for failure to pay excessive fare, it was said: "It is further urged that it is unreasonable to compel a conductor to institute an investigation as to the motives of a passenger, whether he is acting in good faith and under a mistaken belief that he was tendering all the fare that could be rightfully required of him; but his proper course when the collector insisted on the payment of the excess was to pay the fare demanded, and afterward, when opportunity is given for investigation, to apply for a refund or seek redress against the company." But on this question there was no decision.

In *Lake Erie & W. R. Co. v. Mays*, 4 Ind. App. 413, it was said: "If he has been unable to procure a ticket because of the fault of the railroad company in failing to afford him a proper opportunity to do so, he will be entitled to be carried at the ticket rate. He may pay, under protest, the excess demanded and afterward recover it back, but he is not obliged to do so; and if, insisting upon his right to be carried at the ticket rate, he is expelled, the company will be liable for its refusal to carry him."

But in the following cases it was held to be the duty of the passenger to pay the fare demanded and avoid expulsion, or to leave the train when requested, although the failure to have a proper ticket was the fault of the ticket agent:

Where the passenger was unable to get his ticket stamped. *Mosher v. St. Louis, I. M. & T. R. Co.* 23 Fed. Rep. 326; *Peabody v. Oregon R. & Nav. Co.* 21 Or. 121, 12 L. R. A. 823.

In the latter case the court said that this rule will tend to avoid unseemly struggles on railroad trains, and prevent breaches of the peace, and protect the passenger by making the company responsible for all damages resulting from any breach of its contract.

And where the agent made a mistake as to the destination of the ticket, it was held that the passenger should pay the fare demanded or leave the train. *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499.

The court said that if the ticket agent causes the mistake by giving out a wrong ticket, "It is the duty of appellee to pay the fare demanded, and if the company refused to make suitable reparation for the indignity to which he

Flower v. Brumback, 30 Ill. App. 296; *Stearns v. Gosselin*, 58 Vt. 38; *Jefferds v. Alvard*, 151 Mass. 95; *Elmer v. Fessenden*, 151 Mass. 361, 5 L. R. A. 724; *Minor v. Phillips*, 42 Ill. 123; *Wait, Fraud. Conv.* §§ 205, 206; *Hulett v. Hulett*, 37 Vt. 581; *Fisk v. Onester*, 8 Gray, 506; *Thacher v. Phinney*, 7 Allen, 146; *Wheelden v. Wilson*, 44 Me. 11; 1 Greenl. Ev. 15th ed. p. 84, note, § 53, note; *Stephen, Ev. chap. 3, art. 13*; *Hetherington v. Kemp*, 4 Campb. 193. And see *Skilbeck v. Garbett*, 7 Q. B. 846.

It was error for the trial court to instruct the jury that the plaintiff was entitled to some damage if he paid his fare.

Thompson, Charging the Jury, §§ 25, 46, 47; *Drake v. Palmer*, 4 Cal. 11; *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15; *Danville,*

has been exposed in being compelled to repay his fare, he could maintain an appropriate action."

And it was held that the passenger should pay the fare demanded to the next stopping place or leave the car, where the train did not stop at his point of destination. *Lake Shore & M. S. R. Co. v. Pierce*, 47 Mich. 277. In this case the court said that the passenger was not in fault in starting upon that train, but that he could not complain of an indignity which it was his duty to avoid in occurring, and which it was his duty to expect in being removed from the train.

In *Chicago & N. W. R. Co. v. Bannerman*, 15 Ill. App. 100, where Mrs. E. B.'s husband bought for her a mileage ticket reading Mr. E. B., and she was ejected, the court in referring to the opinion in *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238, where the rule was laid down that the passenger should pay the fare demanded and sue for breach of the contract, or leave the train and sue for damages, said: "While the writer of this opinion finds it difficult to yield his assent to the doctrine of the Connell Case, it must nevertheless be accepted as of binding authority, coming as it does from the court of last resort."

And where a ticket agent made a mistake in regard to a return coupon, and the passenger applied to a person at the ticket office to have the mistake corrected, and was assured that it would be honored, it was held that his conduct in getting on the train after he knew there was a mistake was negligence, and if his right of action was a breach of the contract his damages were only nominal, if in tort he was entitled to recover no damages. *Poulin v. Canadian P. R. Co.* 6 U. S. App. 298, 52 Fed. Rep. 197, 3 C. C. A. 23, 17 L. R. A. 800.

This case makes a distinction between an action in tort and one on contract, and endeavors to apply the rule to an action on contract that it is the duty of the party damaged to use diligence to reduce the damages from a breach, and that the failure to do so prevents a recovery for any damages which might by due diligence have been avoided.

And in *Atchison, T. & S. F. R. Co. v. Hogue*, 50 Kan. 40, where a passenger got off the train to buy a ticket to a further point and on failure to find the agent boarded the train and was forcibly ejected for refusing to pay an excessive fare, it was held that it was his duty to avoid that which he was bound to expect if he persisted in refusing to comply with the request of the conductor. In this case it was said that the lawfulness of the fare could have been settled as well without the expulsion as with it, that the plaintiff should have paid the ten cents demanded and brought his action, but he said to

L. & N. Turnp. Road Co. v. Stewart, 2 Met. (Ky.) 122; *Kimball v. Bath*, 38 Me. 222; *Archibald v. Davis*, 49 N. C. (4 Jones, L.) 133; *Hall v. Gale*, 20 Wis. 293; *Scott v. Winship*, 20 Ga. 429; *Bond v. Warren*, 53 N. C. (S Jones, L.) 191; *Easterling v. State*, 30 Ala. 46; *Williams v. Cannon*, 9 Ala. 348; *Knight v. Vardeman*, 25 Ala. 262; *White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548; *Glover v. Duhle*, 19 Mo. 300; *State v. Lynott*, 5 R. I. 295; *Burt v. Gwinn*, 4 Harr. & J. 507; *Case v. Weber*, 2 Ind. 108; *Maltby v. Northwestern Virginia R. Co.* 16 Md. 445.

One damned by reason of the accident, mistake, or tort of another is bound, no less in law than in morals, to make the scope of the injury as narrow, and the extent of the

damage as small, as he conveniently, readily, and reasonably can. And the court's refusal to so instruct the jury, and his own voluntary instruction to the contrary, was wanting in authority of law.

Judge Thompson in 5 Southern Law Review, 831; *Hordern v. Dalton*, 1 Car. & P. 151; 2 Starkie, Ev. p. 741, title Nuisance; *Cincinnati & O. Air Line R. Co. v. Rodgers*, 24 Ind. 103; *Mather v. Butler County*, 28 Iowa, 253; *Wicker v. Hoppock*, 6 Wall. 94, 18 L. ed. 752; *Warren v. Stoddart*, 105 U. S. 224, 26 L. ed. 1117; *Bagley v. Cleveland Rolling Mill Co.* 22 Blatchf. 342, 21 Fed. Rep. 159; *The Oregon*, 6 U. S. App. 581, 55 Fed. Rep. 666, 5 C. C. A. 229; *Heavilon v. Kramer*, 31 Ind. 241. And see *State, Rice*,

the conductor "I am here; if you want me off, you will have to put me off, for I will not get off."

And where a ticket agent sold a limited ticket as unlimited, and assured the passenger that he could be carried on the ticket at any time, it was held that the injury for an expulsion from the train for refusal to pay fare was not the fault of the conductor or the corporation, and it was not liable to the plaintiff; that the injury could have been prevented if the plaintiff had chosen to pay the fare demanded, and in that sense it was the result of his own negligence rather than of anything the conductor did. *Hall v. Memphis & C. R. Co.* 15 Fed. Rep. 57.

In this case the distinction is made by the court between the right of a passenger with an expired ticket where he is not in fault, and a case of a man with a clear right and a clean ticket. And the court said that it was folly for the passenger to insist on the conductor taking his word about what he had been told by the station agent as to the capacity of a ticket stamped in plain terms as expired, rather than pay the fare demanded.

In *Pullman Palace Car Co. v. McDonald*, 2 Tex. Civ. App. 322, where a passenger presented his through ticket to the sleeping-car agent who sold him the through sleeping-car ticket, and the sleeping-car was detached and run on another road and his fare on that road demanded, it was held that it was reasonably within the contemplation of the parties, when the sleeping-car ticket was sold and the contract of carriage entered into, that the plaintiff would be subject to ejection from defendant's car for nonpayment of fare, if said car should not be transported to G. over the route called for. The court held that evidence on the part of plaintiff was admissible to show that he had no money to pay the extra fare demanded, saying: "A passenger will not be required to pay fare twice, or fare in excess of the proper fare, to prevent the damages resulting from a wrongful ejection by the carrier. *St. Louis, A. & T. R. Co. v. Mackie*, 71 Tex. 491, 1 L. R. A. 687." In this case no additional fare was demanded by the defendant, and the ejection was made for the failure of the plaintiff to pay the railroad fare. The court said: "We think that under the circumstances it was the duty of the plaintiff to pay the railroad fare if he had the money, so as not to aggravate the damages, the rule being that he must use reasonable care to prevent the aggravation of damages."

In *Western Maryland R. Co. v. Stocksedale*, 83 Md. 245, it was said that when a passenger receives a wrong ticket from an agent of the company, by reason of the negligence or mistake of the agent, "the passenger should pay the fare demanded and seek his remedy by an 43 L. R. A.

action for the breach of the contract, and not by an action of tort for the ejection."

In *Nelson v. Long Island R. Co.* 7 Hun, 140, where a ticket agent stamped a ticket to expire on Monday, and the passenger claimed that it should have expired on Wednesday, and he was ejected, Brady, J., said: "It was not necessary, for example, for the plaintiff in this action to require the ceremony of stopping the train and of expulsion. It would have saved his rights, if, having refused to pay other than by his ticket, he was told that unless he paid he would be put out, and then paid under protest. If a passenger prefer the other course, then he must rely entirely upon the wrong done in putting him out, and upon the absence of any right of the company to eject him his remedy must depend."

And where the ticket agent by mistake issued a ticket for a shorter distance than paid for, the passenger could not maintain a suit counting only on the failure of the conductor to respect a correct ticket. *Frederick v. Marquette, H. & O. R. Co.* 37 Mich. 342, 26 Am. Rep. 531. In this case it was said: "An erroneous impression seems to prevail with many that where the conductor of a passenger train ejects therefrom a passenger who has paid his fare to a point beyond, but has lost or mislaid his ticket, or whose ticket does not entitle him to go farther, or upon that train, that the company is liable in an action at law for all damages which the party may in any way have sustained in consequence of the delay, mortification, injury to his health or otherwise, and that the passenger is under no obligation to prevent or lessen the damages by payment of the necessary additional fare to entitle him to complete his journey without interruption. Although such damages were claimed in this case, under our present view it will be unnecessary to discuss this question any farther at present."

III. Where another conductor is in fault.

There is some conflict of authority as to the duty of a passenger to pay the fare demanded to avoid an expulsion, where he pays transportation to one conductor without obtaining a transfer, or where the prior conductor detaches the wrong part of his ticket and a subsequent conductor demands fare. The weight of authority seems to impose on the passenger the duty of paying the second conductor and thus avoid expulsion, or else quietly leave the train when ordered and look to an action for breach of contract of carriage rather than to an action for a tortious expulsion. Some of the cases impose the duty on the passenger on the ground that no one can by force compel the performance of a contract. In the cases in this subdivision it may be said that the duty seems to be imposed where the passenger is negligent in starting on

v. *Powell*, 44 Mo. 439; *Miller v. Roy*, 10 La. Ann. 231; *Dufort v. Abadie*, 23 La. Ann. 280; *Miller v. Mariner's Church*, 7 Me. 51, 20 Am. Dec. 341; *Davis v. Fish*, 1 G. Greene, 407, 48 Am. Dec. 387; *Loker v. Damon*, 17 Pick. 284; *Thompson v. Shattuck*, 2 Met. 615; *Milton v. Hudson River S. B. Co.* 37 N. Y. 210.

A party cannot recover for the loss of his property, or for an injury to his person, where his own negligence has to any extent contributed to the result.

Milton v. Hudson River S. B. Co. 37 N. Y. 212; *Louisville & N. R. Co. v. Breckinridge*, 90 Ky. 1; *Sandwich v. Dolan*, 34 Ill. App. 205; *Ford v. Illinois Refrigerating Constr.*

another car without a sufficient ticket, although a recovery was finally had in *Townsend v. New York C. & H. R. R. Co.* 6 Thomp. & C. 495, where the passenger knew the train did not go through and the conductor on the first train took his ticket to a point beyond without giving anything to show payment of fare. But some cases hold that it is not the duty of the passenger to pay the second conductor, as this will be a confession that he is trying to defraud the company.

So, where the wrong part of a round-trip ticket was taken up by one conductor, and the plaintiff ejected by another conductor, the court said that the charge of the conductor that the appellee was endeavoring to cheat the company was humiliating. "To pay fare in response to the conductor's demand was to confess that he was endeavoring to secure a ride by dishonest means, and almost any honest man would subject himself to expulsion before doing an act that would impliedly, if not expressly, fasten upon him the charge of falsehood and dishonesty, and there was no alternative; either the fare must be paid and the confession made, or the passenger must stand to his word and suffer expulsion from the train." *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464.

And in a similar subsequent case it is held that if a passenger has a right to be carried on his ticket he may insist upon being so carried, and if he is ejected he is entitled to recover the damages sustained thereby, although he may take the other course, and pay his fare rather than be ejected, and recover such damages as he sustains in that event. *Pennsylvania Co. v. Bray*, 126 Ind. 229.

A railroad company cannot require a passenger to comply with a regulation to show his ticket, where the train does not go through to his destination and his ticket is taken up without any transfer check being given, and the passenger takes the next train from that stopping point, from which train he is ejected for nonpayment of fare. *Townsend v. New York C. & H. R. R. Co.* 6 Thomp. & C. 495. In this case the court said: "If he had bought another ticket at Poughkeepsie and had then sued the company for the extra sum paid, what cause of action would he have had? They would have justly said: We never refused to carry you to Rhinebeck. Taking up your ticket was no refusal. We always take up tickets at some point before the end of the journey."

On a previous appeal in *Townsend v. New York C. & H. R. R. Co.* 56 N. Y. 295, 15 Am. Rep. 419, it was held that the passenger had no right on the second train, and that when the conductor told him he must pay his fare or leave the car, he then knew that he could not proceed upon the ticket taken, but should resort to his remedy the same as though he had been ejected. 43 L. R. A.

Co. 40 Ill. App. 226; *Akridge v. Atlanta & W. P. R. Co.* 90 Ga. 232; *Stebbins v. Central Vermont R. Co.* 54 Vt. 464, 41 Am. Rep. 855; *Reynolds' Stephen's Ev.* p. 19, art. 11; *Terry v. New York O. R. Co.* 22 Barb. 574; 7 Am. & Eng. Enc. Law, pp. 62, 132, and notes.

If there were negligent, wilful, or intentional acts, or omission to act, upon plaintiff's part after the wrongful act, by which it was aggravated, increased, or enlarged, they will not prevent him from recovering damages for so much of the injury as the original wrongdoer caused by his negligence.

Shearm. & Redf. Neg. § 32, and note; *Beach, Contrib. Neg.* p. 64; *Stebbins v. Central Vermont R. Co.* 54 Vt. 464, 41 Am. Rep.

The court said "If, after this notice, he waits for the application of force to remove him, he does so in his own wrong; he invites the use of the force necessary to remove him; and if no more is applied than is necessary to effect the object, he can neither recover against the conductor or company therefor. . . . No one has a right to resort to force to compel the performance of a contract made with him by another."

The supreme court in 6 Thomp. & C. 495, affirming a judgment for compensatory damages, referring to this opinion says that "the decision of this case in the court of appeals, 56 N. Y. 295, 15 Am. Rep. 419 held that exemplary damages were not proper."

The supreme court evidently in this case interpreted the law differently from the court of appeals, although limiting the recovery to compensatory damages. It is said that the supreme court refused to allow an appeal from its last decision, and as the damages allowed were \$75 no further appeal could be taken.

The supreme court distinguished the case of *Weaver v. Rome, W. & O. R. Co.* 3 Thomp. & C. 270, as there the plaintiff was negligent; but in the present case the plaintiff was not to blame.

In *Ray v. Cortland & H. Traction Co.* 19 App. Div. 530, the court says: "The rule suggested in the *Townsend Case* [56 N. Y. 295, 15 Am. Rep. 419], does not seem to have been followed in that or subsequent cases."

It is not the duty of the passenger to pay the fare and to remain on the train in order to protect the railroad company against the consequences of the mistake of a prior conductor who neglects to give a proper stop-over. *Xorton v. Milwaukee, L. S. & W. R. Co.* 62 Wis. 367.

In a former trial of this case in 54 Wis. 234, 41 Am. Rep. 23, where the evidence differed some, it was held that he could not complain of injuries received from being ejected on a cold night at a station where there was no shelter, as the passenger brought this exposure upon himself by his own conduct in refusing to pay his fare.

But in some cases it was held that it was the duty of a passenger to pay the fare demanded, or leave the train, where a previous conductor failed to give a transfer. *Homiston v. Long Island R. Co.* 3 Misc. 342; *Mahoney v. Detroit Street R. Co.* 93 Mich. 612, 18 L. R. A. 335; *Van Dusen v. Grand Trunk R. Co.* 97 Mich. 439; *Bradshaw v. South Boston R. Co.* 135 Mass. 409, 46 Am. Rep. 481.

Where a conductor on a train failed to give a transfer check and called to the other conductor "This man's fare is paid," and the second conductor claimed that he did not understand him and ejected the passenger for nonpayment of fare, it was held that the wrongful taking of

355; *Greenland v. Chaplin*, 5 Exch. 243; *Thomas v. Kenyon*, 1 Daly, 132; *Sills v. Brown*, 9 Car. & P. 601; *Secord v. St. Paul, M. & M. R. Co.* 5 McCrary, 515, 18 Fed. Rep. 221; *Louisville, N. A. & O. R. Co. v. Falvey*, 104 Ind. 409.

In such cases the damages may be apportioned, and a deduction made by the jury for that portion of the injury due to plaintiff's fault or omission.

Beach, Contrib. Neg. p. 73, § 24; *Louisville, N. A. & O. R. Co. v. Falvey*, 104 Ind. 409; *Gould v. McKenna*, 86 Pa. 297, 27 Am. Rep. 705; *Nitro-Phosphate & O. O. M. Co. v. London & St. K. Docks Co.* L. R. 9 Ch. Div.

a passenger's ticket by the conductor of a previous train did not justify a passenger in violating the lawful regulations on another train. The court said: "A passenger, under such circumstances, has the right to refuse to pay fare, but, when demanded by the conductor, he must either pay or walk peaceably off the train, and his remedy is an action against the company for damages sustained by any detention or any humiliation suffered from having to walk off the train." *Homiston v. Long Island R. Co.* 3 Misc. 342. In this case the court said that "if he waits for the application of force to remove him, he does so in his own wrong; he invites the use of the force necessary to remove him, and if no more force is applied than is necessary to effect the object, he can neither recover against the conductor or the company therefor."

In *Sanford v. Eighth Ave. R. Co.* 23 N. Y. 343, 80 Am. Dec. 286, it was held to be the duty of a passenger to pay the fare demanded, although he claimed the right to ride in that street car because he had paid passage on the previous day on another car, which failed to carry him through owing to the ice and snow. But the refusal to pay did not justify an expulsion while the cars were in motion, and the passenger could lawfully resist an attempt to eject him in such a case.

In *Weaver v. Rome, W. & O. R. Co.* 3 Thomp. & C. 270, where a passenger paid for three tickets and only received two for the persons with him, it was said: "The conduct of this plaintiff, his readiness under the circumstances to get up a quarrel on this question with the conductor, and lay the basis of a lawsuit by requiring him to expel him from the cars, leaving his wife and niece behind, before he would pay the small sum of \$1.35 for the fare, which it appears by his subsequent offer he had ample means in hand to pay at the time, serve to vindicate the propriety of the regulation, and justify the conductor in refusing to disobey the instructions of his employers, in reliance upon the personal veracity of this plaintiff."

So, where a passenger was wrongfully ejected for having a wrong transfer check given him by a conductor on another street car, the court said that "if the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way." *Bradshaw v. South Boston R. Co.* 135 Mass. 409, 46 Am. Rep. 481.

And where a passenger on a street car was compelled to take the next car on account of the one upon which he was riding stopping at the barns, and he was not given a transfer check, it was held that it was the plaintiff's reasonable and clear duty to pay his fare and seek redress.

Hunt v. Lowell Gaslight Co. 1 Allen, 343; *Chase v. New York C. R. Co.* 24 Barb. 273; *Sherman v. Fall River Iron Works Co.* 2 Allen, 524, 79 Am. Dec. 799; *Matthews v. Warner*, 29 Gratt. 570, 26 Am. Rep. 396; *Hibbard v. Thompson*, 109 Mass. 286; *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270.

Mr. Frank D. Nash, for respondent:

The sense of wrong suffered and the feeling of humiliation and disgrace engendered, if any, are actual damage for which the injured party is entitled to compensation.

Willson v. Northern P. R. Co. 5 Wash. 621; *Lake Erie & W. R. Co. v. Arnold*, 8 Ind. App. 297; *Thompson, Charging the Jury*, § 48.

dress from the defendant for a violation of his contract. *Mahoney v. Detroit Street R. Co.* 93 Mich. 612, 18 L. R. A. 335. In this case a judgment for nominal damages for ejection was affirmed, the court saying that the verdict should have been directed for the defendant.

And where a conductor failed to give a passenger on a round-trip ticket a check on change of conductors, leaving him only the return part of the ticket, and he was ejected for refusing to pay fare, it was held that it was his duty to leave the train peaceably or pay his fare and to seek his remedy for damages, and the damages which he suffered by the fault of the first conductor were covered by the recovery of the amount of fare which he was compelled by his fault to pay. *Van Dusan v. Grand Trunk R. Co.* 97 Mich. 489.

IV. Where the conductor demanding fare is in fault.

In *SPRENGER v. TACOMA TRACTION COMPANY*, it is held that payment to avoid expulsion need not be made where a street-car passenger pays his fare and is ejected for not paying again, although he has other tickets which he can use and thus prevent his ejection. In this case it was said that the general rule is unquestioned that it is the duty of one who has been deprived of the contract right, to reduce the damages as much as possible; but in this case there was such a disregard of the rights of the plaintiff as to deprive the defendant of the benefit of this rule, even if it ordinarily applied to cases of this kind. The court said that plaintiff was placed in such a position that it was not his duty to use another ticket, and thus tacitly admit that he had been guilty of trying to beat the company as claimed by the conductor.

There is some conflict of authority as to the passenger's duty to pay fare wrongfully demanded so as to avoid an expulsion, where the conductor demanding the fare is in fault. Some of the cases deny that it is his duty on the ground that it will be an admission that he is trying to defraud the company, other cases do so on the ground that to pay in such a case will be buying what the passenger already owns. In some of the cases holding that it is the duty to pay to avoid an illegal expulsion, the passenger desired and expected to be expelled. Some cases hold that the passenger is unreasonable to insist on ejection, applying the maxim "To the willing mind there is no injury."

The following cases hold that it is not the duty of the passenger to pay fare to avoid an expulsion:

In *Lake Erie & W. R. Co. v. Arnold*, 8 Ind. App. 297, it was held that where a passenger gives his ticket to the conductor it is not his duty to pay fare wrongfully demanded again of him, and afterwards settle the question in dispute with the company or its agent. This

Heyt, Ch. J., delivered the opinion of the court:

Defendant was operating a street-car line in the city of Tacoma, and plaintiff was a passenger on one of its cars. He was ejected therefrom by the conductor for the alleged nonpayment of his fare, and brought this action to recover damages, claiming that he had paid his fare, and that he was unlawfully ejected. The trial resulted in a verdict for \$100 damages, upon which judgment was duly rendered. In its brief defendant has discussed the alleged errors of the trial court under numerous heads, but for the purposes of this opinion they can be so grouped as to present but four distinct propositions. Of

these two relate to the rejection of testimony offered on the part of the defendant, the third to instructions given to the jury and refusals to instruct, and the fourth to the measure of damages.

Plaintiff, having testified that he had paid his fare, and that thereafter he had been compelled to leave the car by the action of the conductor and motorman, was asked by defendant's counsel if he had not been put off of the street cars before for refusal to pay fare. This question he answered in the negative. Whereupon he was asked if he had not been put off the Northern Pacific Railroad cars for nonpayment of fare. Upon objection of the plaintiff, the court refused to

was so held on the ground that the principle involved is the same as if the sum demanded had been a large one, and that it is the privilege of every person to stand upon his strict legal rights, and the law does not require him to yield them, or make concessions to avoid trouble. The court said that "if he had paid the extra fare demanded after such accusations, legitimate inference might be drawn therefrom that he was guilty of dishonesty attributed to him."

And where the conductor fails to give a stop-over check on a ticket entitling to stop over at all points, and the passenger stops over and presents the remainder of the ticket to the same conductor the next day, he is under no obligation, in order to avoid being ejected, to pay the additional fare demanded and sue for the return thereof as money paid under duress. *Cherry v. Kansas City, Ft. S. & M. R. Co.* 52 Mo. App. 499. In this case the court said: "Notwithstanding the rulings of some of the courts which look that way, we think no such course was incumbent on the plaintiff, since he would thereby be purchasing a right he had already. The plaintiff was under no obligation to purchase, even for a trifle, the right which was already his own."

And where the conductor by mistake refuses a return ticket supposing that it had expired, and the company claims that it is the passenger's duty to pay his fare and to rely upon his remedy to recover it back, or leave the train and not provoke or make necessary an assault; and that the amount of damages shall be limited to the exact fare paid with interest,—the court says: "We fully concede that no one has a right to resort to force to compel the performance of a contract made with him by another; and a passenger about to be wrongfully expelled from a railroad train need not require force to be exerted to secure his rights, or increase his damages." But the court held that "where a passenger with a clear right and a clean ticket is entitled to ride on that trip and train, and is wrongfully ejected without forcible resistance upon his part, the jury are, and ought to be, allowed great latitude in assessing damages." *Southern Kansas R. Co. v. Rice*, 38 Kan. 898.

In *Zagelmeyer v. Cincinnati, S. & M. R. Co.* 102 Mich. 214, a recovery was allowed for an expulsion for failing to pay an unlawful excessive fare demanded for not having a ticket. The court says: "But it is contended that inasmuch as the plaintiff might have paid his fare, and avoided being expelled from the car, he is entitled to recover no substantial damages. We are cited to various Michigan cases as sustaining this doctrine. But all the cases cited are cases in which the plaintiff had no ticket which, as between himself and the conductor,

entitled him to ride upon the car in question, and in which there was no tender of the legal fare made. We think the case of *Hufford v. Grand Rapids & I. R. Co.* 53 Mich. 121, 64 Mich. 631, fully recognizes the right of the plaintiff to recover substantial damages for being evicted from the car when he either produces a ticket or stands ready to pay the legal fare."

A passenger is not bound to comply with an illegal demand for an excessive fare, and a railroad company has no right to eject him from the train for a refusal to comply with such a demand. *Wilsey v. Louisville & N. R. Co.* 83 Ky. 511.

And it is not the duty of a passenger having a good ticket on a steamship to pay fare again in order to secure stateroom and meals which are refused him by the purser because he does not pay fare again on being charged with using another person's ticket, which is not shown to be nontransferable. *Gleason v. The Willamette Valley*, 71 Fed. Rep. 712.

In this case the court said: "If Gleason had the right to travel on the ticket he held as a first-class passenger, he had the right to do so without being compelled to pay any additional fare."

But, in *St. Louis & S. F. R. Co. v. Trimble*, 34 Ark. 354, where a passenger was ejected for refusing to pay an excessive fare wrongfully demanded, it was held that where the plaintiff entered a train with the expectation and desire to be put off in order to make a case against the railroad company, he could not recover for wounded feelings, and the recovery will be limited to actual damages for wrongful ejection. The court said: "To the willing mind there is no injury;" and also said that generally the passenger's knowledge that the railroad would eject him unless he consented to submit to an illegal exaction, would not deprive him of the right to recover for mental injuries suffered from the indignity. But here the court refused to apply that rule on account of the passenger's desire and expectation of ejection.

Where a conductor, wrongfully but honestly believing it was his duty, removed a passenger from the train for refusing to pay five cents illegally demanded, and no more force was used than was necessary, it was held that exemplary damages could not be recovered. The court said: "The plaintiff reached his destination without expense, within an hour or two of the time by rail, walking 2 or 3 miles. And he voluntarily preferred to take this course rather than pay five cents, which he might have recovered by law if illegally taken." *Louisville, & G. S. R. Co. v. Guinan*, 11 Lea, 98, 47 Am. Rep. 279.

In *Southern P. R. Co. v. Patterson*, 7 Tex. Civ. App. 451, where an excessive fare was demanded for crossing a bridge, and the passenger

allow him to answer, and it is claimed that in so doing it committed error. A large number of cases have been cited to show that it is competent to prove that one has been guilty of a certain offense by proof of the commission of other offenses of the same nature. But in our opinion none of these cases are applicable to the question here presented. The fact that plaintiff had had trouble about the payment of his fare upon a railroad train would bear so remotely upon the question as to his attempting to beat the street car out of a five-cent fare that it was properly excluded from the consideration of the jury. The ruling of the court, which allowed the defendant to attempt to show that the plain-

tiff had had trouble about the payment of fare upon street cars, was as favorable to the defendant as it could ask.

The conductor, having testified that he collected fare on the side of the car upon which the plaintiff was sitting, up to and including that of a woman sitting next to him, before he left that side to collect fares upon the other, and that, when he returned to the side from which he first collected fares, he sought to collect the fare of the plaintiff, was asked by defendant's counsel a question which sought to elicit from the witness a statement as to the reasons why he was sure he had left off collecting upon the side of the car upon which the plaintiff sat, with the woman

was expelled, it was held that if the passenger was informed before night by the conductor that his ticket did not entitle him to free transportation over a bridge, and that he would receive his fare and pay it over to the bridge conductor so that he would not be disturbed by the conductor in the night, and that if he had paid the same he would not have been disturbed, and that when the bridge conductor demanded the bridge fare the plaintiff refused to pay the same for the purpose of enhancing the damages, the aggravated damages caused by the intentional acts of the plaintiff would not be allowed him in assessing the damages if the jury should find for plaintiff.

In *Cincinnati, H. & D. R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729, where a passenger was wrongfully ejected for not paying an extortionate fare, it was held that a publication in the newspaper of a communication from the plaintiff written after the expulsion, to the effect that the people should ride on that road and make money, when the railroad attempted to extort such fare, was improperly rejected as evidence. The court held that this evidence showed the *quo animo* of the plaintiff, and showed that he entered the car expecting to be ejected for the purpose of making money out of the transaction, and that so far as injuries to feelings were concerned it tended to show that it was a fair case for the application of the maxim that "to the willing mind there is no injury." "The question of the lawfulness of the fare could have been raised and settled as well without the expulsion as with it."

And where a passenger on a street car was wrongfully ejected for refusing to pay again, after he had been handed the wrong change by the driver who assured him that if he paid again the company would correct the mistake at the office, the court said that "the request of the driver to adjust the matter is competent to go to the jury in mitigation of damages." *Curtis v. Louisville City R. Co.* 94 Ky. 573, 21 L. R. A. 649.

In this case the driver was the conductor.

In *Gibson v. East Tennessee, V. & G. R. Co.* 30 Fed. Rep. 904, where the conductor made a mistake in demanding extra fare for a child, the case of *Hall v. Memphis & C. R. Co.* 15 Fed. Rep. 57, was followed, holding that it is the duty of the passenger to pay the extra fare demanded by the conductor if able to do so, and rely on his remedy to recover the amount before a justice of the peace or other competent court, and that damages cannot be increased by an obstinate resistance to the demands of the conductor and by forcing him to expel the passenger from the train. The court said that the passenger can take that course undoubtedly and sue for damages for a breach of the contract or of the public duty of the carrier, but his own 43 L. R. A.

unreasonable conduct in resisting a fairly reasonable demand of the conductor can be taken by the jury as a mitigation of damages, and will reduce them to nominal or actual damage sustained by the delay.

So, it was held that a passenger could not recover for personal injuries caused by necessary force in removing him, although the expulsion was wrongful because not made at a regular stopping place, and made for refusing to pay ten cents extra for failure to have a ticket. He could not recover exemplary damages for being put off at a place other than the station on account of his own wrong in not paying the extra ten cents or in not purchasing a ticket at the station. *Chicago, B. & Q. R. Co. v. Wilson*, 23 Ill. App. 63.

In this case the court said: "How easily the appellee could have avoided all his trouble and inconvenience and humiliation in being put off the train by simply doing what was right and what the law compelled him to do, paying the insignificant sum of ten cents. If a man will thus act, and receives indignity and humiliation in consequence, he should be compelled to charge it to his own account, and accept it with the best grace possible."

In *Chicago & A. R. Co. v. Roberts*, 40 Ill. 503, where a passenger was wrongfully ejected at a place which was not a regular station for refusal to pay the fare, and no special injury occurred, the court said: "This was a violation of the statute, for which the road must pay nominal damages, but what there is in this case to entitle the defendant in error to anything further, we are wholly unable to discover. He suffered no injury from the expulsion. The only disagreeable consequence was the necessity of walking 2 miles to Summit, which he could have avoided by paying the fare. If the defendant in error had been devoting himself to voluntary martyrdom for the sake of establishing a great principle, we could comprehend his conduct."

In *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238, it was held that a passenger was not required to pay fare wrongfully demanded, but that he should leave the train when requested to do so, and rely on an action of damages for breach of contract, and not invite the use of force, where he had a proper ticket but the conductor under instruction refused to honor it.

In this case the court said: "The question presented is, whether he can recover damages for being forcibly expelled from the train, or was it his duty, when notified by the conductor that he would not receive the ticket, to pay his fare under protest, or leave the train and hold the company responsible for the expulsion, without compelling the conductor to resort to force. Had appellee paid the fare demanded, he might

who sat next to him. The objection of plaintiff to this question was sustained, and it is claimed that, in sustaining it, the court committed error. In determining as to the correctness of this ruling it must be remembered that the question was put by defendant to its own witness, that he had testified positively to the fact that plaintiff had not paid his fare, and that he had left off collecting upon that side with the woman sitting next to plaintiff. This being so, it was not competent for defendant to bolster up the testimony of its own witness by asking for the reasons which had led him to come to the conclusions to which he had testified. It might have been competent for the plaintiff,

in cross-examination, to have gone into this question; but, until this was done, the testimony, when offered upon the part of the defendant, was properly excluded.

It will not be necessary to notice in detail the exceptions to the instructions, for the reasons that such exceptions are founded largely upon questions going to the measure of damages, which will be hereinafter considered. It will be sufficient to say that, in view of the measure of damages as to which, under the evidence, we think the jury should have been instructed, the instructions sufficiently and correctly stated the law of the case. It appeared from the uncontradicted testimony, that the plaintiff had several oth-

have sued the company and recovered for a breach of the contract. Had he left the train when the conductor refused to receive the ticket and ordered him to leave, he might have sued and recovered for all damages sustained in consequence of the act of the conductor expelling him from the train. . . . When the conductor demanded that appellee should pay fare or leave the train, he would have been justified in refusing to pay fare, and in leaving the train on the command of the conductor, and had he done so he would have received no personal injuries, and might then have brought his action and recovered, as before stated; but when he refused to leave the train, and thus compelled the conductor to resort to force, he cannot recover for an injury which he voluntarily brought upon himself."

In *White v. Grand Rapids & I. R. Co.* 107 Mich. 681, a recovery was refused where a passenger whose proper mileage had been taken by the conductor allowed himself to be put off for nonpayment of other fare, without attempting to explain or show his mileage book, or prove to the conductor where he had paid his fare to. The court said: "It appears conclusively that it was the plaintiff's own fault that he was put off, and the conclusion is also inevitable that he permitted himself to be put off for the purpose of bringing an action against the company for damages."

In *Magee v. Oregon R. & Nav. Co.* 46 Fed. Rep. 734, it was said "that a person who is able to pay his fare twice should pay twice if it is exacted, rather than suffer unnecessarily the humiliation and other consequent injuries of being ejected, and then claim enhanced damages by reason of peculiar suffering from the ejection."

V. Where the passenger loses his ticket.

It seems that there are but few cases on the question of the duty of the passenger to pay fare twice if he has lost his ticket. The courts of New York and Illinois slightly differ as to the rule of damages for ejection, where he produces a reasonable amount of evidence to the conductor showing that it is paid for and can be used by no other person, as in the case of a drawing-room or a sleeping-car berth ticket.

A passenger who purchases a seat in a drawing-room car and loses the same, but obtains from the ticket agent a written statement of such purchase, which is refused by the conductor, is not bound to pay the price of the seat again, and is entitled to stand on the right acquired by his original purchase, and the company is liable for removing the passenger to another car. *Buck v. Webb*, 58 Hun, 185. In this case the court distinguishes a case claimed to shield the defendant from liability, holding that such cases "were either passage or fare

tickets, not restricted to any car or train, or were detached in such a manner as to deprive the passenger of his right to the passage, or the time to which their use had been limited had previously expired." The court held in this case that the company was liable to compensate the passenger for his exclusion from his seat, and the moral compulsion to which he submitted of passing to and making his passage in another car.

In an exactly similar case, *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232, where it was claimed that the loss of the ticket imposed on the passenger the obligation of purchasing another one or of paying the conductor the price in money, it was held that where the circumstances were such that it was reasonably ascertained that the company could not be defrauded he should have the berth; but the damages for an expulsion to another car were held to be the price paid for his ticket and a reasonable compensation for the trouble and inconvenience he suffered in being deprived of his berth in the sleeping car.

And in *Standish v. Narragansett S. S. Co.* 111 Mass. 512, 15 Am. Rep. 66, it was held that \$50 was ample damages for detention on a steamer for two hours after losing his ticket, where a passenger had sufficient money to pay his fare, and that it was his duty to have paid the same, and that he was the unnecessary cause of his own detention. The court held that the defendant had the right to detain the passenger a reasonable time to investigate on the spot the circumstances of the case; but that if he was detained for the purpose of compelling him to pay his fare or give up his ticket, or detained an unreasonable time to investigate his case, or in an unreasonable way, he was entitled to recover.

In this case the passenger had occupied his stateroom all night, and had obtained the room by a pencil memorandum made on his ticket by an officer of the boat, but subsequently lost his ticket.

VI. Conclusion.

There is no uncontradicted rule respecting the duty of a passenger who has already paid for transportation in regard to payment of fare to avoid an expulsion and keep down damages. Some cases try to adhere to the rule that a passenger must always show a clean, clear ticket to avoid the obligation of paying again or else leave the train. Other cases go to the other extreme holding the company responsible for the mistakes of its agents even to binding their successors. The question arises in different ways, *e. g.*, where an agent sells a second-class ticket for a first-class ticket; where he punches the ticket to the wrong destination; where he limits the ticket to a wrong date or an impossible date; where the train agent misdirects the pas-

er tickets, one of which he could have used in payment of his fare, and thus have prevented his ejection for not paying; and it is earnestly contended on the part of the defendant that, under the well-settled rule that it is the duty of one who has been deprived of a contract right to reduce the damages flowing from the violation of the contract as much as possible, it was the duty of the plaintiff to have used one of the tickets in his possession, by doing which he would have reduced the damages growing out of the wrongful act of the conductor to the sum represented by the value of the ticket. The general rule contended for by the defendant is unquestioned, and it may be conceded that thereunder the defendant would only have been liable in such an amount of damages as was necessarily imposed upon the plaintiff by its wrongful action, if such wrongful action had not been committed by it under circumstances which showed a disregard for the rights of the plaintiff. If no evidence had been introduced tending to show that there had been a want of care and investigation on the part of the conductor before he acted upon the claim that plaintiff had not paid his fare, there might be reason for the application of the rule contended for, though many of the cases hold that such rule is not applicable to a contract of carriage by a common carrier with a passenger. But there

was evidence sufficient to go to the jury to show that there had been such a disregard of the rights of the plaintiff as to deprive the defendant of the benefit of this rule, even if it applied to cases of this kind. The undisputed proof showed that, with the delay of a few minutes, the conductor could have made an investigation which would have definitely determined whether or not the plaintiff had paid his fare; and, in view of the plaintiff's claim that he had paid it, which claim was supported by the statements of at least two of his fellow passengers, good faith required that such investigation should have been made before making the definite charge that plaintiff was attempting to beat his way over the road, and enforcing such charge by his expulsion from the car. In view of the action of the conductor, the plaintiff was placed in such a position that it was not his duty to use another ticket, and thus tacitly admit that he had been guilty of trying to beat the company, as claimed by the conductor. This being so, the instructions as to the measure of damages were what they should have been, and the evidence was such that the verdict for \$100 was not excessive.

The judgment will be affirmed.

Dunbar, Scott, Anders, and Gordon, JJ., concur.

senger, after examining his ticket, to the wrong train; where a previous conductor fails to give a proper stop-over or no stop-over, or no transfer check, or detaches the wrong part of his ticket; where the passenger loses his sleeping-car ticket which is good only for that train and berth, and supplies it with a writing from the Pullman car agent; where the train after starting has been unreasonably delayed by obstructions or otherwise so that the passenger goes to a hotel to wait for a through train,—and in many other cases.

It does not seem unjust to hold that a passenger ought to be required to pay fare, even if it is not justly due to the carrier, in order to avoid unnecessary damages, in a case where he has got upon a train knowing, or having fair opportunity to know, that he has not the proper evidence of his right to ride. In such a case his own fault or negligence may properly be held to preclude him from insisting that his own word be accepted by the conductor in respect to his right to ride. But in such cases it may be fairly urged that the passenger is not in fact entitled to ride upon the train without further payment, and that the demand upon him for fare is rightfully made in the exercise of the conductor's duty, and therefore it is the duty of the passenger to pay it, not merely to keep down damages, but because as between him and the conductor he has no right to ride without paying it. But when the passenger has not

been negligent—when, having paid for his ride, he has got upon a train with a ticket which he reasonably supposes to be good for his transportation, the question involved is simply the question of duty to submit to an improper and unjust demand in order to keep down damages. The cases which affirm that such is the passenger's duty seem to be anomalous so far as they require a submission to an unlawful demand in order to procure protection from a threatened assault or other tort. The doctrine of a duty to minimize damages does not seem to have been carried so far as this in any other class of cases, or to be justly applicable to excuse any party from liability for intentionally inflicting injuries. It is proper to require due care on the part of a person to avoid increasing his own damages, but the reason for the rule ceases when the damage to be avoided is a voluntary injury threatened by the other party who claims the benefit of the doctrine. For a carrier to say to a passenger: "You must submit to extortion in order to prevent me from assaulting you, else you will be deemed in law to have caused your own damage needlessly,"—is equivalent to an attempt by the carrier to profit by its own wrongful threats. It amounts to a claim of exemption from liability for an assault because the wrongdoer first offered his victim a choice between assault and extortion.

L. T.

STATE of Washington

v.

A. P. TUGWELL et al.

(19 Wash. 238.)

1. Liability to punishment for contempt for publishing articles tending to embarrass the court pending a suit is not taken away by a constitutional provision giving every person the right to freely write and publish on all subjects, being responsible for abuse of that right.
2. Punishment for contempt may be imposed upon one who, pending a suit, publishes articles which will tend to embarrass the court in deciding it, where the statutes have adopted the common law governing the punishment of contempts.
3. A newspaper article published before the final determination of a cause, stating that the decision rendered is "rotten," that the judge who rendered it had no mind, and intimating that he was corrupt and that he misstated the facts, is a contempt of court.
4. The supreme court retains jurisdiction to punish for contempt one making a publication tending to embarrass it in the decision of a case, even after the rendition of an opinion and the time for rehearing has elapsed, if time still remains for application for modification of the opinion, which is made soon after the article is published.

(April 14, 1898.)

PROCEEDINGS to punish defendants for an alleged contempt of court. Punishment imposed.

The facts are stated in the opinion.

Messrs. P. H. Winston, Attorney General, T. M. Vance, and A. R. Titlow, for the State:

The American doctrine is that both direct and constructive contempts are punishable by the court wherever they are intended or calculated to influence the action of the court or impair its authority with regard to pending causes.

Works, Courts and Their Jurisdiction, p. 488; *Hawkins v. State*, 125 Ind. 570; *Re Shortridge*, 99 Cal. 526, 21 L. R. A. 755; *Ex parte Terry*, 128 U. S. 289, 32 L. ed. 405; *Cartwright's Case*, 114 Mass. 230; *Cooper v. People*, Wyatt, 13 Colo. 337, 6 L. R. A. 430; *Ex parte Robinson*, 19 Wall. 505, 22 L. ed. 205; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *Clark v. People*, 1 Ill. 266, 12 Am. Dec. 178, note; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224; *Sanders v. State*, 85 Ind. 318; *Brown, Jurisdiction of Courts*, p. 305, § 115; *State v. Morrill*, 16 Ark. 384; *Bayard v. Passmore*, 3 Yeates, 438, 2 Am. Dec. 388; *Ex parte Robinson*, 19 Wall. 505, 22 L. ed. 205; *Rapalje, Contempt*, § 56, p. 70; *Re Lambuth*, 18 Wash. 478; *Ex parte Adams*, 25 Miss. 883, 59 Am. Dec. 234; *Brown v. Brown*, 4 Ind. 627, 58 Am. Dec. 641; *State v. Matthews*, 37 N. H. 453; *Wat-*

son v. Williams, 36 Miss. 345; *Ex parte Stickney*, 40 Ala. 161.

This court has the power to punish the defendants for a contempt if it appear, (1) that the article was contemptuous, calculated to obstruct justice and impair the authority of the court; (2) if at the time of its publication there was a cause pending in the court.

An action is pending until the judgment is fully certified.

Anderson, Law Dict. verb. Pend; Wegman v. Childs, 41 N. Y. 162; *Ulshafer v. Stewart*, 71 Pa. 170; *Littlefield v. Delaware & H. Canal Co.* 3 Cliff. 371; *Holland v. Foa*, 3 El. & Bl. 985; *Graham v. Robinson*, L. R. 2 Q. B. 390; *O'Maley v. Reese*, 1 Barb. 643; *Howell v. Bowers*, 2 Crompt. M. & R. 621; *Dresser v. Van Pelt*, 15 How. Pr. 19; *Bank of Genesee v. Spencer*, 15 How. Pr. 412; *Gould v. Torrance*, 19 How. Pr. 560.

The power of the court to punish for contempt, and thereby to protect itself in the due exercise of its functions, is as much the law of the land as any other process known.

2 Story, Const. §§ 1774-1884; *Ex parte Bollman*, 4 Cranch, 75, 2 L. ed. 554; *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391; *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242; *Ex parte Bergman*, 3 Wyo. 396; *Savin, Petitioner*, 131 U. S. 267, 33 L. ed. 150; *Com. v. Dandridge*, 2 Va. Cas. 414.

A case is pending till remittitur is sent down.

Hayne, New Trial & Appeal, § 293; *People v. Sprague*, 57 Cal. 147; *Blano v. Bowman*, 22 Cal. 25; *Rowland v. Kroyenhagen*, 24 Cal. 53; *Leese v. Clark*, 20 Cal. 417; *Grogan v. Ruckle*, 1 Cal. 194; *People v. McDermott*, 97 Cal. 247; *Columbia Min. Co. v. Holter*, 1 Mont. 429; *Kimpton v. Jubilee Placer Min. Co.* 16 Mont. 383; *State, Haskell, v. Faulds*, 17 Mont. 143; *Hazard v. Cole*, 1 Idaho, 306; *People, Smith, v. Nelliston*, 79 N. Y. 638; *Delaplaine v. Bergen*, 7 Hill, 591; *Iatson v. Wallace*, 9 How. Pr. 334.

The constitutional guarantee is not infringed by punishment for contemptuous article in newspaper.

State, Haskell, v. Faulds, 17 Mont. 143; *Re Hughes*, 8 N. M. 225; *People, Connor, v. Stapleton*, 18 Colo. 568, 23 L. R. A. 787; *Cooper v. People, Wyatt*, 13 Colo. 337, 6 L. R. A. 430; *Hughes v. People*, 5 Colo. 436.

At common law all courts of record have an inherent power to punish contempts committed *in facie curie*, such power being essential to the very existence of a court as such, and granted as a necessary incident in establishing a tribunal as a court.

Rapalje, Contempt, § 1; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *People, Field, v. Turner*, 1 Cal. 153; *Hughes v. People*, 5 Colo. 445.

This inherent and necessary power can be exercised by a "superior court" independently of statutory authority.

Rapalje, Contempt, § 1; *Hughes v. People*, 5 Colo. 446; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528.

Conferment of the power by statute upon a superior court is deemed no more than declaratory of the common law.

NOTE.—For contempt by newspaper publication pending trial in court, see also *People, Connor, v. Stapleton* (Colo.) 23 L. R. A. 787; and *State, Ashbaugh, v. Eau Claire County Circuit Ct. (Wis.)* 38 L. R. A. 554.

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Rapalje, Contempt, § 1; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *Middlebrook v. State*, 43 Conn. 267, 21 Am. Rep. 650; *Whitem v. State*, 36 Ind. 212; *Langdon v. Wayne Circuit Ct. Judges*, 76 Mich. 367.

Statutes may be in affirmation of the common-law powers of courts, and may regulate the mode of procedure and prescribe what punishment may be inflicted, but they cannot deprive a court of power which is necessarily inherent in it to hear and determine matters of contempt.

Re Chadwick, 109 Mich. 588; *State v. Morrill*, 16 Ark. 384; *Langdon v. Wayne Circuit Ct. Judges*, 76 Mich. 367; *Cheadle v. State*, 110 Ind. 301, 59 Am. Rep. 199; *Fishback v. State*, 131 Ind. 304; *Holman v. State*, 105 Ind. 513.

Where a decree has not been enrolled, or where it is subject to modification upon motion, or where the court might grant a rehearing, or where an appeal might be taken, or where the costs had not been taxed, or where no execution had issued,—it not being in condition to issue execution,—the case could not be said to have reached that stage where it could be said it was not pending in that court.

Re Chadwick, 109 Mich. 588; *Fishback v. State*, 131 Ind. 304; *Bloom v. People*, 23 Colo. 416.

A petition of which judgment has been finally pronounced, but on which the order has not been drawn up, is a "pending proceeding."

Ex parte Turner, 3 Mont. D. & De G. 523.

The press may suggest error, but all this must be done in a decent, temperate manner in the language and views of fair criticism and with a view to censure what is apparently wrong.

State v. Frew, 24 W. Va. 478, 49 Am. Rep. 257; *State v. Morrill*, 16 Ark. 384; *Dessault v. Belleau*, 10 Quebec L. R. 247.

While the press has a right to criticize judicial proceedings, any material departure from the truth in doing so may be punished by the court as contempt.

Dessault v. Belleau, 10 Quebec L. R. 247; *State v. Morrill*, 16 Ark. 384; *Brook v. Evans*, 29 L. J. Ch. N. S. 616.

The unbridled license of the press is wrong and should be checked before the waning powers of the courts are impotent to stop its progress.

Note to *State v. Galloway*, 98 Am. Dec. 415, 5 Coldw. 326; *State v. Frew*, 24 W. Va. 478, 49 Am. Rep. 257; *Respublica v. Oswald*, 1 Dall. 319, 1 L. ed. 155, 1 Am. Dec. 246.

It will hardly be tolerated to allow such vicious attacks upon the court under a perverted construction of a constitutional protection which was never meant to apply to such cases as the one at bar.

Burke v. Territory, 2 Okla. 499.

Any publication of any false or scandalous article, the tendency of which was to impute any improper motive to any court, or the judges thereof, or to in any way pervert or impede judicial proceedings, is punishable as contempt of the court.

State v. Morrill, 16 Ark. 384; *Re Moore*, 63 N. C. 397; *Littler v. Thomson*, 2 Beav. 43 L. R. A.

129; *Queen v. O'Dougherty*, 5 Cox, C. C. 348; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *Tenney's Case*, 23 N. H. 162; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528.

Publications scandalizing the court or tending unduly to influence or overawe their deliberations are contempt, which they are authorized to punish by attachment.

People v. Freer, 1 Cal. 519; *People v. Wilson*, 64 Ill. 211, 16 Am. Rep. 528; *State v. Freer*, 24 W. Va. 416, 49 Am. Rep. 257; *Re Moore*, 63 N. C. 397; *Bloom v. People*, 23 Colo. 416; *Re Chadwick*, 109 Mich. 588; *Re Hughes*, 8 N. M. 225.

Messrs. John C. Stalleup and Richard Winsor, for defendants:

The doctrine of constructive contempts is un-American and out of harmony with the constitutional guaranties of nearly all the states, and one that should not be maintained in America.

A statute defining and regulating contempt proceedings is a limitation upon the power formerly exercised by courts to punish contempts.

State v. Kaiser, 20 Or. 50, 8 L. R. A. 584; *Dunham v. State*, 6 Iowa, 245; *State v. Anderson*, 40 Iowa, 207; *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158; *Galland v. Galland*, 44 Cal. 475, 13 Am. Rep. 167; *Johnson v. San Francisco City & County Super. Ct.* 63 Cal. 578; *Cooley*, Const. Lim. 6th ed. p. 518.

After the rehearing and decision thereon, a case is no longer before the court.

PER CURIAM:

On the 3d of March, 1898, the attorney general filed an information against, and moved for a rule upon, the defendants, to show cause why an attachment should not issue against them for contempt of court in respect to the publication on the 24th of February, 1898, in a certain weekly newspaper in the city of Tacoma, known as the "Tacoma Sun," of the following article, to wit: "The supreme court of this state has again eased its conscience. if it ever had any to ease, by its infernal rotten decision in the Tacoma warrant case . . . [naming a member of the court] can now sit snugly up alongside some other supreme simpletons, and suck the hind teat of plutocracy. It is said that he changed his mind. Suffering saints, who ever made a charge that he had a mind to change? It is true, he voted the other way when the case was up before; but nobody ever accused him of having a mind; and even if they did, after reading the decision in the warrant case referred to, which he is supposed to have written, they would know that the accusation had no foundation, and could not be substantiated. This decision is only remarkable for its malignant, dishonest, and damnable distortions of, not only the law, but also the facts. It states the facts shockingly contrary to the truth, as shown by the record in the case, as will be seen by the dissenting opinion that will soon be filed. It is the conception of an ass, a lean-witted, anile leripoop, who no doubt thinks he would rather be rich than be right. We speak of . . . more particularly be-

cause he flopped. What made him flop he knows best, but everyone else has a good idea. There is only one thing about . . . that pleases me, and that is his term soon ends, and he will be relegated to that everlasting oblivion that awaits all of these last rotten articles of Republicanism. How long, O Merciful Creator of the Universe, are we to still suffer for the misdeeds of dishonest, corrupt, and disreputable public servants? The people of Tacoma have lived in a wild and reckless revel of Republican rule. They have drunk deep from the foul cup that folly has filled with perfumed poison and held to trusting lips, while the sweet, sensuous song sung by Satan's sirens lulled the senses to fancied rest, security, and safety as they plunged headlong into the frightful chasm of debt, at the bottom of which they will find destitution, destruction, dishonor, and death. While yet money can be raised, our citizens ought to erect a monument in memory of the past, to stand as a solemn warning for the future. The pedestal or base should be of busted banks. Six stalwart representatives of Republicanism—such, say, as Boggs and McCauley, Hedges and Holmes, Shane and McKane—should stand shoulder to shoulder, with hands clasped and eyes raised, with a look of envious emulation at the central figure yet above them all. And that figure should be, . . . on the top of a long shaft, straddling the American eagle, in one hand a bunch of illegal warrants, and in the other a double-barreled horse pistol, and as he commands fair Tacoma to kneel down and take one more dose of the vile, nauseating stuff, distillations of Republican rottenness, that this supreme court has fixed up for us. Then circling around all we would have the Republican council dancing like diabolical demons, trying to put out a huge bonfire made from the wreck and ruin of a light plant the city once owned, with imaginary water from a water plant for which the city paid more than a million real dollars. If all this could be placed in the public park, where good pious people could go when the weather was nice and warm, and sit on the benches, amidst the perfume of sweet flowers, with a picture of Gratton H. Wheeler in one hand and Walter J. Thompson in the other, oh, what a flood of tender memories would float over the soul! Oh, what a history, pages without printing, volumes without words! But Tacoma will never down. She will fight for justice till the last dishonest damn rascal that drags his slimy carcass across the road to justice shall have been fed to the crows. Men who have forgotten more law than . . . and his stud of supercilious asses ever knew have studied this warrant question for months and years; and they say the warrants have been paid; that they are dead, and should not be paid again. This is only a touch of the tail end of Republican prosperity of the past; but let us go on to the future. The day fast comes when the stains of disgrace and dishonor those perfidious and pusillanimous tools of the trusts have placed upon the fair name and fame of Washington 43 L. R. A.

will be wiped out forever. We must fight the ground inch by inch until honest men, who see no Klondike in the bench, shall be elected,—men who have the people's interests at heart, as well as the interest of the bondholder and warrant shark. This state will rise in its wrath, and, when fall comes, vicious, vacillating . . . will be swept into oblivion forever."

The information charged that the defendant Tugwell was editor and Baker was associate editor of the newspaper, and that such publication was made of and concerning the cause of W. C. Bardsley, plaintiff, against W. A. Sternberg, treasurer of the city of Tacoma, defendant, then pending in this court. 18 Wash. 612. The rule to show cause was issued, and the defendants appeared and answered to the information. They admitted that on the 24th of February, 1898, defendant Tugwell was editor and defendant Baker associate editor of the weekly newspaper known as the "Tacoma Sun," published in the city of Tacoma, and that they published the article set forth in the information. They denied that on the 24th day of February, 1898, or at any time thereafter, there was still pending in this court the cause of *Bardsley v. Sternberg*; denied that, by the publication of the article stated in the information, they were guilty of any act or omission towards the court defined and deemed by the laws of the state to be a contempt of court; alleged that under the facts stated, and under the laws and Constitution of the state, they had a right to publish the facts and comments as they appear in the article set out in the information; denied that they were amenable to the court for the publication; denied the right or power of the court to call upon them to answer as in these proceedings required, and denied that the publication amounted to a contempt. The attorney general thereupon demurred to the answer, on the ground that it set up no defense, and stated no reason why attachment should not issue against defendants. The facts relative to the pendency of the cause of *Bardsley v. Sternberg* were of record in this court when the case was argued. The cause of *Bardsley v. Sternberg* was argued and submitted at the May session, 1897. On June 22, 1897, an opinion was filed by this court affirming the judgment of the superior court in such cause, two of the judges at that time dissenting from the opinion then filed. On July 20, 1897, counsel for the appellant Bardsley duly filed a petition for rehearing, and a rehearing thereafter was granted, and the cause reargued in this court. On February 18, 1898, the opinion of the court was filed reversing the judgment of the superior court. On February 24, 1898, a dissenting opinion in which two of the judges joined was filed. On February 28, 1898, a petition for a modification of the opinion of the majority of the court filed on the 18th day of February was filed in this court by Messrs. John P. Judson, John C. Stallcup, and B. F. Heuston, attorneys for respondent; and on March 2, 1898, a majority opinion of the court was filed, denying the last petition for

modification of the opinion of reversal, and final judgment entered in the cause on the 2d day of March 1898 (18 Wash. 650), and on March 9, 1898, the remittitur issued.

Section 5, art. 1, of the Constitution of Washington, contained in the Bill of Rights, is as follows: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." The statute of the state defining contempt (2 Ballinger's Codes & Statutes, § 5798, 2 Hill's Code, § 778) is as follows: "The following acts or omissions, in respect to a court of justice or proceedings therein, are deemed to be contempts of court: (1) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings; (2) a breach of the peace, boisterous conduct, or violent disturbance tending to interrupt the due course of a trial or other judicial proceeding; (3) misbehavior in office, or other wilful neglect or violation of duty by an attorney, clerk, sheriff, or other person appointed or selected to perform a judicial or ministerial service; (4) deceit, abuse of the process, or proceedings of the court by a party to an action, suit, or special proceeding; (5) disobedience of any lawful judgment, decree, order, or process of the court; (6) assuming to be an attorney or other officer of the court, and acting as such without authority in a particular instance; (7) rescuing any person or property in the lawful custody of an officer, held by such officer under an order or process of such court; (8) unlawfully detaining a witness or party to an action, suit, or proceeding while going to, remaining at, or returning from, the court, where the same is for trial; (9) any other unlawful interference with the process or proceedings of a court; (10) disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness; (11) when summoned as a juror in a court, improperly conversing with a party to an action, suit, or proceeding to be tried at such court, or with any other person in relation to the merits of such action, suit, or proceeding, or receiving a communication from a party, or other person in respect to it, without immediately disclosing the same to the court; (12) disobedience by an inferior tribunal, magistrate, or officer of the lawful judgment, decree, order, or process of a superior court, or proceeding in an action, suit, or proceeding contrary to law, after such action, suit, or proceeding shall have been removed from the jurisdiction of such inferior tribunal, magistrate, or officer." Section 5809 of the same Code (2 Hill's Code, § 789) is as follows: "Persons proceeded against according to the provisions of this chapter are also liable to indictment [or information] for the same misconduct, if it be an indictable offense, but the court before which a conviction is had on the indictment [or information] in passing sentence shall take into consideration the punishment before inflicted."

1. On the 25th day of February, 1898, a formal communication was received by the 43 L. R. A.

court from a reputable member of the bar of the city of Seattle, inclosing a copy of the newspaper containing the publication set out in the information, and praying its consideration by the court; and on the same day the newspaper containing the publication was delivered by mail to several members of the court. The communication and subject-matter thereof were then submitted to the attorney general by the court, and he thereupon filed the information. The principal question raised by the answer of the defendants, and argued by their counsel, is that, under the facts above stated, defendants had a right to publish the facts and comments in the publication set forth in the information. It is also maintained by the learned counsel for defendants that § 5, art. 1, of the Constitution of Washington guarantees to defendants, as charged, immunity from the jurisdiction and process in the nature of contempt of any court or judicial tribunal of any character whatever. In support of their contention, counsel for defendants have cited authorities from the courts of some of the other states.

The case of *Dunham v. State* (decided in 1858) 6 Iowa, 245, was an appeal from a conviction of contempt in the district court of the editor of a newspaper for publication of matter deemed offensive to the court. The Iowa statute, which was construed, defined a contempt as "contemptuous or insolent behavior toward the court, while engaged in the discharge of a judicial duty, which may tend to impair the respect due to its authority." The court said, after stating the acts of the respondent: "It will be observed that, except in relation to his comments, and the publication made of the proceedings in his own case, on the first hearing his articles had reference entirely to cases that were not before the court;" and as "there was no rule, general or special, prohibiting the publication of the speeches of counsel, remarks of the court, or giving a statement of the proceedings," it did not, under the circumstances, amount to a contempt. The court also observed: "We are strongly inclined to think, however, that the provisions of the Code upon this subject must be regarded as a limitation upon the power of the courts to punish for any other contempts. We can conceive of no possible state of case in which the exercise of this power might become necessary for the protection of the court, or the due administration of the law, that is not covered by these provisions. If such a case should, by possibility, arise, we would not say that, by virtue of its inherent power, the punishment might not be inflicted." It will be observed in this case that the gravamen of the publication made by the defendant was criticism and severe denunciation of the district judge for rulings in two cases which were finally concluded before the publication was made; and the court does not seem to regard the publication of proceedings occurring in a contempt proceeding against the defendant as falling within the statute, in the absence of a rule of the court forbidding the publication of such proceedings while still pend-

ing. In 1875, in the case of *State v. Anderson*, 40 Iowa, 207, cited by counsel, the court, referring to *Dunham v. State*, 6 Iowa, 245, said: "In that case it was held that the publication of articles in a newspaper, reflecting upon the conduct of a judge in relation to a cause pending in court, which had been disposed of before the publication, however unjust and libelous the publication may be, did not amount to contemptuous or violent behavior towards the court," under the statute; "nor that such articles were so calculated to impede, embarrass, or obstruct the court in the administration of the law as to justify the summary punishment of the offender," under the statute. And in the case in hand the court said: "The proceedings in the cause had been brought to a close, and what was said in the published article could in no manner influence the rulings of the court. The publication was not contemptuous or insolent behavior towards the court 'while engaged in the discharge of a judicial duty,' tending to impair the respect due to its authority." And the court expressly concludes with this declaration: "Whether, in case the article in question had been published while the court was engaged in the trial, or before the termination, of the cause in which the rulings of the court are criticised, it would have been sufficient to justify the court in punishing the author for contempt, we do not decide, for the reason that such state of case is not before us on the record." It may be observed that these two cases do not decide whether in Iowa the court may punish contempts other than specified in the statute, nor whether the court would deem a publication tending to embarrass or influence the court in a pending cause a contempt, and therefore do not aid the court to any considerable extent in the case at bar.

The case of *Storey v. People*, 79 Ill. 45, was where a publication in a newspaper censured the action of the grand jury, questioned its integrity as a body, and indirectly attacked the moral character of certain of its members; but the publication was made after the grand jury had acted upon and returned three indictments against defendant; which had already been filed in the court, and at the time of the publication of the record there were no complaints pending before the grand jury of any kind against the defendant. The court said: "The only question, therefore, is, assuming the articles to be libelous, whether the publishing of a libel on a grand jury, or on any of the members thereof, because of an act already done, may be summarily punished as a contempt. We do not understand the articles as having a tendency directly to impede, embarrass, or obstruct the grand jury in the discharge of any of its duties remaining to be discharged after the publications were made. No allusion is made to any matter upon which the members were thereafter to act, and there could therefore, of necessity, be no attempt to interfere with the exercise of their free and unbiased judgments as to such matters." And the court, referring to the case of *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528, defined

precisely what was considered and adjudged in that case,—“that the cause in reference to which the article was published was then pending before the court, undecided, and that the article was calculated to, and was designed to, influence the members of the court in deciding it”; and further observes that, “since the decision of that case, the statutes have been revised, and the provision in regard to contempts, before quoted, has been repealed, leaving no statute in force on that subject, except in regard to the enforcement of decrees in chancery, and the punishment of certain specific offenses, such as the failure of jurors to attend in obedience to summons, the failure of officers to make service and return of writs,” etc., but observes: “Courts, however, possess certain common-law powers, subject to modifications that may have been imposed by our Constitution and statutes, among which is included that of punishing for contempt.”

The case of *Galland v. Galland*, 44 Cal. 475, 13 Am. Rep. 167, was one of contempt in a court of equity by a husband for not paying a monthly sum for his wife's support, which he had been adjudged to pay; and on appeal the supreme court merely decided that the defendant might purge himself from the contempt by showing that he was unable to pay it, and that the inability had not been created by his own act. We presume the case was cited because of the following language of the opinion: "In this state the power of courts to punish for contempt has been regulated by statute. . . . This is a limitation upon the power formerly exercised by courts to punish for contempt; but whether courts in this state can exercise power in this respect in cases not named in the statute, or otherwise than it has provided, we are not called upon in this case to consider. In our opinion, however, where one is called before a court to answer for contempt for not doing an act which he has been adjudged to do, inquiry may properly be had as to whether it is still in his power to do it, and if it be not, he should not be adjudged guilty." We cannot perceive that the case is in point.

The case of *Johnson v. San Francisco City & County Super. Ct.* 63 Cal. 578, arose upon the refusal of the court to allow process to a defendant in a divorce suit on the ground that he had not obeyed the order of the court requiring him to pay plaintiff her costs and counsel fees. The California Code [Civ. Proc. § 18] contained this provision: "No statute, law, or rule is continued in force because it is consistent with the provisions of this Code on the same subject; but in all cases provided for by this Code, all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated." The discussion in this case was upon the quantum and manner of the punishment that could be pronounced by the court for a disobedience of its order upon the defendant, and the court held that, the statute having prescribed the punishment, such provision was controlling.

Counsel for defendants seem to rely more particularly upon the case of *State v. Kaiser*, 20 Or. 50, 8 L. R. A. 584. This, again, was a punishment by the district court of a publisher of a newspaper for a libelous publication concerning the judge of the court. The Code of Oregon is identical with ours. The court observes: "The inherent power of a court of justice to punish parties for contempt who commit acts which have a direct tendency to obstruct or embarrass its proceedings in matters pending before it, or to influence decisions regarding such matters, is undoubted; but it can hardly be maintained, from the adjudications had upon the subject in the various states, that such power is broad enough to vest in the court the authority to so punish anyone for criticising the court on account of its procedure in matters which have fully terminated, however much its dignity and standing may be affected thereby. . . . In any event, it seems to me that the legislature has authority to limit the power of courts in regard to matters of contempt to the punishment only of such acts as are specified in the sections of the Code above set out. . . . The publication, according to the general definition given by Blackstone and by some of the more modern law writers upon the subject, would probably constitute contempt; but, under the Code of this state, it does not; nor do I think it would according to the weight of decisions made under the Constitutions of the various states. If it had reflected upon the conduct of the court with reference to a pending suit, and tended in any manner to influence its decision therein, it would, unquestionably, have been a contempt; but it was not shown that any suit was then pending by which the rights of any litigant were, or could have been, affected by it." It will be observed the supreme court of Oregon, upon a statute identical with ours, holds that a publication tending to embarrass or influence the action of the court in a cause pending before it is contempt. All the cases cited by counsel for the defendants have thus been examined, and in them does not seem to be found any substantial support of the principle of constitutional construction invoked here by them.

2. The constitutional liberty of speech and the press and the guaranties against its abridgment are found in the laws of all the American states and the Federal Constitution, and undoubtedly primarily grew out of the censorship of articles intended for publication by public authority. Such a censorship was inconsistent with free institutions, and with that free discussion of all public officers and agents required for the intelligent exercise of the right of suffrage; and thus the common law of libel was almost universally revised by statute, so that the truth of the publication could be given in evidence as defense. The arbitrary rule existing in England before the American Revolution was thus abrogated in this country. Parliament had assumed an extensive power to punish for contempt, as had likewise the English courts of common law. Under the rule frequently enforced by the English courts of that period,

any criticism upon a judicial officer made at any time after the determination of the cause, of an offensive character, was deemed a contempt of court, and thus the rule was dangerous to public and individual liberty. This rule, however, has long since been abrogated in England, and the law of contempt there may be said to be now similar to that announced by the greater number of the American courts. Judge Cooley, on *Constitutional Limitations*, 5th ed. p. 521, says: "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or, to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply, not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards, we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted." And the same eminent jurist and commentator on constitutional law further says, at another place: "It is also been held in many cases that the publication of an article in a newspaper commenting on proceedings in court then pending and undetermined, or upon the court in its relation thereto, made at a time and under circumstances calculated to affect the course of justice in such proceedings, and obviously intended for that purpose, may be punished as a contempt, even though the court was not in session when the publication was made." And Mr. Bishop, a leading commentator on *American Criminal Law*, says: "By the commonly accepted doctrine, 'any publication, whether by parties or strangers, relating to a cause in court, tending to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice,—or reflecting on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel,—may be visited as a contempt.'" 2 Bishop, *New Crim. L.* § 259. The learned editor of *American Decisions*, Mr. Freeman, in notes upon the *Case of Sturoo* (N. H.) 97 Am. Dec. 630, states the rule from all the authorities: "It has long been settled, and is now generally acknowledged, that certain publications in newspapers may amount to contempts of court, and may be summarily punished as such. Publications pending a suit, reflecting upon the court, the jury, the parties, the officers of the court, or the attorneys, with reference to the suit, and having a tendency to influence the action of the tribunal before which the case is pending, is a contempt of that court, which may be summarily punished by attachment." 2 Story, *Const.* §§ 1774-1884; *Ex parte Bollman*, 4

Cranch, 75, 2 L. ed. 554; *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391; *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242; *Ex parte Bergman*, 3 Wyo. 395; *Savin, Petitioner*, 131 U.S. 287, 33 L. ed. 50. Rapalje, a careful authority on Contempt, says, § 56, p. 70, with reference to publications reflecting on the court or its proceedings: "Any publication, pending a suit, reflecting on the court, the parties to the suit, the witnesses, the jurors, or the counsel, is a contempt of court."

The common law was adopted at the organization of Washington territory by the first legislative assembly. The state legislature enacted (Laws 1891, p. 31): "The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state." The law of contempt as enacted by the legislature of this state, and hereinbefore set out, is declaratory of the common law of contempt, as construed by the great majority of the American courts. This was the view held by the supreme court of Oregon in *State v. Kaiser*, 20 Or. 50, 8 L. R. A. 584, in construing the same statute. Chief Justice Thayer, in that case, delivering the opinion of the court, said: "As I view the said sections of the Code, they are little more than declaratory of the law upon the subject of contempt as understood by a large proportion of the courts of the several states at the time of their adoption." And the various adjudications of the American courts referred to have all had in view similar constitutional guaranties of freedom of speech and press as found in our state Constitution. The publisher of the article may be responsible in a civil or criminal action for libel; but if the article is calculated to embarrass or influence a court or prevent a fair trial between suitors in court, either by disturbing the independent verdict of the jury or the independent and unbiased conclusion of the court, it is contempt; and a judge of the court cannot in any action of libel, however it may reflect upon him personally, recover damages for such contempt. It is not a personal wrong, and does not affect the judge personally; but it is such an offense, as has been observed, as alone affects the court and the administration of justice, and the common law and statute affirmatory thereof vest the punishment of such contempt in the court. The legislature of this state has specified punishment for contempts, and has adopted the common law relating to them. The right of suitors in courts, and of persons charged with offenses, to a fair trial, is guaranteed by our fundamental law. This is a sacred right, of very ancient origin. It was the cause, and is the only reason, for the existence of the judiciary as a co-ordinate department of the sovereignty of the state. It is this right of impartial trial which is violated by the publication and submission of an article to the court while a cause is pending and yet undetermined, tending to embarrass or influence the court in its final conclusion; and the individual liberty of the citizen is

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gone when his personal rights are endangered or lost by such extraneous influences. It is this protection of the rights of suitors in a judicial action which compels the courts to exercise their jurisdiction of contempt. It is sometimes a delicate power for the court to exercise. It will ordinarily much more readily exercise its power to punish such contempts when the offensive acts have been directed towards the improper control or influence of a jury or witness or some officer of the court, for the reason that, when such acts are directed towards a court, there is always something of the appearance of the personality of the court involved. As observed by the supreme court of Illinois in *People v. Wilson*, 64 Ill. 221, 16 Am. Rep. 528: "The respondents are correct in saying in their answers that they have a right to examine the proceedings of any and every department of the government. Far be it from us to deny that right. Such freedom of the press is indispensable to the preservation of the freedom of the people. But certainly neither these respondents nor any intelligent person connected with the press, and having a just idea of its responsibilities as well as its powers, will claim that it may seek to control the administration of justice, or influence the decision of pending causes. A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration; but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice. Even if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude. . . . It maybe said that, as long as the court was conscious it had not been frightened from its propriety by the article in question, the wiser course would have been to pass it by in silence. So far as we are personally concerned, we should have preferred to do so. . . . But a majority of the court were of opinion that this publication could not be disregarded without infidelity to our duty. By our relations to the bar, to the suitors in our court, to the entire judiciary of the state, and to the state itself, we felt constrained to call the persons responsible for this publication to account." See also *State, Haskell, v. Faulds*, 17 Mont. 140; *Re Hughes*, 8 N. M. 225; *People, Connor, v. Stapleton*, 18 Colo. 568, 23 L. R. A. 787; *Cooper v. People, Wyatt*, 13 Colo. 337, 6 L. R. A. 430; *Com. v. Dandridge*, 2 Va. Cas. 414; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257. The last case cited is an exhaustive and thorough compilation of the American authorities upon the subject of contempt. The judiciary of this state was created by, and its jurisdiction and the specifications of its judicial functions written in,

the Constitution. It receives its mandate from the sovereign people, and it is responsible to them for the faithful discharge of its trust. Its sole authority from them is to declare the law of the state, and by its process enforce that law; and it cannot make or revise any law. It can no more decline the exercise of rightful authority in the determination of a case presented to it than it can overstep its rightful authority in the assumption of arbitrary power. A timorous judiciary shrinking from a rightful declaration of the law is alike dangerous to civil rights and personal liberty with a corrupt and arbitrary one. As declared by the supreme court of Virginia in *Com. v. Dandridge*, 2 Va. Cas. 414, from the standpoint of able jurists: "They cannot but feel it a delicate and invidious task to define and decide upon the extent of their own powers, nor be ignorant that the judgment they are called upon to render may expose them, on the one hand, to the imputation of timidity and irresolution, or, on the other, to that of usurpation and tyranny. The verity of these suspicions would not be more unworthy of the judges than the fact of their shrinking from this question, because of the consequences in which themselves might be involved by it. . . . In this country, we know no privileges but such as exist for the public good. Many such privileges we have; from those which appertain to the legislature itself, even down to such as belong to the lowest executive officer. Those which surround the administration of justice belong to the same order. Courts, their officers and process, are shielded from invasion and insult, not from any imaginary sanctity in the institutions themselves, or the persons of those who compose them (as in the political and ecclesiastical establishments of another hemisphere), but solely for the purpose of giving them their due weight and authority, and to enable those who administer them to discharge their functions with impartiality, fidelity, and effect. This is the true test of every privilege not granted by statute, and is the spirit of everyone (not merely private) which is so secured."

The court in the case at bar has concluded that the publication made by the defendants, if published while the case of *Bardsley v. Sternberg* was pending here, under the facts above stated, is a contempt, under the laws of this state. In such conclusion it is not intended to intimate or suggest that any citizen of the state has not a legal right to comment upon, criticize, and freely, and without restriction from any lawful authority, discuss any cause determined by any of the courts of this state after the final disposition of such case; or that any restriction of fair and impartial reporting of cases pending in courts, unless forbidden by rule, is now imposed by our laws. The officers who compose the courts are selected by the people of the

state for the discharge of their duties. The freest discussion of individual merits, capacity, and character is necessary for an intelligent exercise of suffrage in the election of judges, as of all other officers of the state. An action has been deemed pending in this court until the remittitur issued; but counsel have argued that, although the statute does not determine when jurisdiction ends in this court, yet the court, having been authorized by statute to frame rules, has, by its rules, determined the question of the conclusion of the case, and refers to rule 13 (11 Wash. 718): "(1) Every petition for rehearing must be filed within thirty days after the opinion shall have been rendered, and no more than one petition for a rehearing of the same question shall be filed: provided, that the court may, in its discretion, allow any petition to be amended. The filing of a petition for rehearing shall suspend the decision of the court until a ruling thereon." Elliott, Appellate Procedure, says (§ 558): "A second petition from the same party will not be considered." And that has been the practice in this court. The first opinion in the cause was followed by a petition for rehearing on the part of the appellant. Leave to print and file additional briefs was granted by the court, and the case assigned regularly, and reargued orally in the court, and the opinion of the majority of the court then filed, reversing the judgment of the superior court. A petition was then filed by counsel for respondent, praying for an important modification of the opinion filed, and subsequently an opinion filed denying such modification. There can be no doubt of the jurisdiction of this court over the cause and the power to make any modification of its opinion, until the final judgment was rendered, and until the remittitur issued. Under the law, the courts in this state are always in session, in legal contemplation. "An action is 'pending' . . . until the judgment is fully certified." Anderson, Law Dict. verb. Pend. See *Ulshafer v. Stewart*, 71 Pa. 170; *Holland v. Fox*, 3 El. & Bl. 977; *Wegman v. Childs*, 41 N. Y. 159; Hayne, New Trial & Appeal, §§ 292, 293.

From an inspection of the article set out in the information, it can readily be perceived that, thrust into the court before its final deliberation and final expression in the cause of *Bardsley v. Sternberg*, it comes within all the authorities as tending to embarrass and disturb the conclusion of the tribunal in the determination of the cause pending before it.

In determining the punishment that the judgment of the court will affix to the contempt in this case, the court has taken into consideration that this is the first offense formally brought to its attention in the history of the state, and the maximum penalty affixed by the statute is reduced for that reason.

WEST VIRGINIA SUPREME COURT OF APPEALS.

John J. CARTER, *Plff. in Err.*,
v.
COUNTY COURT OF TYLER COUNTY.

(.....W. Va.....)

- *1. Where a party holds a lease upon land for oil and gas purposes, upon the usual terms and conditions, paying one eighth of the oil produced as royalty, the oil while it remains *in situ* must be regarded as realty, and as remaining the property of the lessor until brought to the surface.
2. The prospective production of oil from such well cannot be properly charged to the lessee, on the personal property books of the county.
3. Under chapter 29 of the Code, which provides for the assessment of taxes, the words, "personal property," as therein used, shall include all fixtures attached to the land, if not included in the valuation of such land entered in the proper land book.

(January 25, 1899.)

ERROR to the Circuit Court for Tyler County to review a judgment affirming a judgment of the County Court refusing to correct an alleged erroneous assessment for taxation against petitioner as the owner of certain oil wells. *Reversed in part.*

The facts are stated in the opinion.

Messrs. John H. McCoy and Robert McEldowney, for plaintiff in error:

All property is classed for taxation as real and personal property. Real property is taxed on the land books, but a chattel real is personal estate.

Under the statute the words "personal property" include all fixtures attached to land not included in the valuation of such land on the land books.

Code, chap. 29, § 40.

Is an oil well part of the chattel real, that is, the oil lease, or a part of the realty?

The basis of the entire assessment is the estimated production of the wells for the period of one year. This certainly is not an assessment of personal property, because the property was not then in the possession of anyone separate and independent of the land over it.

An assessor cannot estimate the value of an oil well at any average future production of such well, or make such average production the basis of any production assessment.

The wells are drilled under and by virtue of mining leases, and they cannot be taxed as land separately from the surface of the land.

Only when the oil under the surface is owned by another person than the surface owner can it be taxed separately, for it is then freehold estate.

United States Coal, I. & Mfg. Co. v. Ran-

*Headnotes by ENGLISH, J.

dolph County Ct. 38 W. Va. 201; State v. South Penn. Oil Co. 42 W. Va. 102.

There is no authority under the laws of this state to tax leasehold interests for oil and gas purposes.

Mr. Anthony Smith for defendant in error.

English, J., delivered the opinion of the court:

John J. Carter gave notice to the prosecuting attorney of Tyler county that on the 17th day of January, 1894, he would apply to the county court of said county, under §§ 94, 95, 96, and 97 of chapter 29 of the Code, for relief against an erroneous assessment on the personal property books of said county, in which he claimed he was erroneously charged with oil at a valuation of \$81,000,—90 oil wells,—and that he would introduce evidence of such charge, and move said county court to enter an order granting him relief from such erroneous assessment. In pursuance of said notice, Carter presented his petition, specifying therein that he was assessed with 90 oil wells, at a valuation of \$81,000, and with \$72,000, as the value of capital used by him in his business, also setting forth therein the reasons why said assessments were illegal and erroneous. The prosecuting attorney objected to the consideration of so much of the applicant's petition as referred to the assessment of the item of \$72,000, value of machinery, etc., as stated in column 18 of said personal property book, upon the ground that no notice of the intention of said petitioner had been given him that he would ask the court to be released from the payment of taxes upon said item, to which objection the petitioner replied generally. As to this objection the record shows that due notice of the said petition was given the prosecuting attorney, and that he appeared on behalf of the state, and objected to the consideration by the court of so much of the applicant's petition as refers to the assessment of the item of \$72,000, value of machinery, etc., as stated in column 18, and agreed that the said petition be continued until the 6th of February, 1894, which had the effect of waiving the notice required by statute, the only object of which being that the interests of the state, county, and district might be represented in the matter. Now it appears that the sum of \$72,000 was assessed upon the engines, boilers, rigs, and appurtenances, such as casing, etc., belonging to the 90 wells in the proceedings mentioned. This machinery and the appliances connected therewith were in use by the petitioner, Carter, in the production of oil from the wells he had leased; and, in determining whether this property was properly placed upon the personal property books of said county, we must determine whether

NOTE.—The above case decides the somewhat peculiar question of the right to tax the interest of a lessee in an oil lease as personal property.

That oil is to be regarded as real estate 43 L. R. A.

while in the land, see *note* to *Williamson v. Jones* (W. Va.) 25 L. R. A. 222; *Marshall v. Mellon* (Pa.) 35 L. R. A. 816; and *Williamson v. Jones* (W. Va.) 38 L. R. A. 694.

they should be classed as realty or personalty.

I am not unaware of the diversity of opinion expressed by text writers, and the almost irreconcilable conflict of decisions by the different courts, which would necessarily be encountered in investigating the question as to when machinery and appliances used by tenants in the prosecution of the various industries and mining operations upon the lands of their lessors are to be considered personalty, and when realty; but we are spared the labor and perplexity attending this investigation by our statute, which provides (Code, chap. 29, § 46) that the "words 'personal property' as used in this chapter shall include all fixtures attached to land, if not included in the valuation of such land entered in the proper land book." The machinery and appliances about these 90 oil wells appear to have been assessed to the petitioner, Carter, at \$800 each, or \$72,000 for the whole. The question as to whether such assessment was excessive or not was a question of fact, which was passed upon by the county court after hearing testimony in behalf of both parties, the court finding that the property was not excessively valued for taxation. The evidence was certified, and the case appealed to the circuit court, and the finding of the county court was affirmed by that court; and, while there may be some slight conflict in the testimony as to the valuation of the property, this court would not undertake to disturb the finding of the county court, or to place a proper assessment of valuation on said property, especially when the county court was confronted with the witnesses and heard their testimony. The ruling of the county court and circuit court, therefore, as to this property being properly placed on the personal property book, and the assessment not being excessive as applied to the machinery and appliances, is affirmed.

The prosecuting attorney also objected to the consideration of an affidavit presented with said petition, made by one S. G. Pyle, who stated therein that in the spring of 1893 he assisted J. K. Smith, assessor of Tyler county, West Virginia, in making out said assessor's books, and extending levy on same, and that it was his information that the several oil wells in and about the town of Sistersville, consisting of rig, engine, boiler, casing, and other appurtenances thereto for the purpose of operating for oil, were assessed at \$800 each respectively, for the purpose of taxation, and, in addition thereto, the several wells south of said town of Sistersville, Tyler county, aforesaid, within said county, producing petroleum oil, were assessed upon a production of 10 barrels per day from the 1st of April, 1893, for the said assessment year, beginning at 10 barrels on April 1, 1893, and running down to nothing on April 1, 1894, or an average of 10 barrels per day for six months, and fifteen days at an assessed value of 50 cents per barrel. The wells north of said town were assessed at a daily production of 15 barrels per day, on the same basis as the 10-barrel

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wells, at the same rate per barrel, and for the same length of time. Which objections of the prosecuting attorney were sustained, and thereupon the court proceeded to hear the evidence of said S. G. Pyle, which was reduced to writing, and signed by him, which fact makes it unnecessary for us to pass upon the propriety of the action of the court as to the exclusion of the affidavit of said Pyle.

The depositions of John Carter and other witnesses were taken in open court, and the petitioner, by his attorneys, moved the court to strike from said personal property book the entry of the assessments against Carter for the year 1893; which motion, being argued and considered by the court, was overruled, the court holding that said property was not excessively valued for taxation, and that it belongs on the property books. To this opinion of the court the petitioner, by his attorneys, excepted, and, on his motion, the court certified all the evidence taken in the case; and from these proceedings of said county court, on March 15, 1894, John J. Carter obtained an appeal to the circuit court of Tyler county. On the 15th of August, 1894, the appellant, John J. Carter, by his attorney, filed, with the papers of the cause, a copy of the entry of the personal property of said Carter on the property books of Tyler county for the year 1893; also forty-four copies of certain oil leases, deeds, and assignments of oil leases, which are copied in the record. On the 17th of December, 1894, said appeal was heard by the circuit court, and the judgment of the county court appealed from was affirmed, and from this judgment of the circuit court this writ of error was obtained.

Did the circuit court err in affirming the judgment of the county court, and thereby holding that the property of the plaintiff in error, consisting of the prospective product of 90 oil wells for the year 1893, was not excessively valued for taxation, and that the same was properly placed on the personal property books? In determining this question, it is proper that we should first consider the nature and character of the contract between the lessor and the lessee. One of the main features of the contract embodied in these leases is that the lessee shall put down the wells and bring the oil to the surface; and, when thus produced, the landlord is to have one eighth as rent or royalty, and the lessee seven eighths. While the oil remains in the cavities of the rocks *in situ*, this court has held, in *Wilson v. Youst*, 43 W. Va. 826, 39 L. R. A. 292, and *Williamson v. Jones*, 39 W. Va. 231, 25 L. R. A. 222, that it is part of the realty. The lessee may drill the well to the sand or rock in which the oil is contained; but the oil does not change its character from realty to personalty, or any portion of its ownership, until it is brought to the surface, and then seven eighths of it become the property of the lessee.

Can we say that the commissioner of the revenue of Tyler county, on the 1st of April, 1893, in assessing the prospective product of

the 90 wells as the property of the lessee, John J. Carter, was right? While he was the owner of the wells that had been drilled in the rocks, they were merely the conduit through which the oil might be drawn to the surface, and he had the privilege of pumping it to the surface; but the oil in its place among the rocks was not his, and might possibly never be. See *State v. South Penn Oil Co.* 42 W. Va. 102. Again, it is part of the history of this oil territory that what might be a productive, playing well this week or this month may not be worth pumping next week or next month. Aside from all this, said Carter, on the 1st of April, 1893, was the owner of no oil, the product of the year commencing on that day; and he could not be assessed on property that he had not yet acquired, and it would be too speculative to assess him on property that he might thereafter acquire by future exertion. Now, the duty which the assessor attempted to perform in this instance is required by § 54 of chapter 29 of the Code, which provides that "it shall be the duty of the assessor, as soon as possible after the 1st day of April in each year, to ascertain all personal property subject to taxation in his district with the value thereof and the name of the person to whom the same ought to be assessed, and to make proper entry thereof in his personal property book." If the assessor, in pursuance of this statute, had gone to John J. Carter on the 1st day of April, 1893, and required him to return a list of his personal property under oath, he surely could not have returned one gallon of oil as the prospective product of said 90 wells for the year commencing April 1, 1893, and ending April 1, 1894, for the plain reason that no portion of the oil underlying his leases, while it remained beneath the surface, was his property. Section 40 of chapter 29 of the Code provides that "as to real property the person who by himself or his tenant has the freehold in his possession, whether in fee or for life, shall be deemed the owner for the purpose of taxation." See also, opinion of Holt, J., in *State v. South Penn Oil Co.* 42 W. Va. 102, and *United States Coal, I. & Mfg. Co. v. Randolph County Ct.* 38 W. Va. 201 (Syl. point 2). We are not, however, required to pass on the question as to what party should be assessed with the oil *in situ* in this case, but do hold that it is not assessable as personalty. I therefore hold that the assessor or Tyler county improperly placed upon the personal property books of said county, as the property of said John J. Carter, 90 oil wells, valued for the year commencing April 1, 1893, at \$87,750, and that the county court erroneously held that said property belongs on the personal property books. I am further of opinion that the circuit court erred in affirming the judgment of said county court.

The judgment complained of is therefore reversed so far as it holds that said Carter was properly assessed with the item of \$87,750 as the prospective product of said 90 wells as personal property.
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STATE of West Virginia
v.

George W. SPONAUGLE *et al.*,

CONDON-LANE BOOM & LUMBER COMPANY, *Appt.*

(.....W. Va.....)

- *1. That clause of § 6, art. 13, of the state Constitution, forfeiting land for the failure of the owner to enter it for taxation, is not in violation of that clause of the 14th Amendment to the Federal Constitution restraining states from depriving any person of life, liberty, or property without due process of law.
2. The 14th Amendment to the Federal Constitution does not itself define "due process of law." What was such before its adoption continues such. It does not prohibit a state from future, new legislation, action, or proceedings necessary, in its judgment, in the administration of its government, so it bear alike on all similarly circumstanced, and be not unusual, oppressive, or arbitrary action, assailing the essential rights of the person.
3. Due process of law does not always require judicial hearing. It does in matters of purely judicial nature, but not in matters of taxation or matters purely administrative.
4. It is with the Supreme Court of the United States to determine finally whether legislation or action under state authority is due process of law.
5. What is due process of law?
6. Laches will not bar a landowner from assailing a tax sale of his land, when there is no actual possession under the tax title.
7. Laches is not imputable to the state. Statutes of limitation now run against the state.
8. A sale of land for taxes is without warranty by the state, and it is not prevented thereby from setting up its right under forfeiture for omission to enter the land for taxes either before or after the tax sale.
9. If a sale for taxes is made, and the tax purchaser pays taxes thereafter, the receipt of such taxes will not operate, on the theory of estoppel *in pais* by conduct, to prevent the state from setting up against the tax purchaser a title to land, by forfeiture, for failure of the former owner to enter it for taxation subsequent to or before the tax sale. If the tax title be valid, it would prevent such forfeiture for taxes after the tax sale from its own force, not on the theory of estoppel.
10. A sale of land for taxes, valid to pass title of the owner, will prevent its forfeiture for failure to enter it for taxes in the name of the former owner for years subsequent to the tax sale.

*Headnotes by BRANNON, P.

NOTE.—For the general subject of due process of law in tax or assessment matters, see *Kunts v. Sumption* (Ind.) 2 L. R. A. 655, and *note*; also *Scott v. Toledo* (C. C. N. D. Ohio) 1 L. R. A. 688; *Spear v. Athens* (Ga.) 9 L. R. A. 402; and *Violett v. Alexandria* (Va.) 31 L. R. A. 383.

11. An omission, in a list of sales of land for taxes, to state the estate of the owner, will not annul the tax deed.

(November 30, 1898.)

APPEAL by intervening defendant from a decree of the Circuit Court for Randolph County in favor of plaintiff in an action brought to enforce a tax title to certain real estate. *Reversed.*

The facts are stated in the opinion.

Mr. Frank Woods for appellant.

Mr. C. H. Scott, for the State:

If the tax deed is invalid, it was so from its inception, conveyed no title from the owner to the grantee thereunder, and could have proved no impediment to the forfeiture of the owner's title for nonentry for taxation in his name.

If void the deed may be so declared and set aside in this suit both as against the state and petitioner, Cunningham, so far as the same may be in conflict with the owner's right to redeem the owner's title, or remain a cloud upon it after redemption.

Acts 1873, chap. 24, § 18.

By the express provisions of the law the court is confined in the adjudication of conflicting claims to the time when the title was forfeited which the state is proceeding to sell.

The claimants under the tax deed are not within the purview of art. 13, § 3; of the Constitution, and therefore in no manner acquired the title of the state.

The owner while the title is reposing in the state, under no rule of law or equity, can be required to the exercise of diligence on his part for the protection and preservation of his title, because it has by the operation of law passed from him and he is left without a remedy to either compel its restoration or to antagonize conflicting claims of an individual character in the court of the land. He must await the bringing of a suit by the state; he cannot take the initiative.

There were irregularities in the sale of delinquent lands in pursuance of which the deed in question was made.

The power to sell lands for the nonpayment of taxes is not a common-law power, but arises strictly from statute, and therefore exists only when the conditions of the statute are fulfilled.

1 Blackwell, Tax Titles, §§ 126, 127, note.

The omission in the report of the sheriff of lands sold for nonpayment of taxes to state what estate was held therein as required by § 12, chap. 31, of the Code, vitiates a sale under the said chapter.

Jones v. Dils, 18 W. Va. 764; *Barton v. Gilchrist*, 19 W. Va. 230; *Wakeman v. Thompson*, 32 W. Va. Appx. 1.

The failure of the report of the sheriff to show in whose name the land in controversy was taxed was not a mere irregularity.

Dequasie v. Harris, 16 W. Va. 345.

The oath of the sheriff, appended to his list of sales returned to the recorder, is informal, ambiguous, and therefore invalid.

The titles of Jacob Sponaugle and the tax-deed claimant, under the law, being in open

hostility to each other since the creation of the deed, the payment of taxes by the holder under the tax deed in his name did not inure to the benefit of the original owner to protect his title from forfeiture, and cannot estop the state in this proceeding.

Simpson v. Edmiston, 23 W. Va. 684; *McClure v. Maitland*, 24 W. Va. 581.

Messrs. Flick & Westenhaver, for E. A. Cunningham:

The validity of facts touching the assessment, levy, and delinquency of taxes is determined under the law in force at the time they were made, and the tax sale is also governed by the law in force when it was made.

1 Blackwell, Tax Titles, § 127; *Citizens' Gaslight Co. v. State*, Alden, 44 N. J. L. 648; *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240; *United States v. Heth*, 3 Cranch, 399, 2 L. ed. 479; *Cheo Heong v. United States*, 112 U. S. 559, 28 L. ed. 778; *Cook v. Lasher*, 42 U. S. App. 42, 73 Fed. Rep. 701, 19 C. C. A. 654; *Sommers v. Ward*, 41 W. Va. 76.

The tax sale and tax deed to P. J. C. Cresap, under which the Condon-Lane Boom & Lumber Company holds, is absolutely void.

Jones v. Dils, 18 W. Va. 759; *Barton v. Gilchrist*, 19 W. Va. 231; *Dequasie v. Harris*, 16 W. Va. 345; *Baxter v. Wade*, 39 W. Va. 281; *Jackson v. Kittle*, 34 W. Va. 207; *Hays v. Heatherly*, 36 W. Va. 613.

The affidavit to the list of sales is not in conformity to the present law, in that the sheriff does not say that he has not heretofore been interested in this sale. Such an omission renders void a sale and tax deed even after it is made and recorded.

Phillips v. Mincar, 40 W. Va. 58.

If the void character of the sale appears from the deed itself, a suit to set aside the sale cannot be maintained.

Cooley, Taxn. p. 543.

Section 6 of article 13 of the Constitution providing for a forfeiture for nonassessment is valid.

Wild v. Serpell, 10 Gratt. 408; *Staats v. Board*, 10 Gratt. 400; *Levasser v. Washburn*, 11 Gratt. 572; *Usher v. Pride*, 15 Gratt. 190; *Yokum v. Fickey*, 37 W. Va. 762; *Smith v. Tharp*, 17 W. Va. 231.

The doctrine of laches has no application.

Sommers v. Ward, 41 W. Va. 76; *Cook v. Lasher*, 42 U. S. App. 42, 73 Fed. Rep. 701, 19 C. C. A. 654.

Laches is never a bar to the rights of the state.

United States v. Kirkpatrick, 9 Wheat. 720, 6 L. ed. 199; *United States v. Van Zandt*, 11 Wheat. 184, 6 L. ed. 448; *Hunter v. United States*, 5 Pet. 173, 8 L. ed. 86; *People v. Brown*, 67 Ill. 435.

Assessment of land for taxes, and a sale and conveyance of it as delinquent, do not estop the state to assert a right to the land even previously existing.

Michigan v. Jackson, L. & S. E. Co. 37 U. S. App. 220, 69 Fed. Rep. 116, 16 C. C. A. 357, note; *Reid v. State*, *Thompson*, 74 Ind. 252; *State v. Portsmouth Sac. Bank*, 106 Ind. 435; *Crane v. Reeder*, 25 Mich. 303; *Howard County v. Bullis*, 49 Iowa, 519; *Farish v. Coon*, 40 Cal. 33.

Mr. Cunningham is the only person entitled to redeem that part of the land.

Wiant v. Hays, 38 W. Va. 681, 23 L. R. A. 52; *Waggoner v. Wolf*, 28 W. Va. 820; *Yokum v. Fickey*, 37 W. Va. 702; *McClure v. Maitland*, 24 W. Va. 561.

On rehearing.

The validity of this tax sale and deed must be controlled by the laws in force when the sale and deed were made, and that was the Code of 1868.

1 Blackwell, Tax Titles, § 127; *Citizens' Gaslight Co. v. State, Alden*, 44 N. J. L. 648; *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240; *Sommers v. Ward*, 41 W. Va. 76; *Cook v. Lasher*, 42 U. S. App. 42, 73 Fed. Rep. 701, 19 C. C. A. 654; *Jones v. Dils*, 18 W. Va. 759; *Barton v. Gilchrist*, 19 W. Va. 223; *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Allen v. Smith*, 1 Leigh, 231.

The act of 1882 does not purport to be retrospective; and acts are never construed retrospectively, unless the act itself expressly so declares.

Walker v. Burgess, 44 W. Va. 399; *Casto v. Greer*, 44 W. Va. 332; *Lawyer v. Barker* (W. Va.) 31 S. E. 964; *State v. Mines*, 38 W. Va. 125; *United States v. Heth*, 3 Cranch, 399, 2 L. ed. 479; *Chew Heong v. United States*, 112 U. S. 559, 28 L. ed. 778.

Where the validity of a deed depends upon acts in *pais*, a party claiming under it is bound to prove affirmatively the performance of those acts; in the case of a naked power not coupled with an interest the law requires that every prerequisite to the exercise of such power shall exist and precede it; the claimant under a tax sale, being one made to enforce a forfeiture, must show that the law has been rigidly and exactly complied with; the recitals in the deed of the officer making the sale for taxes are not even *prima facie* evidence of the regularity of his proceedings, or of the existence of the facts thus recited, but proof *aliunde* must be furnished.

Yancey v. Hopkins, 1 Munf. 419; *Christy v. Minor*, 4 Munf. 431; *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Allen v. Smith*, 1 Leigh, 231; *Stead v. Course*, 4 Cranch, 403, 2 L. ed. 660; *Parker v. Rule*, 9 Cranch, 64, 3 L. ed. 658; *Williams v. Peyton*, 4 Wheat. 77, 4 L. ed. 518; *Ronkendorff v. Taylor*, 4 Pet. 349, 7 L. ed. 882.

These sales and purchases founded on forfeitures deserve no indulgence from the court.

Wilson v. Doe, Bell, 7 Leigh, 22; *Rockhold v. Barnes*, 3 Rand. (Va.) 473; *Flanagan v. Grimmer*, 10 Gratt. 421; *Forquerran v. Donnelly*, 7 W. Va. 114; *Shutte v. Thompson*, 15 Wall. 151, 21 L. ed. 123; *Burlew v. Quarrier*, 16 W. Va. 108; *Dequasie v. Harris*, 16 W. Va. 345; *Jones v. Dils*, 18 W. Va. 759; *Orr v. Wiley*, 19 W. Va. 150; *Barton v. Gilchrist*, 19 W. Va. 223; *McCallister v. Cottrille*, 24 W. Va. 173; *Williamson v. Russell*, 18 W. Va. 612; *Sommers v. Ward*, 41 W. Va. 76.

The omission of a positive requirement of the statute, such as exists in this case, vitiates the sale and deed.

Dequasie v. Harris, 16 W. Va. 345; *Jones* 43 L. R. A.

v. Dils, 18 W. Va. 759; *Orr v. Wiley*, 19 W. Va. 150; *Simpson v. Edmiston*, 23 W. Va. 675; *McCallister v. Cottrille*, 24 W. Va. 173; *Barton v. Gilchrist*, 19 W. Va. 223; *Burlew v. Quarrier*, 16 W. Va. 104.

Brannon, P., delivered the opinion of the court:

This was a chancery suit in the circuit court of Randolph county, in the name of the state, against Sponaule and others, to sell a tract of 1,200 acres of land patented by Virginia to Jacob Sponaule in 1852, the state claiming title by reason of forfeiture of the land to the state because of its omission from the tax books for five successive years subsequent to 1872. Jacob Sponaule conveyed the land to his children, and they were made defendants, as also E. A. Cunningham, who claimed interests in the land by purchase from some of them. The answer of the children of Sponaule admitted the forfeiture and the liability to sale. Cunningham filed a petition setting up his interest, admitting the forfeiture, and asking to be allowed to redeem the land. This petition and cross bill attacked and sought to set aside a tax deed, and title under it, of the Condon-Lane Boom & Lumber Company. This company was made a defendant to the state's bill, as claiming title to the land; alleging that its claim was void and ineffectual against the state's title under the forfeiture, and that the land was liable to sale under its title by forfeiture. The Condon-Lane Boom & Lumber Company demurred to the bill, and answered, setting up that its claim to the land was based on a sale to Cresap in 1871 for taxes for years prior thereto delinquent in the name of Jacob Sponaule, which tax title had come by conveyance to it, and that this sale rendered the land not taxable after 1871 to Sponaule, but to Cresap and those claiming under him, and that taxes had been charged and paid in their names for the years in which it was omitted in Sponaule's name, and for which the forfeiture was alleged to exist. It claimed that, if the land was forfeited, it took the benefit of the forfeited title, by reason of alleged possession under the color and claim of title arising from said tax deed and payment of taxes. The decree held the land forfeited, that the lumber company had no title, that its tax title was void, and allowed Cunningham and others claiming interests under Sponaule to redeem from the forfeiture. The lumber company appeals.

The demurrer and answer of the lumber company challenge the title of the state as conferred by forfeiture, and assert that it has no title under which to attack said company, and is not entitled to sell the land; and this on the theory that § 6, art. 13, of the West Virginia Constitution is repugnant to article 14 of Amendments to the Constitution of the United States, in its provision, "nor shall any state deprive any person of life, liberty, or property without due process of law." If this is so, the state has no title to the land. No definite definition—none but the most general—has been or

can be given of "due process of law." The best the courts can do is to say, in each case as it arises, whether a given act or proceeding in the particular matter is due process of law. It depends how the question arises; that is, upon the matter or transaction involved. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616. What would be due process if done under the police power or taxing power might not be, in many cases would not be, if not done under either of those powers. 3 Am. & Eng. Enc. Law, p. 714. A horse may be lawfully seized and sold, without judge or jury, for taxes; but an individual or officer or court or legislature, without trial, generally could not do this. In *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, Justice Bradley said: "In judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but, if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'" The clause of the state Constitution in question makes it the duty of the landowner to put his land on the tax books, and provides that "when for any five successive years after the year 1869, the owner of any tract of land containing 1000 acres or more shall not have been charged on such books with state tax on said land, then, by operation hereof, the land shall be forfeited and the title thereto vest in the state." This provision is to be justified under the taxing power of the state, and I think, also under the police power. Its purpose was to raise revenue from vast quantities of land which had been persistently and intentionally omitted by the owners for years from the tax books, and escaped all taxation. What is the limit of the taxing power, except by express provision of the Constitution? It scarcely has any. It is so nearly unlimited from sheer necessity. It involves the operations, nay, the very existence, of government. It is an original power, inherent in every government. Cooley, Const. Lim. p. 581, does not lay it down too broadly as follows: "The power to impose taxes is one so unlimited in force, and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession; and it imposes a burden, which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading and at no point does the power of the government affect more constantly and intimately all the relations of life than through the exactions made under it." "The basis of all taxation is political necessity; without taxes, there can be no revenue; without revenue there can be

no regular government. . . . All subjects over which the sovereign power of a state extends are objects of taxation." Burroughs, *Taxn.* pp. 1, 3. Justice Field said in *State Tax on Foreign-held Bonds*, 15 Wall. 319, 21 L. ed. 186: "It may touch property in every shape, in its natural condition, in its manufactured form, and in its varied transmutations. . . . It may touch business in the almost infinite forms in which it is conducted,—in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited." In *Witherspoon v. Dunoon*, 4 Wall. 210, 18 L. ed. 339, the Supreme Court held that the "states, as a general rule, have the right of determining the manner of levying and collecting taxes on private property."

The states succeeded to the power of taxation of the English Parliament after the Revolution, and possess it yet; and we must find in the Federal Constitution a plain—very plain—prohibition, to restrain this sovereign power, indispensable for our most numerous wants. From quotations above, we see that the state may fasten taxes upon any subject of property. Virginia, very long before the 14th Amendment, adopted and steadily pursued the policy of holding the land itself liable for its taxes. By frequent acts she directed sale of land for taxes charged and unpaid. Acts of November, 1781; May, 1782; October, 1782; January 7, 1788; December 27, 1790; December 20, 1791; December 13, 1792; February 9, 1814; March 10, 1832; February 27, 1835, 1843; Code 1849; Act 1850. By some acts she forfeited lands charged with taxes not paid. Acts of December 27, 1790; December 13, 1792; January 29, 1803; January 20, 1807; April 1, 1831. Acts were passed forfeiting lands not entered on the tax books. Acts of February 5, 1810, and February 27, 1835. Many acts were passed from time to time, through years, giving further time to enter the lands omitted from the tax books, and to redeem lands charged with unpaid taxes. I refer to these many acts running through so many years to show a persistent, fixed policy of Virginia, in one mode and another, to hold the land itself amenable to taxes. West Virginia, since its birth, before the Fourteenth Amendment, pursued this policy, by adopting the Virginia law for the sale of lands for taxes, and after that amendment by her provision for such sale in her Code of 1868, and by the act of March 4, 1869, forfeiting land for nonentry for taxation. Thus, in Virginia and West Virginia these several modes of holding lands liable had become the "law of the land," as to this matter, before the amendment. Did that amendment come to overthrow this long-established law of the land? That amendment came to defend existing personal rights against unusual, arbitrary action of the states; to save the citizen his essential rights against the exercise of unwonted, unusual, arbitrary, and unequal power by the state, operating to prejudice him in such essential rights;

but I cannot think that it came to defend him against the exercise by the state of its usual powers, under its fixed policy, in a governmental function so indispensable as the collection of revenue. The authorities show that the state can select its subjects of taxation, and select its mode of enforcement and collection. It can distrain personal property and sell it. It can sell realty. Why may it not impose forfeiture, if it deem that a necessary means of getting its revenue? This was "due process of law" of Virginia in this matter of taxation, and complies with the demand of the 14th Amendment. A drastic remedy it is, and yet can you say that it is not warranted by that immense power of taxation? Coke's old definition of "law of the land" says that it is that which is according to the "old law of the land." 2 Inst. 50. "Tax laws are laws of the land, and tax proceedings conducted under equal and uniform laws are due process of law." *Bardwell v. Collins*, 20 Am. St. Rep. 554, note (44 Minn. 97, 9 L. R. A. 152). "Proceedings by which taxes have been assessed, levied, and collected from the citizen have always been regarded as administrative, and not judicial in their character, and to constitute due process of law, within the meaning of the Constitution. Such proceedings have, from necessity, been exercised by governments, during all times, by summary methods of procedure. . . . These methods were in exercise and existence long before the adoption of the Constitution, and have never been supposed to be affected thereby." Ruger, Ch. J., in *McMahon v. Palmer*, 102 N. Y. 176, 55 Am. Rep. 796. When that case went to the United States Supreme Court, the opinion said (what is apt in this case): "That law had been in existence over forty years at the time of this proceeding. We do not regard the collection in this way, founded on necessity, and so long recognized by the state of New York as to be justifiably resorted to under the circumstances detailed in the act, and operating alike on all persons and property similarly situated, as within the inhibitions of the 14th Amendment." *Palmer v. McMahon*, 133 U. S. 680, 33 L. ed. 772. A tax act is "law of the land, not merely in so far as it lays down a general rule to be observed, but in all the proceedings and all the process which it points out or provides for in order to give the rule full operation. . . . The mode of levying . . . is completely and exclusively within the legislative power." Cooley, Taxn. p. 39. The author there shows that the Constitution does not restrict this power under the due process clause. *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658. The landlord under his distress, the sheriff under his tax bill, seize and sell personally without judicial process, and the sheriff sells land for taxes without it. Why, since the amendment, is this not unconstitutional? Because those procedures have been settled procedures under the law of the land, and are due process of law in those particular matters. So is the remedy of forfeiture adopted by the state to collect its land tax. 43 L. R. A.

Is such procedure necessary? That is for the state to say. But forfeiture divests the owner of title. So does the distress for rent or taxes divest the owner of personal property. It is only another mode of divestiture. It is claimed that there must be a judicial inquiry to find the fact working forfeiture and declaring the forfeiture. This is so in judicial proceedings, but not in administrative, summary proceedings. This cannot be demanded, unless you say that it is demanded by this particular mode of enforcing taxes,—forfeiture,—and not to sales or other modes; for it is undeniable that no law demands it in proceedings to collect taxes. Mr. Justice Harlan sustains this position in *King v. Mullins*, 171 U. S. 404, 43 L. ed. 214, and cites *Den, Murray, v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372, in which was considered the case where a distress warrant was issued, under an act of Congress, by the solicitor of the treasury against a defaulting collector of customs, and the question was whether it was due process of law; and the court said: "Tested by the common statute and law of England prior to the emigration of our ancestors, and by the laws of many of the states at the time of the adoption of this amendment [fifth], the proceeding authorized by the act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due the government from a collector of customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings; for, though 'due process of law' generally implies and includes *actor, reus, iudex*, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceedings [citing cases], yet this is not universally true. There may be, and we have seen that there are, cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial. . . . The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution. . . . It may be added that probably there are few governments which do or can permit their claims for public taxes either on the citizen or the officer employed for their collection or disbursement to become subjects of judicial controversy according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to." Justice Harlan cites *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, holding that: "Process of taxation does not

require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law, when it is executed according to customary forms and established usage." And Justice Harlan added: "This must be so, else the existence of government might be put in peril by the delays attendant upon formal judicial proceedings for the collection of taxes." So great is this taxing power, that in *Com. v. Byrne*, 20 Gratt. 165, a man was arrested and imprisoned under a mere license certificate issued by a commissioner of the revenue, on failure to pay the license tax as a distiller. He was held to be lawfully imprisoned, and it was said that his imprisonment did not violate the requirement of due process of law. Judge Moncure sustained it in an able opinion. The case of *Wulzen v. San Francisco City & County Supers*, 101 Cal. 15, aptly expresses the idea I would impress as to the effect of legislation of Virginia through so many years in the matter of land taxation. That case says: Taxes are not, as a general rule, collected by judicial proceedings; and the procedure resorted to for their imposition and collection may properly be regarded as due process of law, if it conforms to customary usages. The great opinion of Justice Curtis in *Den, Murray, v. Hoboken Land & Improv. Co.* 18 How. 279, 15 L. ed. 375, strongly sustains this view: "This legislative construction of the Constitution, commencing so early in the government, when the first occasion for this manner of proceeding arose, continued throughout its existence, and, repeatedly acted on by the judiciary and executive, is entitled to no inconsiderable weight upon the question whether the proceeding adopted by it was 'due process of law.'" In *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, it is held: "This court has heretofore decided that due process of law does not in all cases require a resort to a court of justice to assert the rights of the public against the individual, or to impose burdens upon his property for the public use. *Den, Murray, v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372, and *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335." See *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. ed. 414. If there is anything settled by the United States Supreme Court, it is that the requirement of due process of law does not always require judicial procedure. Justice Miller said, in *Davidson v. New Orleans*, that the 5th Amendment, restraining the exercise of power under Federal authority without due process of law, though nearly a century old, had scarcely ever been invoked, whereas, the 14th Amendment, adopted in 1866, had filled the docket of the Supreme Court with cases asking that court to overthrow judgments and legislation of states; that there is abundance of evidence that there exists a "strange misconception of the scope of this provision as found in the 14th Amendment;" and that it seems every unsuccessful litigant in a state court has made it the means of bringing his ab-

stract opinions of the justice of state decisions and the merits of state legislation before the Supreme Court. He ridiculed such a construction of the amendment. So have other justices of that court. What is this amendment? Except as a limitation upon state action, it is not new, as respects the demand of "due process of law." That is simply a new application. It only demands of the states what Magna Charta demanded from the time our English ancestors set foot on American soil, and was in the Constitutions of all the states. For the first time that amendment gave the national government a veto power upon state action upon the citizen not consonant with due process of law, but it gave no new definition of the term "due process of law," or its equivalent, "law of the land." Before it, the state had final right to say whether the act was due process; after it, the supreme court has. That is all. The definition is the same. *Eames v. Savage*, 77 Me. 212, 52 Am. Rep. 757. The amendment does not say what due process is. If it had long been established as such in the state, it is due process under the amendment. *Slaughter-House Cases*, 16 Wall. 78, 21 L. ed. 409. Legislation, action, and procedure long used by the state as usual or customary in the given case were not at once swept away because not attended with judicial inquiry. Nor does this amendment cramp the states so as to forbid the adoption of new legislation, action, or procedure which they may deem necessary, wise, and politic in the administration of government. In either case, so it do not assail the essential right of the citizen under the principles of common equal justice, it is valid under this amendment. *Hurtado v. California*, 110 U. S. 537, 29 L. ed. 239, where a new Constitution dispensed with an indictment for murder, and allowed its trial on information. The opinion says: "However exceptional it [proceeding] may be, as tested by definitions and principles of ordinary procedure, nevertheless this, in substance, has been immemorially the actual law of the land, and therefore is due process of law." This constitutional law, state and Federal, I repeat, is old, and its definition the same at all times; and yet legislation and procedure under state authority, and Federal too, levying taxes, seizing and selling personal and real estate for taxes, personal for rent, seizing and confiscating personalty under the police power, and even selling a defaulting customs receiver's property under a warrant issued by an executive officer for a debt arising from his collection of tariff, and imprisonment under a mere license tax bill, have not been discovered to be without due process. The 14th Amendment is highly salutary as a part of the Federal Constitution, properly construed and applied, as it has been thus far by that eminent tribunal, the Supreme Court of the United States; but it cannot be given the scope often claimed for it, practically denying to the states powers highly essential in the administration of the government. This construction has been several times repudiated by the Supreme Court.

How has this question of forfeiture for taxes been regarded by the Virginia courts? They have been unable to discover that it is not due process of law. It is true that in *Kinney v. Beverley*, 2 Hen. & M. 318, where the act of 1790 which provided that lands on which taxes should not be paid for three years "shall be lost, forfeited, and vested in the commonwealth." Judge Tucker did express the opinion that, without office found, the state could not take title, as it was only by record the King could take title; not definitely saying the act was invalid. Judge Roane (than whom no one has a higher name among Virginia jurists) said, "I cannot for a moment doubt the power of the legislature to pass the law in question;" and he said that no inquest of office was necessary, and that such a construction would defeat collection of revenue. Judge Green's opinion does not mention the subject. So this case cannot be quoted (as it is sometimes) as against the validity of forfeiture acts, as it was decided on other points. In *Wild v. Scorpell*, 10 Gratt. 405, it was held that "the statutes of Virginia forfeiting land to the commonwealth for the failure of the owners to enter them upon the commissioner's books and pay the taxes due thereon are constitutional," and that title vested under them in the state without judgment, decree, or inquest of office. Several cases uphold the statute. *Staats v. Board*, 10 Gratt. 400; *Levasser v. Washburn*, 11 Gratt. 572; *Smith v. Chapman*, 10 Gratt. 445; *Hale v. Branscum*, 10 Gratt. 418; *Usher v. Pride*, 15 Gratt. 190. These cases are unsatisfactory, in not discussing the matter; but they do decide it, though in but one was it expressly mentioned. In *Armstrong v. Morrill*, 14 Wall. 120, 20 L. ed. 765, the constitutional point was not discussed, but the Virginia forfeiture acts were recognized as operative. So it was settled in Virginia. In West Virginia, our courts, in many decisions, have recognized the Virginia decisions as binding authority. *Twiggs v. Chevallie*, 4 W. Va. 463; *Smith v. Sharp*, 17 W. Va. 221. And this state adopted this forfeiture policy as her only weapon, as shown by long experience, to compel payment of taxes on vast areas of wild, unseated land, by an act in 1869, and in 1872 by the Constitution containing the forfeiture clause in question, and by several later acts to enforce it. Several decisions recognize the validity of these laws, not by express decisions on the constitutional point, as our courts and bar treated the Virginia cases, and our cases in 4 and 17 W. Va. as settling it under the doctrine of *stare decisis*, but by recognizing these laws as binding law. *McClure v. Maitland*, 24 W. Va. 561; *Auril v. Lager*, 24 W. Va. 583; *McClure v. Mauperture*, 29 W. Va. 633; *Tebbetts v. Charleston*, 33 W. Va. 705; *Hays v. Camden*, 38 W. Va. 109; *Wiant v. Hays*, 38 W. Va. 68, 23 L. R. A. 82; *Holly River Coal Co. v. Howell*, 36 W. Va. 489. Judge Goff, in the United States circuit court for West Virginia, held this clause of our Constitution valid in *King v. Mullins*. Titles to thousands upon thousands of acres, the homes of

our people, rest upon this long line of enactment and decision; and for this court to reverse so many cases, and annul the constitutional provision, would shake those titles, and turn thousands from their homes. The rule of *stare decisis* binds us to adhere to them, especially as titles to property rest on those decisions. Not to do so would spread disaster, the extent of which would be appalling. And this is a consideration justly and deeply entering into the question, as the United States Supreme Court said, speaking through Justice Harlan, in *King v. Mullins*, decided in 1898. That court unanimously affirmed Judge Goff's decision holding valid the clause of the Constitution in question. I shall not say that the opinion holds that clause, taken alone, valid, though it virtually does so. The opinion holds that as, in connection with the state Constitution, the statutes to sell land as forfeited give the owner a hearing, "there is no ground for him to complain that his property has been taken without due process of law." In *Read v. Dingess*, 8 U. S. App. 526, 60 Fed. Rep. 21, 8 C. C. A. 389, it was held by the circuit court of appeals (fourth circuit) that the clause of the West Virginia Constitution was not against the 14th Amendment. Judge Goff holds the same in *Van Gunden v. Virginia Coal & I. Co.* 8 U. S. App. 229, 52 Fed. Rep. 851, 3 C. C. A. 294. Another element in this question is not to be overlooked. The state Constitution (§ 4, art. 13) provides for a sale of the forfeited land, and, by § 5, gives the owner the excess of its proceeds after paying taxes. This relieves the forfeiture clause from the charge of being arbitrary spoliation and confiscation of property; gives to it the hue of being only a step necessary to collect the taxes, showing that after that the state regards his right by holding in trust for him. I therefore reach the conclusion that this forfeiture clause is not repugnant to the 14th Amendment.

A point that is pressed against the state Constitution is that it, *ipso facto*, divests the owner of his title, and vests it in the state, without judicial inquiry,—without what is called "office found" at common law. If this is so, it is within the power of the state, under the tax power, to do so. "A legislative act directing the possession and appropriation of the land is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government. It may be after a judicial investigation, or by taking possession directly under the authority of the government, without these preliminary proceedings." *United States v. Repentigny*, 5 Wall. 267, 268, 18 L. ed. 645, 646. Can it, indeed, be said that the owner has irretrievably lost his land, without a hearing to contest the forfeiture? It is beyond doubt that the state has power to forfeit land, and vest title in itself, for delinquency or nonentry for taxes, if it leave a door open for hearing. If the Constitution had declared a forfeiture, and expressly given a hearing, no question could arise. It has declared a forfeiture, and has not shut

the door against the owner to contest it. It simply declares that, if a fact exist, forfeiture ensues, as a legal consequence. It only says that a certain offense shall involve a certain penalty. All criminal or penal laws do this, but final conviction and penalty are to come after trial. It seems to me, we cannot consider the clause invalid, when privilege of contestation is not denied. Under the law before the act of 1882, a decree in a proceeding to sell land as forfeited was, while conclusive upon strangers, only prima facie evidence of forfeiture as against the owner. *Holly River Coal Co. v. Howell*, 36 W. Va. 489; *Strader v. Goff*, 6 W. Va. 257. In fact, *Twiggs v. Chevallie*, 4 W. Va. 463, holds the jurisdiction as limited and special, and based only on forfeiture; and, if the land was not in fact forfeited, the decree would be void. It is perhaps immaterial whether prima facie or not, it surely not being conclusive. So, when the owner's title is in any way assailed, he can deny the forfeiture. It may be questioned whether the party claiming under the forfeiture must not show it as an original proposition, as the owner was no party. The forfeiting provision does not give the state or a third party taking title possession, but merely vests title, if forfeited. When sued by them, he can contest the forfeiture. If the state could, she has not enacted that he shall be ousted by force; and, therefore, if she or her purchaser desire possession, they must sue, and he can defend, or he can sue the state's tenant or purchaser in possession. This seems from authority, adequate hearing, if any were required. How is the party prejudiced? Where the door was open to a taxpayer to enjoin, though a bond were necessary, it did not render an act giving a right to levy a tax not due process. *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335. Justice Miller said that as he could sue to recover back the money, as an illegal tax, that would free it from the charge of being without due process. In *Newark & S. O. Horse Car R. Co. v. Hunt*, 50 N. J. L. 308, there were statutes providing for the destruction of diseased horses; and the court held that these acts are within the police power of the state, and, further: "They are not within the prohibition of the 14th Amendment to the Federal Constitution, because, although they authorize the abatement of such nuisances in advance of a judicial adjudication of the fact of nuisance, yet they do not make the determination of the officials as to that fact conclusive, and only permit their acts in abating the nuisance to be justified by proof of the actual existence of such nuisance." Plaintiff, however, contends that the determination of the officials that the prescribed disease exists is to be made without notice to the property owners and without affording them an opportunity to be heard, and on this ground claims that these acts are obnoxious to the constitutional provision invoked. If the legislature by these acts has made the determination of these officials as to the existence of the common nuisance a conclusive adjudication upon the rights of the property

owner, then it is perfectly obvious that this legislation cannot be supported. It has been settled in this state that it is not within the power of legislation to impart to a determination of this sort a conclusive character, as against the property owner, and legislation intending that result was held to be futile. *Button v. Camden*, 39 N. J. L. 122. An examination of the acts in question clearly shows that there was no intent in the legislative mind to make the conclusions of the officials decisive of the right of the property owner as to the existence of that condition of things which these acts declared would constitute in these cases a common nuisance, and would justify its abatement by the destruction of the animals diseased. The right of the property owner is not thereby barred, on the one hand, nor is the justification of the officials made effective, on the other hand, by reason of their adjudication, but by reason of the fact that the common nuisance declared by the acts existed, and so existed as to permit the officials to exercise the power of abatement. What the acts authorize is the abatement of an actual nuisance. They afford no protection to any invasion of the rights of property in any other case." The court says, in conclusion: "But if the property owner is not deprived of a right to contest the existence of such conditions, and to obtain redress, as for a trespass, if they are not shown to have existed, such legislative acts would not infringe any constitutional provision." So, in *Lauston v. Steele*, 152 U. S. 142, 38 L. ed. 390, where a statute authorized officers to destroy nets used in violation of the statute, without any judicial proceedings to ascertain the fact of such violation, the court says: "Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain. If not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute." In *Read v. Dingess*, 8 U. S. App. 526, 60 Fed. Rep. 27, 8 C. C. A. 395, the court said: "But if the act, in every case of its commission, involves the forfeiture, nothing remains but to ascertain the fact of its commission, and that can as well be done in a subsequent suit involving the title as by a proceeding brought by the state to enforce the forfeiture." Also, *New York Health Dept. v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710; and *People, ex rel. Copcutt, v. Yonkers Bd. of Health*, 140 N. Y. 23, 23 L. R. A. 481; *Branson v. Gee*, 25 Or. 402, 24 L. R. A. 355. Statutes of limitation take land from one man and vest it in another. Why does no one claim that they violate the Constitution? I suppose, because they allow him a hearing afterwards. And the acts of 1872-73, providing for selling the land, gave him right to redeem his land, and so to pay what he justly owed the state. But since the act of 1882, and especially under that of 1893, for the sale of forfeited

land, the proceeding is a regular chancery suit,—must be such,—and the owner must be a party, and is entitled to make full defense against the forfeiture; and surely this is a full hearing before decree, and satisfies the demand for “due process of law.” Under the latter statute (Acts 1893, chap. 24), this proceeding was had. It was held by the United States Supreme Court in *King v. Mullins* (1898) that, taking the clause of the Constitution and statute of 1882 in connection, the demand of the 14th Amendment was satisfied, and the proceeding valid. That is our adequate defense for this decision. I am myself now free from doubt as to the correctness of our holding on this question.

It is claimed that the state is prevented by laches from assailing the tax deed under the tax sale to Cresap in 1871, twenty-two years having passed from the tax deed to the date of this suit. No possession was ever held under the tax deed. The express statute of limitations did not, therefore, bar the state, and laches does not. Where the adverse claimant of land has no actual possession, the other claimant need not sue. Until then it is mere cloud, never maturing as title. *Battin v. Woods*, 27 W. Va. 58. Delay in bringing suit to annul a tax deed is not imputable as laches to the owner. *United States v. Insley*, 130 U. S. 263, 32 L. ed. 968; *Cook v. Lasher*, 42 U. S. App. 42, 73 Fed. Rep. 701, 19 C. C. A. 654; *Sommers v. Ward*, 41 W. Va. 80. The statute of limitations does not, at common law, apply to the state. *Hall v. Webb*, 21 W. Va. 322. Our statute now applies limitations to the state, like individuals. Code 1891, chap. 35, § 20. But no statute applies laches to the state, and the common-law rule says that it does not apply to it. 12 Am. & Eng. Enc. Law, 1st ed. p. 56.

It is further raised, as a question, that as the state sold to Cresap for taxes, and collected taxes for years from those claiming under that title, it is estopped by this conduct from claiming forfeiture for nonentry in Sponaugle's name in after years,—the very years which the owners under the tax sale were paying taxes for. Now, as the state at a tax sale sells, not her own land, but only such title as the taxed party has, and by her sale and deed makes no warranty whatever, this estoppel cannot be maintained. And the forfeiture alleged accrued several years after this sale. *Camden v. Alkire*, 24 W. Va. 681. An estoppel *in pais* against the state from asserting a title to escheated land is not made out by assessment of taxes, and sale and conveyance for taxes, and the assessment and collection of taxes from the purchaser at the tax sale. An auditor's deed made in consummation of a sale for taxes cannot bar the assertion by the state of any claim or right to the land. The court says the deed is without warranty, and has not, as an estoppel, the force which a quitclaim deed has to pass title in the grantor at its date. *Reid v. State, Thompson*, 74 Ind. 252, 260. If it is contended that payment by the tax purchasers of taxes

under their title paid the taxes on the land, so that it may be said to the state, “You have already gotten tax once on the land, and you cannot enforce a forfeiture for taxes for the same years in the name of the original owner, whose title we got by the tax sale, we having acquired the land under his title,” the response is: “That is so if your tax deed is valid, because there was no title left in the original owner to be taxed, but not so if your tax title is void. If valid, you defeat forfeiture by superiority of your tax title, not by estoppel from conduct, as it does not bind the state in this matter; but, if void, the title was left in the old owner, to be forfeited for taxes, and the state is not bound merely by conduct.” And, as to double taxation, *Simpson v. Edmiston*, 23 W. Va. 680, holds that there is no privity between former owner and tax purchaser, their claims being hostile, and payment by the tax purchaser does not discharge the state demand for taxes against the former owner, if lawful demand she had against his title as yet good; and, if he wants to deny the validity of the tax sale and keep his title good, he must still keep the land on in his name, just as in case of two stranger titles.

I come, in conclusion, to a very important question: Is the tax sale to Cresap efficient to pass title? It is alleged to be void because of irregularity in the sale lists apparent. If void, leaving title in Sponaugle, the state acquired title by forfeiture; but, if valid, it divested Sponaugle of title, leaving no land in him to be entered for taxes, and the state had no longer claims to taxes from him. We have concluded that this sale is valid.

One ground of irregularity is that in the column of the list of sales in which the estate (whether in fee or life) of the owner is to be stated there is a blank as to this tract, and so the estate is not given. Code 1868, chap. 31, § 25, it will be seen, makes sedulous efforts to cure numerous specific irregularities, so as to confer upon purchasers, effectually, such title as the party charged with taxes owned, and also inserts the general provision that the purchaser shall take such title “notwithstanding any irregularity in the proceedings under which the said grantee claims title, unless such irregularity appear on the face of the proceedings of record in the office of the recorder, and be such as materially to prejudice the rights of the owner.” First, I must say that there would be a presumption of a fee. A deed, under our statute, confers a fee, unless a less estate is stated; and even in a tax-sale list it would be a fair presumption. But who would be misled by it? And, so the owner be not misled, it is no matter as to others. How could he be misled? He would surely know his own estate without information from this list. How does this unsubstantial slip prejudice him? And the same section says, “And no irregularity as to the manner of laying off any real estate so sold, or in the plat, description, or report of the surveyor or other person, shall, after the deed is made, invalidate the sale or deed.” This is a strong curative provision. The sale list is a “re-

port" under it, and the "estate" pertains to the "description." I know the books tell us that, in times past, tax sales were looked upon as forfeitures, and the proceedings must be rigidly regular; but these doctrines do not apply in full force in West Virginia, and ought not to, because our tax-sale system is, and long has been, so large and important to the state in collecting delinquent revenue, and to many buying at her sales, and so important, too, in quieting title and settling the waste places, that the legislature has, time and time again, in many acts, beginning as far back as 1814, sought to mitigate and qualify, if not abolish, the strict rule before prevailing, by which almost any irregularity would annul a tax sale, and provided that only substantial errors, capable of working harm to the former owner, and misleading him, and thus prevent timely redemption, should avoid such sale. Each one of these acts has gone further than its predecessor in this effort of liberalization. I referred to this legislation in *Winning v. Eakin*, 44 W. Va. 19, as did Judge Holt in *Hays v. Heatherly*, 36 W. Va. 613. Under this rigid procedure, tax sales were a myth, conferring on the purchaser a certain lawsuit, and as certain defeat; and the state had to buy in, herself, vast quantities of lands, which lay in her hands many years, wild and unsettled, paying no taxes, and she lost her revenue. Even to-day, with all this legislation, everybody regards tax titles as dangerous shadows. The state offers the land. The purchaser pays the taxes, and gets nothing. The innocent purchaser is disregarded, and the delinquent landowner is favored. True, it seems hard that he should lose his estate for a pittance, but whose fault is it? Is it the fault of the innocent purchaser? This state of things is not the fault of the legislature. It has seen the bigness of the evil, and often tried to remedy it. Anyone looking at its acts must see that it seeks to favor the innocent purchaser, to the extent of saving him from unsubstantial errors by ministerial officers, and technical defects not injuring the owner. The courts should be alert to execute a plain purpose of the lawmakers, and not to nullify it. And especially is it more difficult, after the sale has been executed by a deed, to annul the sale. The Code itself so intends, as above seen. *Winning v. Eakin*, 44 W. Va. 19. I am aware that in *Jones v. Dils*, 18 W. Va. 764, the opinion is expressed that the defect in question vitiates a sale; but the syllabus does not announce this as law. And in *Barton v. Gilchrist*, 19 W. Va. 230, the same opinion is expressed, though it may be called *obiter*, and is not in the syllabus.

Another irregularity is, as alleged, that the sale list does not show in whose name the land was charged for three out of four years for which it was sold. It shows as to one year confessedly, and a sale for that year's taxes would be as efficacious as four. It would call the owner to redeem. But,

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looking beyond the printed to the manuscript record, we find it plain that it was sold for four years.

Another defect alleged is that in the affidavit to the sale list the sheriff swears that the list contains a true account of all the real estate sold by "me during the present year for nonpayment of taxes due thereon for the years 1863, 1864, 1865, 1866, 1867, 1868, 1869, and 1870 (or some of those years)." The words in parentheses are claimed to overthrow the whole sale proceeding of Randolph county. This affidavit is intended, perhaps, more to enforce a true account of the treasury than for the benefit of the landowner. By the unnecessary use of the words of surplusage, the sheriff meant to say some tracts were sold for some years, some for others, but the years named covered the years for which this land was sold. Now, it is the list that tells for what particular years the owner's land is sold, and Sponaugle had but to look at it; and that told him his land was sold for 1865, 1866, 1867, and 1868. He should look at the list for this specification, rather than the affidavit, but read both together. The affidavit does not say or intimate that the land was sold for any other than those four years. The years it specified include all the years for which any tract was sold, and the list tells for what particular years a particular tract was sold.

Twenty-two years after the tax deed to Cresap, it is attacked. During all this long period Cresap and his alienees have paid taxes. This, as said above, would not help them, if their tax title were bad; but it is a satisfaction to a court, in rendering judgment, to feel sure that substantial justice is done. The present owners, on the faith of this title, spent a large sum in acquiring the land. The former owners failed to pay taxes charged, let the land be sold, failed to redeem, and afterwards failed to charge their land. They have always been in default, likely because the land was of little value; but now that this land is in reach of the West Virginia Central Railroad, which has pierced that mountain wilderness, and given it life and enterprise, and made land very valuable, and the lumber company is carrying on large operations in cutting timber on its land very near the line of this tract, the Sponaugle claimants come in to redeem. The suit is in the name of the state, it is true; but the contest is between them and the company, as the state has only a tax claim, and the Sponaugle representatives applied to redeem, and filed a cross bill to assail the tax title, and thus it is their suit. On which side is the equity, if we go by it? But the law decided it for the Condon-Lane Boom & Lumber Company.

Therefore we reverse the decree, and dismiss the state's bill and the Cunningham cross bill.

Rehearing denied.

OHIO SUPREME COURT.

John N. GLIDDEN, *Plff. in Err.*,
v.
MECHANICS' NATIONAL BANK of Pitts-
burg.

(58 Ohio St. 588.)

- *1. In the absence of express agreement authorizing it, a pledgee cannot become the purchaser of the pledged property at his own sale; and if the property be bid off by him the contract of pledge is not thereby terminated, nor the relations of the parties changed, unless the pledgeor elects to treat the transaction as a valid sale, in which event the pledgee will be accountable for the net proceeds of the sale.
2. If the pledgeor do not so elect, the pledgee, while he retains the possession and control of the property with the ability to perform his part of the contract by restoring the property to the pledgeor, cannot be held for its conversion, without demand for its
- *Headnotes by the COURT.

NOTE.—*Pledgee's conversion of pledged property by invalid sale.*

- I. What sales amount to a conversion.
 - a. Generally.
 - b. With reference to corporate stock.
- II. Power to sell.
 - a. General statement as to.
 - b. Implied authority.
 1. The general rule.
 2. As to goods and chattels.
 3. As to stocks and bonds.
 4. As to choses in action.
 - c. Special authority.
 1. Express contracts generally.
 2. Blank transfers of stock.
- III. Demand and notice.
 - a. Necessity of, generally.
 - b. When term for redemption or payment is indefinite.
 - c. Where stock is held as security for advances.
 - d. Under special contract.
 - e. Sufficiency of.
- IV. Conduct of sale.
- V. Purchase by pledgee.
- VI. Tender of payment to render conversion actionable.
- VII. Ratification of sale and waiver of conversion.
- VIII. Remedies.
 - a. By direct action.
 - b. By way of defense.
 - c. As against purchasers from the pledgee.
- IX. Measure of damages.
 - a. As to personal property generally.
 - b. As to stocks, bonds, and other securities.
 - c. As to notes and other choses in action.
- I. What sales amount to a conversion.
 - a. Generally.

The rule is general, if not universal, that the wrongful or unauthorized disposition of pledged property by the pledgee so as to put it out of his power to redeliver it on payment of the debt which it secures, is a conversion for which an action will lie.

This is held directly in *Luckey v. Gannon*, 37 How. Pr. 134; *Klipatrick v. Dean*, 19 N. Y. S. R. 837; *Douglas v. Carpenter*, 17 App. Div. 329; 43 L. R. A.

- return accompanied with an offer by the pledgeor to perform his part of the agreement.
3. When however, the pledgee puts it out of his power to perform his part of the agreement, by an unauthorized disposition of the property, he will be liable for its conversion without demand and offer of performance by the pledgeor; and when he has so disposed of a part of the property, he may be held for the conversion of all of it, as of the time of such disposition.

(December 17, 1895.)

ERROR to the Circuit Court for Cuyahoga County to review a judgment reversing a judgment of the Court of Common Pleas allowing defendant's claim to the value of certain collateral security in a suit upon a promissory note. *Affirmed.*

Statement by **Williams, J.:**

The original action was brought by the Mechanics' National Bank against John N.

Hope v. Lawrence, 1 Hun. 317; *Rosenzweig v. Frazer*, 82 Ind. 342; *Alinsworth v. Bowen*, 9 Wis. 349, and it is asserted inferentially in nearly, if not all, the cases in this note.

And any disposition by a stock broker of the securities carried for a customer which would deprive him of his right to immediate possession thereof upon payment or tender of the indebtedness on account of such securities would amount to a conversion thereof. *Douglas v. Carpenter*, 17 App. Div. 329.

While a pledgee of personal property or security cannot transfer them to the injury of his pledgeor, or devert the pledgeor of title to them until he has demanded payment and given the pledgeor opportunity to redeem, and then only at public sale and on notice, however, a transfer of his interest in the pledge is no fraud on the pledgeor, as he will occupy precisely the same position as before, and can redeem the pledge on the same terms. *Drake v. Cloonan*, 99 Mich. 121.

A pledgee of property to secure a debt acquires a special property therein which he may transfer to another without impairing the original lien, or give the pledgeor a right to reclaim it on any other or better terms than he could have done before the transfer. *Belden v. Perkins*, 78 Ill. 449; *Whitney v. Peay*, 24 Ark. 22; *Williams v. Ashe*, 111 Cal. 180; *Bullard v. Billings*, 2 Vt. 809; *Talty v. Freedman's Sav. & T. Co.* 93 U. S. 321, 23 L. ed. 886; *Mores v. Conham, Owen*, 128.

And a pawnee may assign his interest in the pledge, and the assignee will take it under all the responsibilities of the original pawnee, or he may transfer conditionally his interest by way of pawn to another, and his assignee may withhold the pledge until the debt of the original owner is discharged. *National Bank v. Winston*, 5 Baxt. 685.

So long as nothing is done by a pledgee to deprive the pledgeor of the right to redeem upon repayment of the amount due on the principal debt, the pledgeor is not injured, and the pledgee may assign the principal debt with the pledge to a third person who will hold it subject to payment and redemption the same as the pledgee, without being guilty of a conversion of the pledge. *Chapman v. Brooks*, 31 N. Y. 75.

The rule that a pledgeor is at liberty to treat an unauthorized sale of the pledged property as

Glidden, in the court of common pleas of Cuyahoga county, on the following written obligation:

\$14,524.

Pittsburg, Pa., August 30, 1883.

On October 10th after date I promise to pay to the order of the Mechanics' National Bank fourteen thousand, five hundred and twenty-four dollars, without defalcation, for value received, having pledged to the said bank as collateral security, in lieu of an indorser, nine warrants of the Union Storage Company numbers as follows: 655, 656, 657, 658, 659, 660, 661, 662, 663, for 108 (2268) tons each, 972 tons in all, with authority to sell the same on the nonperformance of this promise, in such manner as they in their discretion may think proper, without notice, either at public or private sale, and to apply the proceeds hereon holding me responsible for the deficiency, if any should occur.

(Signed) John N. Glidden.

The petition alleges that the iron referred to in the above obligation "remained in

a conversion by the pledgee applies only to such a sale as puts the property beyond the control of the pledgee. *GLIDDEN v. MECHANICS' NAT. BANK.*

So, in *Mores v. Conham, Owen, 123, cited in Jarvis v. Rogers, 15 Mass. 408*, it was held that a pawnee has an interest and special property in a pawn which he may assign, but that if the assignee detains it after payment by the owner he is liable to an action of detinue.

And in *Balley v. Colby, 34 N. H. 29, 66 Am. Dec. 752*, in which the cause of action arose from a conditional sale, title to pass upon payment, it was held that while a sale of the property bailed by a pledgee or bailee puts an end to the bailment, his transfer of his interest only—that is, of the property subject to the rights of the general owner—will convey that interest, and the purchaser will hold the property in the same manner as the seller did.

A pawnee may deliver the goods pawned to a stranger without consideration, or he may sell or assign all his interest absolutely, or he may assign it conditionally by way of pawn, without in either case destroying the original lien or giving the owner a right to reclaim the property on any other or better terms than he could have done before such delivery or assignment. *Jarvis v. Rogers, 15 Mass. 389; Ratcliffe v. Davis, cited in Jarvis v. Rogers, 15 Mass. 408.*

And the severance of the security from the debt, and the assignment of a pledge without the debt secured by it, are not unlawful where the assignee takes but the nominal interest for the purpose of bringing an action, and the substantial interest remains in the pledgee. *Easton v. Hodges, 18 Fed. Rep. 677.*

Nor is a transfer of stock by a pledgee into other hands for the purpose of avoiding liability as a stockholder, taking the certificates back with a power of attorney to transfer them at his will, a transfer which will amount to a conversion of the stock pledged. *Heath v. Griswold, 5 Fed. Rep. 573, 18 Blatchf. 555.*

And transfers of mining stock, made by a pledgee thereof in good faith, for the purpose of relieving himself from supposed damage to his credit by reason of holding so much of that particular stock, does not amount in law to a conversion where there was no contract of sale, and no money or other consideration was paid 43 L. R. A.

storage at the price agreed upon by said Glidden, with the Union Storage Company, under the said warrants described in said instrument until February 7, 1887, when the said plaintiff sold 15 tons of said iron at \$20 a ton, \$300; and on August 20, 1888, it sold 524 tons at \$16 per ton, on paper running four months without interest, \$8,398.97; and on September 11, 1888, it sold 108 tons at \$16 per ton on time at four months without interest, \$1,728; and on September 20, 1888, it sold 324 tons at \$16 per ton on four months paper without interest, \$5,184. All said iron was sold by said plaintiff in the exercise of the power given by said instrument of writing, and amounted to the sum of \$15,610.97. The plaintiff further says that to reduce said time sales to cash required the payment of \$306.21, leaving the balance that it received on the sale of said iron \$15,304.76, less charges which the plaintiff alleges that it paid as follows:

Storage to the Union Storage Company under and by virtue of the terms of said warrants, which the defendant agreed to pay to

or agreed to be paid, and he took back from the transferees blank assignments thereof, and all the stock remained within his control ready for delivery to the pledgee on payment of his indebtedness. *Day v. Holmes, 103 Mass. 306.*

So, where shares of stock are pledged to secure the payment of notes, and it is afterwards discovered that some of them had been fraudulently overissued by officers of the company, and the company under a decree of the court substituted genuine shares for spurious ones, which were delivered to the pledgee, the substitution is not such a change of the subject-matter of the pledge as will affect its identity, or the power of sale given in the pledge. *Jeanes's Appeal, 116 Pa. 573.*

And where stock in a mining corporation is pledged as collateral security for a loan, and the company afterwards reduces its capital under legislative authority and proportionately reduces the nominal value of the shares of its capital stock, the surrender by the pledgee of the original certificate of stock and the acceptance by him of a new certificate for the same number of shares, are not a wrongful conversion of the pledge where he took no part in the reorganization. *Donnell v. Wyckoff, 49 N. J. L. 48.*

So, where partners, after pledging goods to a creditor as collateral security for a debt, conveyed all their partnership property, including the goods pledged, to another in consideration of his agreement to obtain a discharge of their debts, appointing him their attorney to receive all debts, goods, and effects owing or belonging to the partnership, the delivery by the pledgee to such purchaser, upon payment of a portion of the debt, of a part of the property pledged, supposed to be proportionate with the payment, is not such a dealing with or disposition of his collateral security as will make him liable to account to the pledgeors for any greater sum than that received by him. *Faulkner v. Hill, 104 Mass. 188.*

And a pledgee of collateral securities may exchange them for other securities without the consent of the pledgeors where there is no restriction in the contract under which the pledge is given, and the fact that a note and other securities which had been delivered as collateral security for a loan had been exchanged for

said Storage Company at the time that he placed said iron in their storage:
 From March 9, 1883, to Sept. 20,
 1888, 5 yrs., 6 mos. and 10 dys. \$3,223 80
 Freight on iron from Newcastle to
 Pittsburg, where said iron was
 sold, at 70c. a ton - - - 677 64
 Commission paid to auctioneer for
 selling iron at 25c. per ton, - 243 00

Total charges - - - - \$4,144 44
 —Which being taken from \$15,304.76, leaves
 \$11,160.32, which the plaintiff realized upon
 the sale of said iron, and no more.

The plaintiff further says that the freight paid by it on said iron from Newcastle to Pittsburg where the same was sold, was but the ordinary and reasonable freight over the line of railroad between said places; and the commission for selling the iron was the ordinary and customary price for the sale of the same.

The plaintiff says that after deducting said amounts so received by it on the sale of said iron, to wit, \$11,160.32, as of the date of the last sale, to wit, September 20, 1888,

from the amount due on said note, there is due the plaintiff the sum of \$7,708.73 thereon, with interest from said 20th day of September, 1888, no part of which has been paid.

Wherefore the plaintiff prays judgment against the said defendant in the said sum of \$7,708.73, with interest thereon from the 20th day of September, 1888.

The answer, after admitting the execution of the written instrument sued on, and the corporate character of the plaintiff, and denying the other allegations of the petition, avers, by way of counterclaim, that "at the maturity of said note this defendant was so embarrassed that he could not and did not therefore pay the same; and that thereafter on or about the 5th day of November, 1883, the said plaintiff proceeded to advertise and sell at public auction the said iron at Pittsburg, though the iron itself was all still at Newcastle, about 50 miles away. And at said auction sale said plaintiff bid in all the iron named in said nine receipts, and all the iron covered thereby; and proceeded from that time forward to claim it and to manage

other securities which had been found to be worthless is not a defense in an action on the note unless it appears that proper care and diligence had not been used, and that there had been a loss to the owners of the collateral because thereof. *Girard F. & M. Ins. Co. v. Marr*, 46 Pa. 504.

And a payee of a note, who takes other notes as collateral security for the payment thereof, is not liable in trover for the conversion of the collateral, where he transfers them with the principal note to an indorsee thereof, and the indorsee converts them to his own use. *Goss v. Emerson*, 28 N. H. 42.

But while a pledgee may, when not restrained by statute or agreement, sell and transfer his debt against the pledgeor, and transfer other collateral held by him to secure its payment to the assignee, he must act fairly, and in doing so must not prejudice the rights of the pledgeor or impair his right to redeem upon payment of the original debt. *E. F. Hallack Lumber & Mfg. Co. v. Gray*, 19 Colo. 149.

And where one puts notes in the hands of another as collateral security for a specified purpose, and suit is brought thereon in the name of another, thus putting it beyond the power of the bailee to return the notes when the purposes for which they are pledged are satisfied, he is justly charged with their conversion. *St. John v. O'Connel*, 7 Port. (Ala.) 466.

A sale by a pledgee of bonds held as collateral security on the same day he receives them in pledge is clearly a tortious conversion of the securities. *Butts v. Burnett*, 6 Abb. Pr. N. S. 302.

b. With reference to corporate stock.

The rights of a pledgeor of stock are satisfied, and there is no conversion of his stock by the pledgee, where the stock in question was not defined and designated so as to be distinguished from other stock of the same corporation, and the pledgee had always in his possession and name, and under his control, shares to the amount of that pledged during the whole time of the credit given, and was ready, able, and willing at all times to account to the pledgeor for that number of shares and the dividends arising thereon whenever he entitled himself to such an account by payment. *Nourse v. Prime*, 43 L. R. A.

4 Johns. Ch. 490, 8 Am. Dec. 606, 7 Johns. Ch. 69, 11 Am. Dec. 403.

A pledgee of stock performs his duty, and is not liable as for a conversion, though he may have sold stock of the same kind as that pledged and cannot tell whether the stock so sold was the identical stock delivered to him as collateral security or not, where the shares of the stock in question do not appear to have been in any way distinguished or distinguishable from any other similar number of shares of the same stock. *Berlin v. Eddy*, 33 Mo. 426; *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102.

Where pledgees of stock procure a transfer of it to themselves on the books of the company, it becomes impossible to distinguish between those shares and others held by them, and it is of no consequence, therefore, that in selling stock they dispose of those particular shares, where at all times they have on hand an amount equal to or in excess of the shares received from the pledgee, and are constantly prepared to keep their contract with him. *Hubbell v. Drexel*, 11 Fed. Rep. 115.

And a sale by a pledgee of the same kind of stock is a sale of his own stock and not that of the pledgeor, where he was at all times able, ready, and willing to respond to the pledgeor in case he should come and demand his stock, whether the same identical shares were kept or not; and in such case it is not material whether the facts are imparted to the pledgeor or not. *Hayward v. Rogers*, 62 Cal. 372.

Thus, a pledgee of mining stock upon a redemption of the pledge is not obliged to return to the pledgeor the identical certificates pledged, but may return corresponding certificates, and the fact that the pledgee sells the particular certificates pledged does not render him liable as for a conversion, where he retains and restores similar certificates, and remains at all times ready to do so. *Thompson v. Toland*, 48 Cal. 99.

And a broker who agrees to hold stock of a customer as security for money advanced is not liable to the customer for the money which the latter had invested in such stock, because his share had not been kept separate from the mass of the broker's stock, where one share was precisely equal in value to every other share, and

and control it as its own, and did then and there convert it to its own use; and has ever since until the time of filing said amended petition, controlled and claimed as its own, said iron, by virtue of said public sale of November 5, 1883.

"And this defendant says that at the time when said plaintiff so converted said iron to its own use, the same was of the value of \$17 per ton, and of the total value of \$18,360 for which sum plaintiff then and there became and was liable to account to this defendant. And that when sufficient is applied therefrom to pay the amount then due on said note, there remains the sum of \$3,780.33 for which said plaintiff is indebted to this defendant with interest from November 5, 1883; for which amount this defendant asks judgment against said plaintiff."

The reply controverts, generally, the alle-

he always had the requisite quantity of shares on hand to meet the customer's demand. *Horton v. Morgan*, 19 N. Y. 170, 75 Am. Dec. 311.

It is not necessary that stock purchased by a broker for a customer upon a margin, and held by him as security for advances, should be kept separate and apart from other stock of the same company belonging to him, or that it should be so marked as to designate it as belonging to the customer, if he keeps and has in his possession either that or a like quantity of similar stock ready for delivery upon the customer paying what he owed upon it; that is all that is required. *Worthington v. Tormey*, 34 Md. 182.

And brokers in ordinary transactions between them and their principals perform their duty so long as they are prepared at all times to deliver on payment and demand certificates representing the requisite number of shares of the kind of stock purchased, though they may have disposed of the identical shares of stocks purchased on some one particular order. *Boylan v. Huguet*, 8 Nev. 345; *Glavin v. Howell*, 5 Pa. 41, 45 Am. Dec. 720; *Caswell v. Putnam*, 120 N. Y. 153; *Douglas v. Carpenter*, 17 App. Div. 329.

There is nothing in the relation of a customer and his broker who purchases stock for him on a margin for speculation which requires that certificates should be taken out identifying the stock, and retained by the broker subject to the customer's order upon his paying the balance; the brokers are only bound to have enough of the stock on hand to make an immediate transfer on demand, and in case of such a transaction the customer cannot repudiate the acts of the broker because no such certificates had been taken out, and recover the amount paid the broker. *Horton v. Morgan*, 6 Duer, 56.

And a pledgee of bank shares as security for the payment of his note under an agreement for the sale thereof in case of failure to pay, which note was not paid and the shares were sold at a reduced figure, cannot call on the pledgee to account for the sale of the like amount of shares at the highest price obtained during the year of the transaction, on the ground that the pledgee's stock had never been sold, where the shares in question were not defined and designated, so as to be distinguished from other bank shares in the same bank. *Nourse v. Prime*, 4 Johns. Ch. 490, 8 Am. Dec. 606, 7 Johns. Ch. 69, 11 Am. Dec. 403.

And a customer for whom a firm of brokers purchased stock and pledged or otherwise disposed of it, after which they became insolvent, may reach similar stock coming into the hands

of the counterclaim, but "admits and avers that just prior to November 5, 1883, the plaintiff advertised said iron for sale at public auction in newspapers of general circulation in the vicinity where said iron was located, that said sale would occur on the 5th day of November, 1883. The plaintiff further admits that on said day it offered for sale at public auction, the iron covered by said receipts or warrants, and there being no one present that was willing to give as much therefor as one W. H. Carr, who was president of the plaintiff, he, the said Carr, bid for portions of said iron about \$10 per ton, and for some other portions about \$11 per ton, he being the highest bidder for the same at said sale; and the said Carr purchased the same for said plaintiff in the belief that he had the right to do so; but the plaintiff says that the said defendant Glid-

of the receiver unencumbered by any pledge, and have a delivery of it by paying to the receiver the amount due to the firm with respect to it. *Chamberlain v. Greenleaf*, 4 Abb. N. C. 178.

So, it has been held that the sale of stocks pledged by a pledgee as a conversion presents a case for nominal damages only, where the pledgee was at all times ready and willing to transfer to the owner an equivalent number of similar shares in the same company by a proper and valid certificate. *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282. And see *Ogden v. Lathrop*, 65 N. Y. 158, *infra*, III. d.

A broker purchasing stock for a customer is bound to keep at all times on hand or under his control, either the particular shares purchased, or an equal amount of other shares of the same kind, however, and to have them in such a situation that the customer paying the amount due by him can at any time obtain them; and this is so whether the broker holds the stock as pledgee or under a special contract. *Tausig v. Hart*, 58 N. Y. 425.

A pledge is not for use but merely as a security; and if the pledgee sells it without authority it is a violation of his trust, although he afterwards purchases other articles of the same kind and value, to be returned to the pledgee, unless there is some agreement, either express or implied, between the parties that he shall be permitted to do so. *Dykens v. Allen*, 7 Hill, 497, 42 Am. Dec. 87, 3 Hill, 597.

In *Allen v. Dykers*, 3 Hill, 597, *Nourse v. Prime*, 4 Johns. Ch. 490, 8 Am. Dec. 606, 7 Johns. Ch. 69, 11 Am. Dec. 403, was distinguished upon the ground that in that case the pledgees had at all times after the date of the note a sufficient amount of stock standing in their own names subject to their absolute control to have enabled them to restore the shares of stock deposited with them.

And a tender of other similar bonds by a pledgee with whom had been pledged bonds as collateral security upon a demand therefor is not good, and will not enable him to recover in an action for the recovery of the money loaned, in the absence of proof that such bonds had been continuously in his possession from the time of the loan. *Stuart v. Bigler*, 98 Pa. 80.

And evidence of a demand by a pledgee of bonds for their return, and tender of the amount due thereon, and of a refusal by the pledgee and a tender of a like number of similar bonds, is sufficient to go to the jury on the question of the conversion of the bonds, in an action by the pledgee to recover the principal debt. *Ibid.*

A broker who purchased stock for a customer

den repudiated said sale, because of the fact that said plaintiff could not be both seller and buyer, and refused to recognize the validity of the sale, and has ever since and now does repudiate said sale and refuse to recognize its validity. The plaintiff especially denies that it controverted said iron to its own use, but alleges that the said iron was kept and retained in said storage where placed by said Glidden until the time stated in said petition, when the same was sold for the price and in the manner therein stated."

Upon the trial of the issues to a jury, the court charged that the purchase of the iron by Carr for the bank constituted a conversion of the iron as of the date of November 5, 1883; and that the defendant could hold the "bank to an account for that iron for what it was reasonably worth on Novem-

ber 5, 1883, in the market where the iron was sold."

A verdict was returned finding the issues for the defendant, and assessing the balance due him, after deducting the debt due the bank from the value of the iron on the 5th day of November, 1883; and, after the overruling of a motion for a new trial filed by the plaintiff, judgment was rendered on the verdict. A bill of exceptions, containing all the evidence, was duly allowed and filed, and on error prosecuted to the circuit court, the judgment was reversed, upon the ground, as stated in the journal entry, "that said court of common pleas erred in holding that the sale by the plaintiff in error of November 5, 1883, of the iron held by it, as collateral security, was a conversion at that time," and the cause was remanded for a new trial. Er-

and carried the same as security for advances, who sells all he has of that kind of stock, will be deemed to have sold the customer's stock, and the customer can ratify the sale and claim the benefit thereof, or claim the value of the shares on the date of the sale; and the subsequent acquisition by the broker after the stock had fallen to a lower figure of a sufficient number of shares to replace those which he had held for the customer will not relieve him from liability. *Tauselg v. Hart*, 58 N. Y. 425.

And the fact that a broker who had failed did not have enough stock of a particular kind to fill all his contracts therefor cannot be urged as an objection to a recovery as for a conversion of stocks by a customer for whom he had purchased stocks of that kind, and who had not assented to the assignment, and had made a demand for a return of his stocks, which was refused. *Boylan v. Huguet*, 8 Nev. 345.

And where a firm of stock brokers becomes insolvent having a block of stocks in its hands carried for customers on margins, which is insufficient to meet all the demands of such customers as pledgees of the stock, it is to be divided *pro rata* among them, and a shortage of the stock pledged is to be borne *pro rata*. *Skiff v. Stoddard*, 68 Conn. 198, 21 L. R. A. 102.

So, a pledgee with whom stock has been deposited as collateral security for an indebtedness payable on demand, which he sells before demanding payment, is not relieved from liability for the conversion by a tender and return of an equal number of shares of converted stock in the same company, where the stock pledged was consolidated stock, and there was a material difference in the market price between the consolidated and the converted stock. *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307.

The rule has been laid down in some cases, however, that a pledgee of stock is entitled upon payment of the indebtedness to have the identical shares returned, where they can be identified and separated from the other stock; and in such case if they are not returned the pledgee would be liable for their value. *Allen v. Dubois* (Mich.) 5 Det. L. N. 158, 75 N. W. 443.

So, a pledgee of stock has been held to be bound to keep the stock ready for delivery to the pledgee on payment of the debt at maturity or at any time afterwards before a sale in accordance with the terms of the pledge, and has no right in the meantime to sell or loan or pledge it; and if he transfer it to a creditor of his own, the pledgee may treat his act as a conversion; and the fact that he has a large number of shares of stock in the same corpora-

tion standing to his credit on the books is immaterial. *Fay v. Gray*, 124 Mass. 500.

In the above case *Day v. Holmes*, 103 Mass. 306, *supra*, I. a. was distinguished upon the ground that there the pledgee assigned the collateral stock to third persons in order not to injure his credit by appearing to own too much of it, but kept it in his own control by taking assignments in blank from the transferee by means of which he could redeliver the stock if the pledgee should become entitled to it, while in the present case the transfer was for the purpose of returning stock, which the pledgee owed the transferee, which would put the stock beyond his control.

So, one on whose behalf a firm of stockbrokers borrowed a sum of money for a designated term from another firm of stock brokers upon the security of certain railway stock, which was transferred by the borrower to the lender, and the lender pending the loan sold the stock, transferring a similar amount to the borrower on his repaying the loan, has been held to be entitled to sue the lender as principal in the transaction, and the lender is bound to return the identical stock pledged, and is therefore liable to the borrower for the disposition thereof for the amount of profits realized by his dealings in it. *Langton v. Walte*, L. R. 6 Eq. 165, 37 L. J. Ch. N. S. 345, 18 L. T. N. S. 80, 16 Week. Rep. 508.

And where stock brokers employed to purchase a specified amount of United States bonds made a purchase and reported it to the customer at a price greater than that paid, and upon the customer's failure to pay therefor upon maturity of the demand similar bonds were sold leaving a deficiency, and an action was brought by the customer to repudiate the alleged purchase and recover back the money paid, a counterclaim for the deficiency arising on such sale was held to have been properly rejected, as substantial performance of their contract by the brokers was a condition precedent to their right to recover. *Levy v. Loeb*, 85 N. Y. 365.

The burden of proof in an action by a lender against a borrower for money loaned, where the borrower had deposited bonds as collateral security, and upon demand the lender had declared himself unable to restore the bonds, but tendered a like number of similar ones, rests with the lender to rebut the *prima facie* presumption that he had converted the bonds pledged, either by producing them or satisfactorily accounting for their nonproduction, and he cannot recover in case of failure to do so. *Stuart v. Bigler*, 98 Pa. 80.

The above rule has been applied to personal property where one item or parcel is the exact

ror is prosecuted here to obtain the reversal of the judgment of the circuit court, and the affirmance of that of the common pleas.

A further statement of facts is contained in the opinion.

Messrs. Burke & Ingersells, for plaintiff in error:

Any distinct act of dominion wrongfully exerted by one on the property of another is a conversion.

Cooley, Torts, p. 448; 2 Greenl. Ev. § 642; 1 Addison, Torts, p. 483, note 3; 4 Am. & Eng. Enc. Law, p. 108 (4); Jones, Pledges, § 571; *Baldwin v. Cole*, 6 Mod. 212; *Dodge v. Meyer*, 61 Cal. 405; *Hills v. Snell*, 104 Mass. 173, 6 Am. Rep. 216; *Johnson v. Farr*, 60 N. H. 426; *Cobleigh v. Young*, 15 N. H. 494.

equivalent of another. It having been held that a purchaser from a pledgee of a quantity of barrels of oil cannot take advantage of the wrong of the pledgee in disposing of the oil, where he afterwards substitutes in its place and delivers to the purchaser other barrels of oil of like quantity and value which are accepted by him: and it is no defense in an action by a pledgee to recover the amount of his lien upon the goods. *Carrington v. Ward*, 71 N. Y. 360.

But in *Levy v. Loeb*, 15 Jones & S. 61, affirmed 75 N. Y. 609, the court below made a finding of law that, in the absence of an express agreement that a pledgee might part with bonds pledged, or use them, provided a sufficient amount of like bonds were always kept on hand, he was bound to keep in his possession the identical bonds bought for a customer, on the ground that government bonds have not the same equivalency between them that measures of grain or undivided interests in capital stock of corporations evidenced by certificates have between themselves; but the court on appeal refused to express an opinion thereon, deciding the case upon other grounds.

II. Power to sell.

a. General statement as to.

So, though a sale is absolute, passing title and depriving the pledgee of power to return the thing pledged in case of tender of payment by the pledgee, it is not necessarily wrongful or unlawful, the question whether or not it is so depending upon whether or not the pledgee was authorized to sell, the extent of the power to sell if any there was, and its construction and the manner in which it was exercised.

b. Implied authority.

1. The general rule.

In the absence of contract regulating the matter, a pledgee may, in default of payment of the debt secured upon giving reasonable notice, sell the pledged property at public auction and appropriate the proceeds to the payment of the debt, unless the character of the thing pledged be such that the law will presume that it was the intention of the parties that the money should be raised in some other way than by a sale, as in the case of a bill of exchange or promissory note which matures in a short time. *Kling v. Texas Bkg. & Ins. Co.* 58 Tex. 689.

2. As to goods and chattels.

In the absence of special agreement ordinary 43 L. R. A.

A high degree of good faith is required on the part of a bailee of property.

Bates v. Wiles, 1 Handy (Ohio) 532; *Everett v. Coffin*, 6 Wend. 603, 22 Am. Dec. 551; *Boyce v. Brockway*, 31 N. Y. 490; *Scott v. Rogers*, 31 N. Y. 676; *Strong v. National Mechanics' Bkg. Assn.* 45 N. Y. 718; *Pease v. Smith*, 61 N. Y. 477.

Every unauthorized taking of personal property, and all intermeddling with it beyond the extent of authority conferred in case a limited authority had been given with an intent to interfere with the owner's dominion, is a conversion.

Laverty v. Snethen, 68 N. Y. 522, 23 Am. Rep. 184; *McCormick v. Pennsylvania C. R. Co.* 99 N. Y. 67, 52 Am. Rep. 6; *Seriat v. Utica, I. & E. R. Co.* 102 N. Y. 681; *Comley v. Dazian*, 114 N. Y. 161.

goods and chattels pawned or pledged may be sold either with or without judicial process, and the proceeds applied to the payment of the debt. *Union Trust Co. v. Bigdon*, 93 Ill. 458.

Where goods are deposited by way of security to indemnify a party against a loan of money, the contract between the parties is to repay the money on the one part, and to redeliver the goods upon the other, and if the one party fails to repay the other may sell the security for the purpose of repaying himself. *Potholier v. Dawson*, Holt, N. P. 383.

Thus, where goods are deposited as security for the repayment of a loan of money on a future day certain power to sell in default of payment on that day is implied by law from the nature of the transaction, though there was no express stipulation to that effect, and in case of such sale under such circumstances, an action for conversion thereof cannot be maintained. *Pigot v. Cubley*, 15 C. B. N. S. 701, 33 L. J. C. P. N. S. 134, 10 Jur. N. S. 318, 9 L. T. N. S. 804, 12 Week. Rep. 467.

But a pledgee of chattels pledged without authority by one to whom they had been intrusted by the owner for a special purpose is liable to a subsequent purchaser thereof in trover after notice of the true ownership and demand by the owner, which he refused, after a demand by such purchaser, though he sold the property after the first and before the second demand. *Carpenter v. Hale*, 8 Gray, 157.

So, while the pawnee of a slave may assign his claim he cannot, either at civil or common law, make an absolute sale of the slave without observance of the prescribed conditions and formalities in cases of nonpayment. *Jones v. Thurmond*, 5 Tex. 318.

And in the absence of any express contract or any custom or usage in relation thereto, a broker employed to purchase pork and lard on the board of trade upon a margin has no right to sell or close out the contracts made for the customer before their maturity unless the customer so directs, or unless he fails to keep his margins good, and in case he does so the customer can recover back of the broker the money deposited as margins, and the loss, if any, occasioned by the closing out of such contracts. *Denton v. Jackson*, 106 Ill. 433.

But a transaction by which a customer deposited with a broker a sum of money as a margin to secure him against loss by any decline in the market, and the broker purchased at his request and for his account a designated amount of gold coin to pay for which the customer advanced an amount in currency, implies that if the customer should fail to keep the broker se-

No demand is necessary where the party has not the means to comply with it.

Story, Bailm. ¶ 107; 5 Am. & Eng. Enc. Law, p. 528, t (2) and p. 528, y (4); Jones, Pledges, § 748; *Spencer v. Morgan*, 5 Ind. 146; *Alden v. Pearson*, 3 Gray, 347; *Haas v. Taylor*, 80 Ala. 459; *Cothran v. Moore*, 1 Ala. 423; *Warner v. Dunnagan*, 23 Ill. 380. A wrongful conversion terminates the bailment.

2 Am. & Eng. Enc. Law, p. 58 (13); *Smith v. Stewart*, 5 Ind. 222; *Setzar v. Butler*, 27 N. C. (5 Ired. L.) 213; Story, Bailm. ¶ 352, 413.

A pledgeor has a choice of several remedies.

Garlick v. James, 12 Johns. 146, 7 Am. Dec. 204; *Stearns v. Marsh*, 4 Denio, 227, 47 Am. Dec. 248; *Strong v. National Mechanics' Bkg. Asso.* 45 N. Y. 718.

cured against loss by maintaining the margin the broker would have the right to sell the gold for reimbursement and security. *Schepeler v. Eisner*, 3 Daly, 11, Affirmed, 54 N. Y. 875.

So, the receipt by a creditor of goods of another from his debtor in pledge, supposing them to belong to the debtor, and afterwards permitting the debtor to sell the goods on the promise of the purchaser to pay the creditor the price thereof toward the discharge of the debts for which they were pledged, does not constitute a conversion thereof, and does not render him liable to the true owner in an action of trover. *Leonard v. Tidd*, 3 Met. 6.

And evidence that one person asked another for a loan, and offered his watch as security, which the other took and went away and upon returning in about twenty minutes said that he could not let him have all the money, but that he had not got the watch, declining to give any explanation, does not show any tortious act upon the part of the proposed lender for which an action for conversion will lie. *Hall v. Robinson*, 2 N. Y. 298.

So, where goods are sent to a factor for sale, and he makes an advance upon them and is afterwards ordered not to sell, he ceases to be a factor and becomes a pledgee as to the advance, having the right of a pledgee to sell on giving reasonable notice, but if he sells without such notice he is liable for the damages suffered by the consignor therefrom. *Marfield v. Goodhue*, 3 N. Y. 62.

And a power of sale in case of nonpayment of the principal debt is not implied in a contract of pledge where there is no stipulated day for payment, or where the stipulated time has been rendered indefinite by subsequent agreement, and in such case a sale without proper demand and notice would be a conversion. *Pigot v. Cubley*, 15 C. B. N. S. 701, 33 L. J. C. P. N. S. 134, 10 Jur. N. S. 318, 9 L. T. N. S. 804, 12 Week. Rep. 467.

If one delivers stock or cattle to another to be kept and fed, with power to sell them to pay for their keeping, the pledgee has the right to sell only so much of the stock as is necessary to pay what may be due him for the keeping and feeding, and if he proceeds to sell all of them, which was not necessary to pay the expense of such keeping, it is a conversion of the portion of the stock sold by him which was not necessary to pay the debt due for keeping, for which trover will lie. *Whitlock v. Heard*, 18 Ala. 776, 48 Am. Dec. 73.

3. As to stocks and bonds.

Stock or bonds pledged as collateral security 43 L. R. A.

The question whether the pledgee acts in good faith or not is not material.

Boyce v. Brockway, 31 N. Y. 493; *Lavery v. Snethen*, 68 N. Y. 527, 23 Am. Rep. 184; *Dodge v. Meyer*, 61 Cal. 420.

The courts do not hesitate where an attempted sale has been at a very low price to comment on this as an act of oppression against the real owner.

Wheeler v. Newbould, 16 N. Y. 401.

Messrs. Boynton, Hale, & Horr, for defendant in error:

A pledgee purchasing the pledge at public sale is not chargeable with conversion; if the purchase is invalid, the relations of the pledgeor and pledgee are unchanged.

Bryan v. Baldwin, 7 Lans. 174, Affirmed, 52 N. Y. 232; *Duncomb v. New York, H. & N. R. Co.* 84 N. Y. 205; *Roach v. Duckworth*, 95 N. Y. 402; *Maryland F. Ins. Co.*

may be lawfully sold at public auction after the debt is due upon demand of payment and due notice of the time and place of sale, unless the sale thereof is restricted by express stipulation. *Brown v. Ward*, 3 Duer, 680.

And bonds are negotiable instruments which pass by delivery, and may be sold on default of a pledgeor even though there was no express stipulation in the contract of pledge for a sale, and they may be sold upon default in payment after an adjudication in bankruptcy against the pledgeor. *Jerome v. McCarter*, 94 U. S. 734, 24 L. ed. 136. *Bank of Old Dominion v. Dubuque & P. R. Co.* 8 Iowa, 277, 74 Am. Dec. 302; *Middlesex Bank v. Minot*, 4 Met. 325.

And county bonds held as collateral security for an indebtedness may be sold by the pledgee on default, as the mode of making county bonds available is by sale thereof. *Alexandria L. & H. R. Co. v. Burke*, 22 Gratt. 254.

A deposit of coupon bonds of an incorporate company transferable by delivery as collateral security for the payment of promissory notes soon to mature differs entirely from a deposit of ordinary bonds, mortgages, promissory notes, and like choses in action, which in the absence of agreement the creditor cannot expose to sale because they have no market value, the fair presumption being that they were designed to be held as a pledge and exposed to be sold after demand and due notice, like goods, chattels, stock, and public securities, in case of nonpayment of the debt. *Morris Canal & Bkg. Co. v. Lewis*, 12 N. J. Eq. 323.

A sale by a pledgee of shares of stock to be held as collateral for the payment of notes, drafts, etc., discounted or held by a bank against the pledgeor made in default of a demand for payment of a debt which included a large sum for which the stock was not pledged, however, and because the debtor declined to pay another debt to another person which was not included in the pledge, is an unlawful conversion of the stock for which the pledgeor is entitled to recover. *Blood v. Erie Dime Sav. & L. Co.* 164 Pa. 95.

And where a broker holds shares of bank stock for a customer as collateral security to a debt due on account of gold purchased for him, and the customer gives an absolute order to sell at a designated price, at which price they then might have sold, and the broker fails to sell at that time and afterwards sells at a lower price, and the customer tenders a sufficient sum to pay the balance of the amount if the sale had been made at the higher price, a sale after such tender is a conversion entitling the customer to recover the value of the stock sold after deduct-

v. *Dalrymple*, 25 Md. 242, 89 Am. Dec. 779; *Canfield v. Minneapolis Agricultural & Mechanical Asso.* 4 McCrary, 646; 5 Field, *Lawyers' Briefs*, title *Pledges*, § 120; Cooley, *Torts*, § 453; Jones, *Pledges*, § 637.

The plaintiff could not maintain an action for conversion until the lien created by the pledge was discharged, and the lien could not be discharged until payment or tender of payment of the debt for which the pledge was made.

Jones, *Pledges*, § 571; *Whelan v. Kinsley*, 26 Ohio St. 139; *Lewis v. Mott*, 36 N. Y. 401; *Cunnock v. Newburyport Inst. for Sav.* 142 Mass. 342, 56 Am. Rep. 679; *Day v. Holmes*, 103 Mass. 306; *Halliday v. Holgate*, L. R. 3 Exch. 299; *Thompson v. Toland*, 48 Cal. 99; *Talty v. Freedman's Sav. & T. Co.* 93 U. S. 326, 23 L. ed. 887; *Smith v. Bunting*, 86 Pa. 116; *First Nat. Bank v. Boyce*, 78

Ky. 42, 39 Am. Rep. 198; *McGulla v. Clark*, 55 Ga. 53; *Colbrooke*, *Collateral Securities*, § 344.

What property brings at public auction is some evidence of its market value.

Hooven v. Scott, 22 Ohio L. J. 168; *Campbell v. Woodworth*, 20 N. Y. 499; *People, New York, v. McCarthy*, 102 N. Y. 639; *Dixon v. Buck*, 42 Barb. 74; *Gray v. Walton*, 107 N. Y. 259; *Gill v. McNamee*, 42 N. Y. 44; *Hoffman v. Conner*, 76 N. Y. 121; *Lawton v. Chase*, 108 Mass. 238.

Williams, J., delivered the opinion of the court:

The record discloses that at the time of the execution of the written instrument on which the action below was founded, the maker, Glidden, had in store with the Union Storage Company, at Newcastle, Pennsylvania

ing the actual indebtedness for which the property was pledged. *Hope v. Lawrence*, 1 Hun, 817.

And an owner of stock who loans it to another to enable him to pledge it as security for the purchase of particular stock, such stock having been issued to a trustee who had indorsed it in blank, which was used for that purpose by pledging it to a broker who purchased the required stock and afterwards sold it at an advance, and the broker thereupon refused to return the pledged stock but held it for another indebtedness against the pledgeor, and sold it after notice by the real owner of his claim and after offer by him to pay any proper charges against it, is entitled to judgment against the pledgee for such sale as a conversion of his stock. *Niles v. Edwards*, 90 Cal. 10.

And a corporation which takes shares of stock as collateral security for the payment of a note, and permits the stock to be transferred absolutely and for a good consideration to its president to be held by him in his own right, violates its duty as a pledgee, and such transfer constitutes a misappropriation or conversion of the pledge rendering it liable for its value; and such liability may be asserted by way of recoupment or counterclaim in an action on the note. *Star. F. Ins. Co. v. Palmer*, 9 Jones & S. 267.

And a custom or usage by which brokers may use by hypothecation or otherwise securities received by them as a margin in transactions of a particular kind is not admissible in evidence in an action by a customer against a broker with whom he had pledged certain stock certificates as security against losses in a contemplated transaction for their conversion, by a sale thereof, though the customer knew of such custom or usage. *Lawrence v. Maxwell*, 58 N. Y. 19.

So, one who holds state scrip as a pledge or collateral security for a note with authority to sell for nonpayment has the right to sell in such case so much of the scrip as is necessary to pay the indebtedness and no more, and where more is sold the pledgee is responsible for the damage done. *Fitzgerald v. Blocher*, 32 Ark. 742, 29 Am. Rep. 3.

Where a deposit as security for an indebtedness is separable, no greater amount in value thereof should be sold in case of nonpayment than is sufficient to pay the debt. *Ibid.*

But a pledgee of scrip who sells more than is necessary to pay the debt due is not liable to the pledgeor who accepts the proceeds and replaces the scrip for anything more than the difference between the price received for the scrip and the price paid to replace it. *Ibid.* 43 L. R. A.

In the above case *Hamilton v. State Bank*, 22 Iowa, 306, *infra*, IV., was distinguished upon the ground that in that case the sale was made by the direction and express consent of the plaintiff given on the day of the sale.

4. As to choses in action.

The general rule, subject to some exceptions noted below, is that where notes or other choses in action are deposited as collateral security, and the contract is entirely silent as to the power of the pledgee over them, he has no right on default in payment of the original indebtedness to sell the notes either at private or public sale or at auction, but is bound to hold and collect them as they come due, and apply the money to the payment of the loan and return the balance if any to the pledgeor. *Wheeler v. Newbould*, 16 N. Y. 392, 5 Duer, 29; *Brown v. Ward*, 3 Duer, 660; *E. F. Hallack Lumber & Mfg. Co. v. Gray*, 19 Colo. 149; *Cole v. Dalziel*, 13 Ill. App. 23; *Joliet Iron & S. Co. v. Scioto Fire Brick Co.* 82 Ill. 548, 25 Am. Rep. 341; *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Zimbleman v. Veeder*, 98 Ill. 613; *Stevens v. Wiley*, 165 Mass. 402; *McLemore v. Hawkins*, 46 Miss. 715; *Whitaker v. Charleston Gas Co.* 16 W. Va. 717.

And in the absence of such an agreement a court of equity will not decree a sale. *Whitaker v. Charleston Gas Co.* 16 W. Va. 717.

While the holder of stocks and bonds of a corporation as collateral security may sell them at public auction after demand of payment and due notice of sale a pledge of commercial paper as security for a loan of money does not, in the absence of a special power for that purpose, authorize the pledgee upon the nonpayment of the debt and upon notice to the pledgeor, to sell the securities either at public or at private sale; he is bound to hold and collect the same when due, and apply the money to the payment of the loan, for the reason that notes, not being usually marketable at their fair value, must generally be sold at a sacrifice, so that injustice would be likely to be done to the debtor. *Fletcher v. Dickinson*, 7 Allen, 23.

And the holder of a promissory note indorsed to him as collateral security for advances made, who sells the note to another, is liable to the indorser for its value at the time of the sale, which is *prima facie* the amount of the note when transferred including interest. *Hazzard v. Duke*, 64 Ind. 220.

And where two notes secured by a mortgage on real estate were transferred as collateral security to certain other notes which the pledgee then held against the pledgeor under an agree-

nia, 972 tons of pig iron, for which he held the company's nine storage warrants mentioned in the instrument. Each warrant bound the company to deliver the iron represented by it to the order of Glidden at the place of storage, upon payment of the charges and surrender of the warrant properly indorsed. When the instrument sued on was executed by Glidden, he duly transferred the nine warrants to the bank for the purpose of pledging the iron as collateral security for the debt so contracted. On the 5th day of November, 1883, the debt having then become due, and being unpaid, the bank offered the iron for sale at public auction, after having published notice to that effect in some of the newspapers of Pittsburgh; and the president of the bank, in its behalf, made a bid of \$10 per ton for part of the iron, and \$11 per ton for the remainder, and all of it

was struck off to him at those prices. Thereupon, the cashier of the bank notified the storage company of the purchase, and requested the ownership of the iron to be transferred at once to the president of the bank. That company made the transfer on its books, and thereafter, from time to time, rendered its accounts for storage, against the bank, which were paid by it. No demand of the debt was made of Glidden before the sale, nor was any notice of the sale given him, before or after it occurred; the first information he had with respect to it was when the action below was commenced, in 1888. In the meantime, however, he had made no effort to pay his debt, and no inquiry concerning it, or the situation of the iron pledged for its security, for the reason, as he states, that he had become embarrassed, and unable to pay the debt. At the time of

ment that when such other notes were paid the notes and mortgages were to be reassigned or the proceeds received accounted for, the pledgee had no right, by private agreement between himself and another of which the pledgee had no notice, to sell the securities for a sum much less than the amount due upon them to one who purchased them for the purpose of discharging the mortgage, to the knowledge of the pledgee. *Fletcher v. Dickinson*, 7 Allen, 23.

So, in *Gay v. Moss*, 34 Cal. 125, which was an action for the conversion by a pledgee of a chose in action by a sale thereof without notice, it was said that it may well be doubted whether the pledgee was authorized to sell a pledge of this character at all, and whether he was not bound to collect the amount due on the chose in action and reimburse himself out of the proceeds.

When a creditor who has received a note as collateral security transfers it to another he must be taken to have elected that mode of payment, and to have made the security a substitute for the debt. *Cocke v. Chaney*, 14 Ala. 66.

And where one debt is transferred as collateral security for another the creditor becomes an agent for the collection, and the amount collected after deducting costs and other charges should be credited on the debt to be secured, and if the transferee transfers the security, he appropriates it to his own use and to the extent of its value the debt is thereby extinguished. *Ibid.*

And where a collateral note is transferred without a transfer of the original indebtedness, the transfer operates as a payment to the extent of the amount then due upon it of the original indebtedness, leaving only the residue, and where this is done one taking the note representing the original indebtedness after maturity can only recover the balance due after allowing credit for the collateral note. *Ware v. Russell*, 57 Ala. 43, 29 Am. Rep. 710.

When commercial securities pledged as collateral for the payment of a debt are sold by the pledgee without authority before maturity of the debt, the pledgee may at his election either ratify the sale and claim the proceeds or treat the unauthorized sale as a conversion, and recover the advance in the market price from the time of the sale up to a reasonable time within which to replace the securities, or hold the pledgee for a breach of his duty to keep the property pledged until the maturity of the debt and claim as damages the market value of the securities at that time. *Dimock v. United States Nat. Bank*, 55 N. J. L. 296.

And where one comes into the possession of 43 L. R. A.

notes lawfully as a pledge and security for another note, and he sells or trades them for bank stock to another, the conversion takes place at the time of the absolute trade and wrongful disposition and notice thereof to the pledgee. *Walley v. Deseret Nat. Bank*, 14 Utah, 305.

Where notes deposited as collateral are converted, however, it is competent for the defendant in an action therefor to show in reduction of damages the inability of the maker to pay, his insolvency, or any other matter which would legitimately affect or diminish the value of the notes at the time of the conversion, though they had no market value. *Ibid.*

And the sale by a pledgee of notes of a third person held as collateral security for the payment of the pledgee's note at public auction after default is not a conversion thereof where it was made under an authority to collect or negotiate for the purpose of liquidating the principal debt in case of nonpayment. *Fraker v. Reeve*, 36 Wis. 85.

In the above case *Wheeler v. Newbould*, 16 N. Y. 392, *supra*, was distinguished upon the ground that in that case the contract was entirely silent as to the power of the pledgee over the subject of the pledge.

And where a borrower gives his own note for a sum larger than that borrowed, secured by deed of trust as collateral security for the note given for the original indebtedness, both notes being made by him and payable to the same payee, the first note will be deemed to have been without consideration and the payee will only have power to sell and transfer the original note and trust deed to raise money with which to pay the smaller one and until sold and indorsed the larger note is inoperative, and no sale can be made under the trust deed securing them. *Walker v. Carleton*, 97 Ill. 587.

Upon the other hand, however, it has been held that the rule that a pledge may be sold after maturity of the principal debt upon due notice is the same where the pledge is a promissory note of a third person as when it is a chattel, when the note will not mature until a long time after the time fixed for the maturity of the loan. *Richards v. Davis*, 5 Clark (Pa.) 471.

And that the authority of a pledgee of a note to give the pledgee notice and to sell the pledge is not affected by the fact that the pledge is a negotiable note of a third person not yet due. *Brightman v. Reeves*, 21 Tex. 70.

And that where negotiable notes are delivered as collateral security it is upon the supposition that something is due or at least owing upon them, and they may be collected or sold to raise

the auction sale, the iron was worth in the market from \$16 to \$17 per ton, and the defendant sought, by way of counterclaim, to compel the bank to account for the market value of the iron, as of that date, upon the ground that the sale constituted a conversion of it. An account upon that basis leaves a balance due Glidden. After that sale the iron remained in store, as it had been before, at the same place, subject to the same charges, and without change in any respect, except the transfer of ownership on the books of the storage company to the president of the bank, and the entry of the storage charges against it, until February 7, 1887, when the bank sold 15 tons of the iron at \$20 per ton, and thereafter, in August and September, 1888, sold the balance for \$16 per ton; and an account stated upon the basis of those sales, after deducting storage

charges, leaves a balance due the bank. In making these sales, the officers of the bank believing in good faith it had become the owner of the iron at the auction sale, assumed to sell it as the property of the bank, and not under or in execution of the power of sale contained in the instrument by which it was pledged; but it claims the sales were within the power thus given. The case here turns upon the question whether the first sale constituted a conversion? The right of the pledgee to sell the article pledged upon the nonperformance of the pledgeor's obligation is the one characteristic which distinguishes a pledge from a common-law lien; and while the former is always accompanied with an implied power of sale, if none be expressed, it is often declared in the contract of pledge, and the exercise of the power may, of course, be regulated and controlled, and the rights

the money due for which they are pledged, or may, if nothing be due, and they are only in the nature of accommodation papers, be negotiated, and the money applied on the debt for which they were intended as a security. *Walker v. Carleton*, 97 Ill. 587.

So, in England the rule of law that if the pawnor neglects or refuses to comply with his engagement, the pawnee may upon due demand or notice to the pawnor require the pawn to be sold, applies to a pledge of choses in action, as well as to a pledge of physical chattels. *France v. Clark*, L. R. 22 Ch. Div. 830, 52 L. J. Ch. N. S. 263, 48 L. T. N. S. 185, 31 Week. Rep. 374.

And a pledgee who takes, as collateral security for the return of certain railroad bonds loaned, two notes and an acceptance made by the borrower and indorsed by third persons as accommodation indorsers, who demands the bonds of the agent of the borrower on the date on which they were made returnable by the agreement, tendering the securities in exchange for them, may lawfully sell such securities at public auction after due notice for his reimbursement, where they had all fallen due before the notice of sale was given. *Potter v. Thompson*, 10 R. I. 1.

And a wholesale merchant who makes an arrangement with a jobber to give him accommodation in the form of loans, discounts, and the sale of goods, for which the jobber places bonds, notes, and accounts of his customers in the hands of the merchant as collateral security without agreement as to the mode in which they are to be dealt with, and the jobber afterwards fails, largely indebted to the merchant, may compound or compromise a debt held by him as such collateral if, looking to the interests of the creditor in the exercise of an honest discretion, that is deemed best. *Fant v. Miller*, 17 Gratt. 187.

So, in *Morris Canal & Bkg. Co. v. Fisher*, 9 N. J. Eq. 667, 64 Am. Dec. 423, it was doubted, though nothing was decided, whether a third party's bond or mortgage deposited by way of collateral security or as a pledge can be sold by the pledgee in default of payment after notice to the pledgeor, unless a known usage or express agreement to do so is shown.

But in *Commercial Bank v. Shuart*, 46 Barb. 371, which was an action brought by creditors holding notes to reach a note made by third persons and deposited to secure an accommodation indorser on the principal note against loss, it was held that it was entirely competent for the accommodation indorser to convert the collateral note into money by selling and transferring

it to a third person, and that after he had so sold it and received the money therefor neither the purchaser, nor any person to whom the purchaser might have transferred it, was responsible for the manner in which he appropriated the proceeds.

The rule applicable to commercial paper, that the pledgee thereof cannot sell the same on default of payment of the original debt without a special authority, is applicable to railroad bonds payable upon condition. *Joliet Iron & S. Co. v. Scioto Fire Brick Co.* 82 Ill. 548, 25 Am. Rep. 341.

And a holder of a mortgage as collateral security, who causes the property to be sold on execution, himself becoming the purchaser, does not, within the California Code, § 3006, hold the title as a trustee for his debtor, unless it is shown that he obtained the title by some fraudulent means; he cannot sell an evidence of debt of that kind, but may collect the same when due, and to that end he may foreclose the lien and himself become the purchaser, and he takes an absolute title to the property and must account for the proceeds. *Kelly v. Matlock*, 85 Cal. 122.

c. Special authority.

1. Express contracts, generally.

A sale of a pledge under a special power made to a third person cannot be treated as an unlawful conversion for which trover will lie. *Cole v. Dalsiel*, 13 Ill. App. 23.

Thus, sales of collaterals made to third persons which are not impeached for fraud or unfairness, under an authority to sell the pledges for payment of the debt without notice, are valid and not the subject of an action of trover. *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269.

And under a contract by which one pledges a note to another with express authority to sell the note on default at either public or private sale without notice, the title of the pledgeor is gone beyond reach where a bona fide sale is made to a person capable of buying. *Zimelman v. Veeder*, 98 Ill. 613.

And a direction by the drawer of drafts to one who held his securities to pay them from the proceeds of the securities gives authority to sell such securities, and an order to pay in funds from the proceeds makes the deduction conclusive that other sales are yet to be made, and a sale under such authority without notice of the time or place and without previous demand of payment is good, and does not constitute a conversion of the securities. *Hyatt v. Argenti*, 3 Cal. 151.

and obligations of the parties with respect to the sale specifically defined, by the express agreement of the parties. Where the power rests upon implication, the pledge cannot be sold without reasonable notice to the pledgeor of the time and place of sale, for the reason that he is entitled to redeem up to the very time of sale, and should be afforded opportunity to be present at the sale to see that it is fairly conducted, and procure bidders, if he should so desire. This requirement of notice may be waived by the pledgeor, either in the contract of pledge, or afterward; and by the agreement between the parties in this case, the bank was expressly authorized to sell the property pledged to it by Glidden, without notice. But there was no agreement that the bank might become the purchaser at any sale

which should be made; and it is well settled that in the absence of an express agreement to that effect, a pledgee cannot, directly or indirectly, become a purchaser at his own sale, for the satisfactory reason that he holds the property in a fiduciary capacity which forbids the disposition of it for his personal benefit, and requires good faith and fidelity to the interests of the pledgeor, in making a sale of it. His duty as a seller is inconsistent with his interest as a purchaser; and the principle that a trustee cannot be a purchaser at his own sale is applicable. *Story, Bailm. § 319; Torrey v. Bank of Orleans, 9 Paige, 649-603; Chouteau v. Allen, 70 Mo. 290, 335.*

The purchase for the bank, by its president, at the auction sale of November 5, 1883, was therefore unauthorized, and its subse-

So, an express contract contained in a note, that stocks given as collateral security therefor should be sold after a certain specified time and in a particular manner, precludes the idea of implied authority to sell before the note becomes due or at any other place than that provided for. *Dykens v. Allen, 7 Ill. 497, 42 Am. Dec. 87, 3 Ill. 504.*

But a pledge of a promissory note with a power of sale in case of default does not authorize the pledgee to compromise with the maker of the note and take less than was due thereon, where the note was well secured and apparently worth its face value. *Zimbleman v. Veeder, 98 Ill. 613.*

And a sale by a pledgee of a negotiable promissory note under a contract conferring power to sell for an amount much less than the face value of the note, without notice to the pledgeor, will not be regarded as such a sale as the law requires, but rather as a compromise between the pledgee and the maker of the note. *Ibid.*

And the surrender by a pledgee of promissory notes as collateral security who has an express written authority to sell at public or private sale, for a sum less than is due thereon, but which is enough to pay the particular debt, is not a sale within the meaning of the power conferred, but is a compromise which renders the pledgee liable in an action on the notes to the pledgeor for the injury thereby sustained, and if at the same time he sells other collaterals of the same debtor the whole transaction being a tort, the pledgeor may recover for the whole. *Union Trust Co. v. Rigdon, 93 Ill. 458.*

So, trover will not lie against a pledgee of bonds deposited as collateral security where they are sold pursuant to the terms of the agreement of the parties made at the time of the deposit, to recover any surplus in his hands belonging to the depositor. *Loomis v. Stave, 72 Ill. 623.*

A sale by a pledgee of stocks at the board of brokers publicly and fairly made in parcels in the usual way to a third person is legal, however, terminating the pledge and vesting title in the purchaser under a contract authorizing him to sell for nonpayment without further notice. *Maryland F. Ins. Co. v. Dalrymple, 25 Md. 242, 89 Am. Dec. 779.*

And authority in a pledge of shares of stock to secure payment of loans to sell the shares on nonpayment of the notes secured at maturity without demand of payment or further notice warrants the holder upon the dishonor of the notes secured in selling the pledge at public or private sale without notice to redeem and without notice of sale. *Jeanes's Appeal, 116 Pa. 573.*
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And a sale of hypothecated stock, made by a broker at private sale for the full market value of the stock, under authority in writing, signed by the pledgeor, expressly authorizing the pledgee to sell the pledge in case it is not redeemed by a specified day or to give the same to any broker to sell on that date, is valid where the pledge is not redeemed on the day specified. *Bryson v. Rayner, 25 Md. 424, 90 Am. Dec. 69.*

But authority to use, transfer, or hypothecate stock pledged to secure a note does not authorize a sale of the stock by the pledgee for his own account before the note matures or becomes due. *Ogden v. Lathrop, 1 Sweeney, 643.*

And authority to a pledgee in a contract of pledge to sell stock pledged before maturity of the debt without notice, if the security should depreciate in value, will not warrant a sale of the pledge before maturity by a purchaser of the debt without notice, on the ground that the stock was fraudulently issued. *Hulskamp v. West, 47 Fed. Rep. 236.*

And authority to a creditor who holds collateral security to sell it before maturity of the debt in the event of such security or any part thereof depreciating in market value, gives him no right to sell on finding that corporate stock which forms a part of the security is not genuine and is therefore worthless. *National Bank v. Baker, 128 Ill. 533, 4 L. R. A. 586, 27 Ill. App. 356.*

A power of attorney given to an agent authorizing him to buy, sell, and transfer, at his discretion, gold, stocks, etc., and to draw, execute, and deliver all orders, checks, or other instruments in writing which shall or may, in his discretion, be necessary in the transaction of the business of purchasing and selling stocks on speculation, however, authorizes him to employ a broker to purchase and sell stocks and empower him to sell stocks purchased at public or private sale without notice whenever the margin should fall below a designated per cent, and in case of such employment a sale under such circumstances by the broker would not be wrongful, and any deficiency arising on such sale may be set up as a counterclaim in an action by the principal against the broker charging an unlawful sale. *Wicks v. Hatch, 62 N. Y. 535, 6 Jones & S. 95.*

But written authority to act for another in any stock transactions with certain brokers does not authorize the person holding it to direct the brokers to sell such stocks or interfere with the contract between the parties, where the person from whom he had the authority did not own the stock but held it for the purpose of using it as security in stock transactions, and where the brokers had notice of such ownership and the

quent assumption of proprietorship unwarranted, unless ratified in some way by Glidden, which is not claimed; the sale was repudiated by him soon after he became aware of it, and ratification could not be presumed from his silence, for he was ignorant of the sale, and it was manifestly against his interest, having been made at a price much below the market value of the property. If the sale had been ratified, his right would have been to charge the bank with the price at which the property was so sold, and require the application of the proceeds, as of the date of the sale, toward the satisfaction of his debt and the charges against the property; and in that case he would have remained liable for the balance due on his debt. And, it appears to be established by the great weight of authority that such a sale, when repudiated by the pledgee, is not a conver-

sion, where no change has occurred in the actual condition and situation of the property. The relation of the parties remains the same as before the sale, the pledgee continuing to hold under the contract of pledge, leaving the title to the property and rights of the parties unaffected, as though no sale had been attempted. Indeed, in such case, it is said there is no sale for want of a competent purchaser. *Bryan v. Baldwin*, 52 N. Y. 232; *Middlesex Bank v. Minot*, 4 Met. 325; *Stokes v. Frazier*, 72 Ill. 428; *Killian v. Hoffman*, 6 Ill. App. 200; *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779; *Bank of Old Dominion v. Dubuque & P. R. Co.* 8 Iowa, 277, 74 Am. Dec. 302; *Canfield v. Minneapolis Agricultural & Mechanical Asso.* 4 McCrary, 646; *Duncomb v. New York, H. & N. R. Co.* 84 N. Y. 205; *Halliday v. Holgate*, L. R. 3 Exch. 299; *Day*

facts of the case they are liable for such disposition as a conversion. *Porter v. Parks*, 49 N. Y. 564.

And an authority by a wife to her husband to raise money on her watch does not authorize the husband to consent to a sale of the watch by the pledgee, except in the ordinary mode after due notice as required by law, and where he authorizes such a sale and a sale is made without notice, the pledgee having knowledge of the facts, the sale is a conversion, and the title of the true owner is not divested, and her right to sue is complete. *Van Arsdale v. Joiner*, 44 Ga. 173.

A clause in an assignment of a note and mortgage as collateral security, providing that in case of default the pledgee might maintain immediately an action for the purpose of fixing the amount due and directing the note and mortgage to be sold by the sheriff, does not restrict the pledgee to a sale of the notes and mortgage or prevent him from foreclosing the mortgage. *McArthur v. Magee*, 114 Cal. 126.

And where a number of persons associated themselves together to purchase lands of a corporation, and it was arranged that the interest of the purchasers was to be divided into shares, and there was to be issued to each purchaser a certificate of the number of shares belonging to him on payment of 10 per cent of the purchase price in cash and the remainder in his bond secured by a pledge of his certificates, the fact that the agreement of the corporation for the improvement of the land sold was to be completed within a period which would expire before the bonds would become due, upon the expectation of all the parties that the land would be speedily sold after the completion of the improvements, does not show the intention that the pledgee should rely, as the means of meeting any default in payment of the bonds secured, upon dividends to be made from the proceeds of land to be sold, and not upon a sale of the certificates; but the ordinary right of foreclosure implied in a pledge of stock or personal property would be included. *Merchants' Nat. Bank v. Thompson*, 133 Mass. 482.

The liability of a pledgee in an action by the pledgor against a pledgee and purchaser, in which there is evidence that a negotiable note was pledged, and that the pledgor upon being notified to redeem gave the pledgee authority to sell, and it was sold at what appeared to be an unreasonably low price, depends upon whether the pledgor had in fact authorized the sale, and whether the purchase was made in good faith for a reasonable price, and an instruction to the jury that the liability of the purchaser

depended on the question whether he had notice that the note was pledged, is erroneous. *Brightman v. Reeves*, 21 Tex. 70.

A pledgee under a written contract authorizing him to sell the thing pledged, however, is limited in his authority to sell to the articles named in the contract. *Clark v. Bouvain*, 20 La. Ann. 70.

And a pledgee of property for security for money advanced with the right to sell the property and satisfy the debt and pay over the balance of the price to the pledgor, who exchanges the property for other property, exceeds his authority, and it would be optional with the pledgor either to adopt or repudiate the act of making the exchange. *Strong v. Adams*, 30 Vt. 221, 73 Am. Dec. 305.

And one who exchanges stock owned by him for an equal number belonging to another, pledged to secure an indebtedness, cannot claim that he did not know the terms of the pledge, and did not consent that his stock should be sold at private sale without notice, where the exchange was made under such circumstances that the pledgee had the right to assume that the exchanged stock would become and remain the property of the pledgor to be dealt with the same as the shares originally pledged. *Smith v. Lee*, 84 Fed. Rep. 557.

So, the holder of corporate stock who has pledged it as security for a debt of the corporation, under an agreement that bonds pledged by the corporation for the same debt should be first resorted to though the stock was void because issued without receiving the 75 per cent of its par value required by statute, may sue for a conversion of the stock by a sale thereof in violation of such agreement. *Hinckley v. Pfister*, 83 Wis. 64.

The Missouri statute giving to a pawn broker the right of absolute disposition of and ownership in pledges left with him as security for his debt after the failure to pay the interest on the principal debt or the debt itself for sixty days after maturity thereof, does not apply to a pledge of notes secured by deed of trust on real estate as collateral to the indebtedness represented by the note. *Richardson v. Ashby*, 132 Mo. 238.

And where a pledge is not redeemed at the expiration of a year and a day, the pawnbroker has the right under the English statute to expose it to sale as soon as he can consistently with the provisions of the act, but the failure to pay within that time does not absolutely lose all right to the pawnor: if at any time before the sale has actually taken place he tenders the principal, interest, and expenses incurred,

v. Holmes, 103 Mass. 307, 311; *Donald v. Suckling*, L. R. 1 Q. B. 585.

The rule results from the nature of the contract between the parties. Under a contract of pledge the right of the pledgee to retain possession of the property continues until the debt or engagement for the security of which it was pledged has been discharged by payment or performance, or a tender, and demand for its return; and his obligation is to keep the article pledged, with due care, and restore it to the pledgee upon the performance of his agreement. On the other hand, in the absence of any stipulation to the contrary, it is the duty of the debtor to seek the creditor at the proper place and pay the debt, or tender its payment, before he is entitled to receive back the pledge. These obligations of the parties are reciprocal, and neither can require performance by

the other without himself being able and ready to perform on his part; so that, the possession of the pledgee being lawful as long as he retains the actual control and custody of the pledge, with the ability to perform his obligation by restoring it, he is not in default until a demand, accompanied by a tender of the debt, is made. If he then refuse or fail to restore the pledge, he may be charged with its value. The action for its recovery, though treated as one for conversion, is, in reality, founded on the breach of the contract, and hence the creditor is entitled to recoup his debt. Until the breach occurs no right of action accrues in favor of the pledgee; suffering the debt to run unsatisfied after maturity does not destroy the pledgee's lien, or the pledgee's right to redeem. *Whelan v. Kinsley*, 26 Ohio St. 131; *Jones, Pledges*, §§ 543, 566, 571.

he has a right to his goods, and in such case the right to sell is terminated, and if the pawn broker sells the owner is entitled to recover in trover for such sale. *Walter v. Smith*, 5 Barn. & Ald. 439, 1 Dowl. & R. 1.

2. Blank transfers of stock.

A pledge of stock as collateral security by the delivery of certificates with a blank transfer on the back signed by the owner confers power upon the pledgee where the principal indebtedness is past due to sell the stock, after giving the pledgee reasonable notice to redeem and of the time and place of sale, that being the readiest mode of collection. *Candfield v. Minneapolis Agri. & Mechanical Asso.* 4 McCreary, 646; *Es parte Sargent*, L. R. 17 Eq. 273, 43 L. J. Ch. N. S. 425, 22 Week. Rep. 815; *France v. Clark*, L. R. 22 Ch. Div. 830, 52 L. J. Ch. N. S. 263, 48 L. T. N. S. 185, 31 Week. Rep. 374.

Such a transfer confers on the pledgee, not merely a power to complete his title by registration, but also a power to sell the shares. *France v. Clark*, L. R. 22 Ch. Div. 830, 52 L. J. Ch. N. S. 263, 48 L. T. N. S. 185, 31 Week. Rep. 374.

And the transfer will pass the legal title if the articles of association do not require a deed, otherwise it will pass the equitable title. *Es parte Sargent*, L. R. 17 Eq. 273, 43 L. J. Ch. N. S. 425, 22 Week. Rep. 815.

Thus, one who advances money in good faith to the holder of a certificate of stock with the power of attorney in blank annexed, which is expressed to be for value and is irrevocable on its face, taking it as collateral security, acquires a valid title as against the person by whom the power was executed and in whose name the stock stood, and is not bound to surrender it except upon repayment with interest of his whole advance, though such owner may have satisfied the debt for which he himself pledged it. *Fatman v. Lobach*, 1 Duer, 354.

And where an owner of stock delivers to and leaves with his brokers the certificates of the shares, having indorsed thereon the form of an assignment expressed to be made for value received and an irrevocable power to make all necessary transfers, he confers upon them such an apparent title to or power of disposition over the shares in question as will estop him from asserting his own title as against parties who take bona fide through the broker. *McNeill v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Lacombe v. Forstall*, 123 U. S. 562, 31 L. ed. 255.

In *McNeill v. Tenth Nat. Bank*, 46 N. Y. 325, 43 L. R. A.

7 Am. Rep. 341, *Bush v. Lathrop*, 22 N. Y. 535, *infra*, VIII. c, was distinguished and explained, that being a case of pledge of a bond and mortgage, the court saying that in no part of the opinion is it sought to apply the doctrine to shares in corporations or any other personal property, the legal title to which is capable of being transferred by assignment and the free transmission of which from hand to hand is essential.

And where certificates of stock are transferable by indorsement in blank and delivery on pledge, a bona fide purchaser or subsequent pledgee may hold them against the real owner, and is not liable to him therefor in an action of trover. *Jarvis v. Rogers*, 15 Mass. 389.

A certificate of stock deposited as collateral security for the payment of a loan, accompanied by irrevocable power of attorney to sell, assign, and transfer it, is prima facie evidence of equitable ownership in the whole, and may be held by any person in whose hands it is found where he is shown to be a holder for value without notice of the rights of the pledgee. *Mount Holly, L. & M. Turnp. Co. v. Ferree*, 17 N. J. Eq. 117.

And a title of a holder for value without notice of a certificate of stock pledged as collateral security, accompanied by a power of attorney to sell or transfer it when disposed of by the pledgee, is in no wise affected by a provision in the charter or by-laws of the corporation that stock is transferable only on its books, such provision being intended merely for the protection and benefit of the corporation. *Ibid*.

And the owner of certificates of mining stock issued in the usual form in the name of and indorsed by certain persons as trustees, which were delivered to a creditor as collateral security and by the creditor delivered to another who had full knowledge of the former transactions, and thereafter delivered by such other to stock brokers to sell in the stock board, and sold, the brokers having no knowledge of the previous transactions, cannot assert his title to the certificates as against the brokers, though he had tendered the debt and demanded the return of the stock of the intermediate holders. *Stone v. Marye*, 14 Nev. 362.

And the owner of such certificates issued in the name of different parties and indorsed by them as trustees, who deposit them with a bank to be held as collateral security for any indebtedness then existing or thereafter to be incurred by reason of purchases or sales of stock that the bank might make for him, which stock is subsequently delivered by the bank with other

The pledgor may, undoubtedly, refuse to recognize a sale made by the pledgee to himself when such a sale is not expressly authorized; but he cannot affirm it in part and reject it in part; he cannot adopt it so far as to make it effectual to transfer the title to the pledgee, and at the same time reject it as to the price and terms of the sale; nor can his rejection, which has the effect of defeating the pledgee's title under the sale, at the same time destroy the lien of the latter under the contract of pledge. The sale must be either accepted or rejected as an entirety; and when so rejected, and the pledgee remains in the possession and control of the property, with the ability to perform his contract by restoring it to the pledgor on demand, the contract of pledge continues in force, and the pledgee's possession, being referable to the contract, is as lawful as before

the sale, and therefore he can be charged with a conversion of the property only upon his refusal or failure to return it on the performance, or tender of performance, of the pledgor's obligation. The observation sometimes met with in the opinions of judges, and in text-books, that the pledgor is at liberty to treat an unauthorized sale of the pledged property as a conversion by the pledgee, must be taken to refer to such a sale as puts the property beyond the control of the pledgee. In cases of that kind the pledgor may charge the pledgee as for a conversion of the property without demand or tender of performance; though he is not bound to do so, but may by subsequent tender and demand require the pledgee to account for the market value of the property at that time. And, of course, it is not the right of the pledgee to insist that his wrongful sale

stocks to another as collateral security for the payment of a loan made by him to the bank, and for further advances that might be made, the lender having no knowledge of the ownership of the stock, cannot recover the value thereof of the second pledgee as for a conversion thereof. *Gass v. Hampton*, 16 Nev. 185.

So, executors are not entitled to recover for certificates of stock pledged as collateral security for the personal indebtedness of coexecutors against the last pledgee, where the certificates were accompanied by a blank bill of sale and power of attorney, and the pledgee pledged them to one who advanced money to him, supposing him to be the real owner, as the same principle which prevails in the case of an absolute owner applies in the case of an executor who invests the holder of certificates of stock with apparent ownership. *Wood's Appeal*, 92 Pa. 379, 37 Am. Rep. 694.

The delivery by a debtor to a creditor of stocks with a blank transfer by way of security, however, does not authorize the creditor to delegate to another person authority to fill up the blanks for purposes foreign to the original contract. *France v. Clark*, L. R. 26 Ch. Div. 257, 50 L. T. N. S. 1, 36 Week. Rep. 466, 53 L. J. Ch. N. S. 585.

And one who without authority takes from another holding the same in pledge an instrument signed in blank by a third party, and fills up the blanks, cannot, even in the case of a negotiable instrument, claim to be a purchaser for value without notice, so as to acquire a greater right than the person from whom he received it. *Ibid.*

And where owners of shares of stock deposit the certificates with a signed transfer by way of security with another, with the understanding that they are not to be dealt with by the pledgee, and the pledgee does not put them upon the register or execute an acceptance of the shares, but fraudulently transfers them and hands them over with the previous transfer and certificates to mortgagees for value, such mortgagees cannot, after becoming aware of the true ownership, get their title perfected against the owner through further acts on the part of the mortgagor, which would be a continuation of his fraud, as they have no equity which will prevail against the owner. *Ortigosa v. Brown*, 47 L. J. Ch. N. S. 168, 38 L. T. N. S. 145.

And where a firm of stock brokers, having bonds and shares of stock payable to bearer, and passing by delivery, belonging to a customer, in its possession for safe keeping, sells some of them, and contracts for a repurchase of 43 L. R. A.

similar securities for the same amount for the next settling day, and pledges the substituted securities with others belonging to the same owner to a bank to secure a loan from the bank in order to obtain funds to pay for the purchase, the substituted securities are the property of the original owner, and though the bank believed that the brokers were entitled to pledge the securities, if they did not believe that they had authority from the true owners to pledge them *en bloc* with other securities to raise a lump sum, they are not bona fide holders for value without notice, and the owner is entitled to recover such stocks or the value thereof from the bank. *Simmons v. London Joint Stock Bank*, 63 L. T. N. S. 789.

So, one with whom a registered holder of shares in a company whose articles of association do not require a transfer of shares to be by deed deposits the certificates of his shares accompanied by a transfer executed by himself with the name of the transferee and the date of execution left in blank with the transferee as security for a loan, no time being fixed for repayment of the loan, has no authority without previous demand for repayment to sell or sub-mortgage the shares, and if he does so, and a purchaser or mortgagee fills the blank with his own name, he acquires no title as against the original owner except to the extent of what was due him from his pledgor or mortgagor. *France v. Clark*, L. R. 22 Ch. Div. 830, 52 L. J. Ch. N. S. 362, 48 L. T. N. S. 185, 31 Week. Rep. 374. Affirming L. R. 26 Ch. Div. 257, 50 L. T. N. S. 1, 36 Week. Rep. 466, 53 L. J. Ch. N. S. 585.

In the above case *Ex parte Sargent*, L. R. 17 Eq. 273, 43 L. J. Ch. N. S. 425, 22 Week. Rep. 815, was distinguished upon the ground that the question in that case was as to the legal right of a person to have a transfer on the register of members of a company, and that in that case the blanks were filled up by the first transferee.

III. Demand and notice.

a. Necessity of generally.

* A pledge to secure a loan of money to be repaid at a fixed time may be sold by the pledgee after the expiration of such time and a demand for repayment duly made, provided reasonable notice be also given to the pledgor of the time and place of the intended sale, but in the absence of such notice the sale would be invalid. *Richards v. Davis*, 5 Clark (Pa.) 471; *Almsworth v. Bowen*, 9 Wis. 849.

* And a creditor to whom a pledge of property is given is bound to call for a redemption or give notice of sale before selling the property

constitutes a conversion, for that would enable him, if he were allowed to do so, to take advantage of his own wrong, and by his own violation of the contract determine the time, and thus the measure, of his liability for its breach. As has already been stated, no offer was made by Glidden, at any time, to pay the debt he owed the bank, nor was any demand made for the return of the iron held in pledge; and, after it was bid off by the president of the bank, on the 5th day of November, 1883, it remained in the control of the bank, as it had been before, without change in any respect, up to the 7th day of February, 1887, when, under the sale that day made, part of the iron passed into other hands; so that until that time the bank's possession was lawful, and it was able to perform its obligation to Glidden by returning the iron to him upon payment of his

debt. It had, up to that time, exercised no actual dominion or control over the property inconsistent with Glidden's right to redeem; and the sale of November 5, 1883, being ineffectual to transfer the title, did not, we think, constitute a conversion of the property, which, in legal contemplation, was still held under the contract of pledge.

But, by the sale of February 7, 1887, a part of the property pledged passed beyond the control of the bank, and it was thereafter no longer able to perform its contract with Glidden by making return of the iron to him; and if that sale was unauthorized by the terms of the pledge, he might rightfully claim there was then a conversion of the whole of the property without tender or demand by him. The obligation of the pledgee being to return all of the property pledged, a conversion of part may, at the election of

pledged, where the debt was one which did not become due and payable until a future day certain, as well as where it became due and payable immediately. *Stearns v. Marsh*, 4 Denio, 227, 47 Am. Dec. 248.

- A sale by a pledgee without notice or a call for redemption of the property pledged is wrongful. *Ibid.*; *Wilson v. Little*, 1 Sandf. 351; *Washburn v. Pond*, 2 Allen, 474.

And where in a promissory note, the payment of which was secured by a deposit of specified chattels, it was stipulated that in case of the nonpayment of the note at maturity the payee might sell the collaterals after giving at least ten days' notice to the maker of the note, and the creditor sells the collaterals without giving such notice, the sale is a conversion thereof, especially when the seller also becomes the purchaser. *Waring v. Gaskill*, 95 Ga. 731.

- A creditor having property pledged to him as security for his debt cannot sell it until he has called upon the debtor to redeem, and given him notice of the time and place of sale. *Stevens v. Hurlbut Bank*, 31 Conn. 146; *Castello v. City Bank*, 1 N. Y. Legal Obs. 25; *Gay v. Moss*, 34 Cal. 125; *Robertson v. Lippincott*, 1 Phila. 308; *Conyngham's Appeal*, 57 Pa. 474; and see *Wheeler v. Newbould*, 16 N. Y. 392, 5 Duer, 29; *Morgan v. Dod*, 3 Colo. 551; *Luckett v. Townsend*, 3 Tex. 119, 49 Am. Dec. 736; *Bates v. Wiles*, 1 Handy (Ohio) 532, *infra*, IV. - And a pledgee electing to sell a pledge without resort to judicial proceedings must, in the absence of agreement, make the sale at public auction upon reasonable notice of the time and place to the pledgee that he may have opportunity to redeem. *Sharpe v. National Bank*, 87 Ala. 644; *Diller v. Brubaker*, 52 Pa. 498, 91 Am. Dec. 177; *Davis v. Funk*, 39 Pa. 243, 80 Am. Dec. 519; *Wheeler v. Newbould*, 16 N. Y. 392, 5 Duer, 29; *Little v. Barker*, Hoffm. Ch. 487.

And where a sale is made without notice, the pledgee is entitled to maintain an action for an accounting. *Diller v. Brubaker*, 52 Pa. 498, 91 Am. Dec. 177.

And it amounts to a conversion of the pledge which renders the pledgee liable to the pledgee in an action for conversion. *Gay v. Moss*, 34 Cal. 125.

A sale of a pledge is not valid so as to protect the pledgee making it where it was without a previous demand of payment and notice to the pledgee. *Lewis v. Graham*, 4 Abb. Pr. 110.

And a pledgee has no right to sell until after demand and notice, and if he does so without demand and notice to a party having full knowledge, no absolute title passes and the

property remains in the hands of the purchaser as a pledge, and the pledgee may maintain a suit in equity to enforce the performance of the trust. *Dewey v. Bowman*, 8 Cal. 145.

One who receives a bond as collateral security for an indebtedness of the pledgee to him assumes the duty resulting from that relation or notifying the pledgee of the time and place of sale thereof in case of nonpayment of the indebtedness before disposing of the same, or, in case of neglect so to do, to account to him for the value thereof. *Washburn v. Pond*, 2 Allen, 474.

And a sale of stock by a pledgee is illegal and a conversion thereof, where it was pledged to secure a loan payable on demand, and a reasonable time to make payment was not allowed between the time of the demand and notice and the sale. *Genet v. Howland*, 45 Barb. 560.

The rule that a sale of stock by a pledgee is not valid unless made at public auction upon reasonable notice of time and place, and that it cannot be made at a board of brokers unless otherwise agreed, applies even in a case where the hypothecation was general and no specification of the mode or time of sale was made, and the pledgee had applied to the borrower to repay the debt, notifying him that he would sell in case of nonpayment. *Castello v. City Bank*, 1 N. Y. Legal Obs. 25.

An attempt to sell property pledged by sending it to a market for that purpose without notice to the owner and without offer to deliver it or demand payment of the lien is in itself a conversion which destroys the lien and renders unnecessary a demand by the owner before commencing suit to obtain possession. *Vincent v. Conklin*, 1 E. D. Smith, 203.

A pledgee is entitled to notice of the time and place of sale of the thing pledged unless his right has been waived or surrendered by consent, and in case of failure to give it the pledgee becomes liable for the value of the thing pledged. *Milliken v. Dehon*, 10 Bosw. 325.

And a pledgee of a bond as collateral security for an indebtedness due him, who sells the bond without notice to the pledgee of the time and place of sale, is not relieved from liability by a subsequent notice to the pledgee that he might redeem the bond within thirty days at the same price and expense. *Washburn v. Pond*, 2 Allen, 474.

And a bank loaning money to a customer and taking a pledge of shares of stock as collateral to the indebtedness has no right to sell the shares without first demanding payment of the debt and giving him notice of the intention to sell, and cannot sell at private sale for less

the pledgeor, be treated as a conversion of all, for he is entitled to the return of the very thing pledged, and is not obliged to accept a part of it only. Nor is a tender of payment and demand for the property necessary where the pledgee has put it out of his power to comply with the demand, and make restoration of the pledge, in order to entitle the pledgeor to maintain an action for its wrongful sale. Such tender and demand, when the pledgee has thus incapacitated himself to perform his part of the contract, are excused because the act would be a useless ceremony which the law never requires. *Cortelyou v. Lansing*, 2 Cal. Cas. 200; *Alden v. Pearson*, 3 Gray, 342; *Fletcher v. Dickinson*, 7 Allen, 23; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307.

than its fair market price, and where it takes less he is responsible to the pledgeor for the difference between that amount and the market value of the stock. *Nabring v. Bank of Mobile*, 58 Ala. 204.

So, a transfer of a bill of lading of a quantity of flour for which a receipt was given by which it was stipulated that the flour was to be used as security for the owner's note and that the sale of it was to be under his direction, is a pledge, and the pledgee has no right to sell the flour until payment of the note is demanded and reasonable notice of the intended sale is given, and where it is sold without notice the owner may, after offering to pay the note and expenses and demanding the flour, maintain an action against the pledgee for its conversion. *Jaroslauskis v. Saunderson*, 1 Daly, 232.

And that a sale made by a consignee to reimburse himself for advances upon a cargo was made in good faith is no defense in an action against him by the consignor for damages for selling without notice of sale or calling upon him for reimbursement, as the consignee has no right to sell to reimburse himself without notice to the consignor and calling on him for reimbursement, and if he does so the consignor may maintain an action against him for the damages thereby caused. *Porter v. Patterson*, 15 Pa. 229.

So, the inability of a pledgee to make a demand and give notice of the time and place of sale of a pledge, does not entitle him to sell without such demand or notice, and without judicial proceedings. *Strong v. National Mechanics' Bkg. Asso.* 45 N. Y. 718.

— Though where stocks and bonds of a corporation are pledged they may upon default be sold for the debt, the sale must be at public auction and can only be made after demand of payment and notice to the pledgeor of the time and place of sale, and if the pledgeor cannot be found so that a personal demand may be made upon him, the pledgee must resort to proceedings at law for a judicial sale. *Indiana & I. C. R. Co. v. McKernan*, 24 Ind. 62.

But it has been held that where bonds are pledged by a bank as security for the performance of an agreement, and the pledgee is empowered to sell them in case of a breach of the agreement on thirty days' notice of sale, and the bank afterwards fails and closes its place of business, and thereafter transacts no business and has no office or officers, and fails to perform the agreement, a sale of the pledge may be made without notice to the bank on the ground that the giving of notice had been rendered impossible by the act of the pledgeor, such sale not rendering the pledgee liable as for a conversion of the bonds. *City Bank v. Babcock*, *Holmes*, 180, 43 L. R. A.

Whether the sale of February 7, 1887, was made in violation of the agreement between the parties, so as to render the bank liable for the market value of the property at that date, or whether that and the subsequent sales were made in pursuance of the power conferred by the contract, which, if so made would limit the bank's liability to the amount of the net proceeds of those sales, are questions not now before us, and upon which we express no opinion. Issues of fact are joined by the pleadings concerning them, upon which the parties are entitled to have a trial by jury.

In the decision of the question, upon which the judgment below was reversed, the circuit court, we think, committed no error, and its judgment is affirmed.

Where no agreement was made as to notice in a contract between a broker and a customer for whom he bought and sold pork and lard on the board of trade, and the broker is compelled to secure himself against losses by a sale, the transaction is to be governed by the rules of the board of trade. *Denton v. Jackson*, 106 Ill. 433.

A sale of county bonds held as collateral security by a pledgee without notice is not wrongful, however, though the pledgeor was entitled to notice, where it appears that he had actual knowledge of the time and place and reasonable time before the sale was to take place. *Alexandria, L. & H. R. Co. v. Burke*, 22 Gratt. 254.

And some of the cases have appeared to dispense with notice under some circumstances. Thus, the want of notice of sale of stock pledged will not affect bona fide purchasers for a valuable consideration where a power of attorney to transfer was delivered by the pledgeor to the pledgee with the stock pledged. *Conyngham's Appeal*, 57 Pa. 474.

And where gold is held by way of pledge or security, the pledgee may sell it upon giving reasonable notice in case of default, and no allegation in an action by the pledgee for a balance due of tender of the gold or notice to redeem is necessary. *Schepeler v. Elsner*, 3 Daly, 11. Affirmed 54 N. Y. 873.

b. When term for redemption or payment is indefinite.

Where no time is expressly fixed by contract between the parties for the payment of a debt secured by a pledge, the pledgee cannot sell the pledge without a previous demand of payment, although the debt is technically due immediately, and though he had been authorized to sell without notice in case of nonpayment. *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307.

Where the time of redemption is indefinite the pawnee cannot sell it without notice to the pledgeor, and if he does so the pledgeor may maintain an action for damages for a refusal to retransfer it. *De Lisle v. Priestman*, 1 Browne (Pa.) 176.

Where a pledge is delivered without any specified time of payment or redemption, the pledgeor has his whole lifetime to redeem, and if the pledgee sells the pledge before application or notice to redeem he is answerable for the value at the time of the application. *Cortelyou v. Lansing*, 2 Cal. Cas. 200.

And a sale of stock hypothecated to secure a note under an agreement authorizing the sale thereof in case of nonpayment without notice at public or private sale, without notice thereof or demand that the note should be paid, may be treated as a conversion, where the time of payment had been extended indefinitely, and where

the purchase was made by the pledgee, the pledgeor would be entitled to redeem on payment or tender of the principal debt. *Greer v. Lafayette County Bank*, 128 Mo. 559.

In *Barrow v. Paxton*, 5 Johns. 260, 4 Am. Dec. 354, it was said with reference to the case of *Cortelyou v. Lansing*, 2 Cal. Cas. 200, by Kent, Ch. J., that that case was never decided by the court, that it was argued once and he prepared the written opinion which appears in the report of Mr. Calnes, but the court directed a second argument which for some reason or other was never brought on, so that no decision took place on the points raised in the cause.

So, while one who makes an advance upon an assignment of cotton under an agreement that should there be a decline in the market price the consignor should on demand deposit cash sufficient to cover such decline, and if he failed to do so or repay the advance at a fixed date, the consignee might sell the cotton for the most it would bring, can sell in the usual mode where the consignor fails to make good a decline in the market price, without giving notice of his intention or of the time or place of sale, he is bound to give notice of a decline and make an actual demand for the margin, though such demand need not be a personal one. *Milliken v. Dehon*, 27 N. Y. 364.

c. Where stock is held as security for advances.

Some of the earlier cases draw a distinction between ordinary pledges of stock and stocks purchased and held by brokers for customers as security for advances made by them, and it has even been intimated that no notice at all is necessary in case of a sale of stocks pledged.

Thus, the notice required in the case of a sale of pledged stock as security for the payment of money advanced thereon is not required in case of a purchase by brokers as agents advancing money therefor, but the brokers must give the customer notice that his margin is diminished and that they require a further margin, and a reasonable time must be given within which to comply with the demand before the stock can be sold. *Hanks v. Drake*, 49 Barb. 186.

So, in *Sterling v. Jaudon*, 48 Barb. 459, it was held that notice of the time and place of sale for failure to maintain a margin applies to a pledge of stock or other securities for the payment of a debt only, and does not apply to the time and place of purchase, where a customer employs a broker to sell short and upon a failure to maintain a margin the broker buys for the customer to fill the order at a large loss.

And in *Worthington v. Tormey*, 34 Md. 182, it was said in case of sales of some kinds of pledges such as heirlooms, plate, and other articles of like character and description which possess a peculiar value to the owner, or which cannot readily be replaced, it is right and necessary to give notice to the pledgeor of both the time and place of sale that he may have an opportunity of redeeming or attending and protecting his interests, but that the same reason does not apply in case of sales of stocks, as one share is exactly similar to and of the same value as another of the same company, and can be readily purchased to replace that sold if desirable.

This idea, however, would seem to have been entirely overthrown, at any rate in New York, by later well-considered cases.

Thus, the relation existing between a customer and a stock broker with reference to stocks purchased by the broker on a margin for the customer is that of pledgeor and pledgee, and if the broker sells the stock without demanding additional margin or giving the cus-

tom reasonable notice of the sale, it will be wrongful and operate as a conversion. *Gillett v. Whiting*, 120 N. Y. 402; *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Read v. Lambert*, 10 Abb. Pr. N. S. 428.

A broker employed to purchase and sell stocks, who purchases stock with his own funds and in his own name and afterwards sells them to realize his advances without demanding payment of the price and without transferring or offering to transfer them to his principal and without notice of his intention, thereby disabling himself from making the necessary transfer or tender, in effect converts the stock to his own use, and loses all right of action against the principal that he might otherwise have had. *Merwin v. Hamilton*, 6 Duer, 244.

And while parties may agree that a broker may sell stocks purchased by him without notice when they fall in price, so that the margin does not cover the difference between current rates and prices paid, he cannot do so, in the absence of special authority, without giving his principal opportunity to increase his margin, and hold the stock for a favorable change in the market. *Ritter v. Cushman*, 35 How. Pr. 384.

Where stocks are held by a broker for a customer on a margin, it is a part of the contract that if the stock depreciates the margin shall be kept good on demand, and upon failure to do so the stocks may be sold upon reasonable and customary notice, but where the stock depreciates and a call for additional margin is made and complied with, and afterwards a second call is made which is not complied with, and the brokers sell the stock without notice, the sale is irregular and constitutes a conversion. *Gruman v. Smith*, 81 N. Y. 25.

So, the rule has been laid down that a custom among brokers to sell stocks deposited with them as collateral security for call loans at the board on failure of the borrower to pay on the date on which demand is made is not illegal as to parties familiar with and dealing on the basis of such custom. *Colket v. Ellis*, 10 Phila. 375.

It has been held, upon the other hand, however, that a custom in a designated place between brokers and their customers by which the brokers have a right to sell out a customer's stock on the exhaustion of the margin would be in hostility to the terms of the contract between them and an attempt to change its obligation, and is not therefore admissible in an action by a customer against a broker for an alleged wrongful sale of his stocks. *Markham v. Jaudon*, 41 N. Y. 235.

In the above case *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307, *supra*, III. b, was distinguished upon the ground that that was a case of a formal pledge and therefore not an authority in the present case.

But evidence of a custom in a broker's office to sell stocks in pledge at the public board of brokers for want of margin without notice to the pledgeor of the time and place of sale is admissible in evidence in an action by a customer against a broker for a conversion of his stock by sale without notice, where it was agreed between the parties that all transactions in stocks should be in every way subject to the usages of the broker's office. *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80.

And an arrangement by which stock brokers are employed by a customer to buy certain stocks on his account and carry them for him on paying and keeping with them a designated margin, authorizing a sale without notice in case of his failure to keep the margin good, is a contract of pledge and the pledgee is bound first to call upon the pledgeor to make good his

margin, and, falling in that, the pledgeor is entitled to notice of the time and place where the stock would be sold, which time and place must be reasonable. *Markham v. Jaudon*, 41 N. Y. 235.

But a contract by which a broker purchases stocks as agent for a customer and advances money therefor, upon condition that the customer deposits a margin of a designated per cent and a further margin when required by the agent, is not a pledge of stocks for payment of the money advanced requiring notice of the time and place of selling the pledge for nonpayment to render the sale legal. *Smith v. Savin*, 69 Hun, 311, 30 Abb. N. C. 192.

In the above case *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325, *infra*, VI., was distinguished upon the ground that in that case the pledgee acted in pursuance of and under the power conferred by the contract of pledge, and it was immaterial therefore what ulterior rights there were of which it had no notice at the time of the making of the pledge, the waiver of right of notice of the time and place of sale and personal demand being a part of the contract of pledge.

In the absence of any contract between a broker and customer with regard to notice of sale, and of any rule of the board of trade, the common law would govern regarding reasonable notice and opportunity to the customer to make his margin good in order to justify the sale. *Denton v. Jackson*, 106 Ill. 433.

d. Under special contract.

The rule that a pledgee of personal property must demand payment of the pledgeor before sale, and give him notice of the time and place of the intended sale, may be waived by agreement of the parties. *Chouteau v. Allen*, 70 Mo. 290.

And an express waiver by a pledgeor of stock of notice of sale is broad enough to include notice of the reasons for making it, and a pledgee having such authority, wishing to sell because he regards the security as depreciating in value, or for any other reason, may do so without any formal announcement of the reason on which he exercises his power. *McDougall v. Hazleton Tripod Boiler Co.* 60 U. S. App. 209, 38 Fed. Rep. 217, 81 C. C. A. 487.

Where the parties to a pledge agreed to have it sold at public or private sale without notice, the pledgeor cannot insist that he should have notice, and no question can arise as to the mode of sale or want of notice. *Genet v. Howland*, 45 Barb. 560.

The rule that a pledgee of personal property must demand payment of the pledgeor before selling, and give him notice of the time and place of the intended sale, does not apply where a power of sale without notice is given, and where by the contract a definite time is fixed for the payment of the debt. *Chouteau v. Allen*, 70 Mo. 290.

And where a debt secured by a pledge was payable at a fixed time, and by the terms of the contract no demand of payment was necessary, sale without notice being expressly authorized, a sale made under the contract in pursuance thereof cannot be treated as a conversion of the property though no notice was given, and all that the pledgeor would be entitled to receive was what the property brought in excess of the amount loaned, and interest thereon. *Harris v. Thomas*, 37 Ill. App. 517.

And in Illinois and Maryland the rule is that an authority to sell property pledged either at public or private sale, saying nothing as to notice, is a waiver of notice to the pledgeor of the time and place of sale.

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Thus, where a pledge is made upon a special contract with reference to sale for nonpayment conferring the right to sell, but which is silent as to the question of notice, it will be intended that a power of sale was conferred without notice. *McDowell v. Chicago Steel Works*, 124 Ill. 491.

And a contract between a pledgeor and pledgee of stock as collateral for a loan, that if said loan was not properly paid according to agreement the collaterals might be sold for the payment of the debt without further notice, waives and dispenses with all notice of the time and place of sale when the power arises, leaving the pledgee only under the obligation to sell publicly and fairly for the best price he can obtain. *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779.

In New York, however, the contrary rule has been adopted. Thus, an agreement between a pledgeor and pledgee that in default of payment the pledgee might sell at public or private sale and pay the debt and expenses does not have the effect to waive notice of the sale so as to relieve the pledgee from liability as for conversion for selling the pledge without notice. *Haskins v. Patterson*, 1 Edm. Sel. Cas. 120; *Milliken v. Dehon*, 10 Bosw. 325.

So, stock pledged to secure a loan payable on demand cannot be lawfully sold until a demand for the payment of the loan is made, and a reasonable time allowed for such payment, though the contract provided that sale might be made upon default without notice. *Genet v. Howland*, 45 Barb. 560.

And a pledgee of stock certificates deposited with him, by a customer, as margin, or conditional security against loss while carrying other stocks for the depositor, has no legal right secretly or without knowledge or notice to the pledgeor to sell stock pledged, though a power of attorney from the owner was annexed authorizing the transfer of the scrip, the purpose of such power of attorney being to put the pledge in condition to be available as such in case of default. *McNeill v. Tenth Nat. Bank*, 55 Barb. 59.

In the above case, *Crocker v. Crocker*, 31 N. Y. 507, 88 Am. Dec. 291, *infra*, VIII. c, was distinguished upon the ground that in the present case there never was any title in the brokers, or any agency to make an absolute sale without notice, and no consent to the use of the pledge to borrow money was ever given, and its use was unknown and unauthorized, while in that case its use was known and authorized.

So, an agreement between a pledgeor and pledgee, made upon receipt of the property pledged, that if the original indebtedness should not be promptly paid at maturity, the pledgee should have the right and privilege of disposing of the pledge at private sale, and apply the proceeds to the satisfaction of the debt, and pay the balance to the pledgeor, changes the legal rights of the parties only by dispensing with notice to the pledgeor to redeem before making a sale. *Robinson v. Hurley*, 11 Iowa, 410, 79 Am. Dec. 497.

And authority given to a pledgee upon a pledge of promissory notes, that if the debt is not paid at maturity he may make the money out of the notes in the best way he can, and that he may sell the notes for that purpose, does not authorize him in case of such nonpayment to sell the notes without notice to the debtor to redeem and of the time and place of sale. *Goldsmidt v. First M. E. Church*, 25 Minn. 202.

And an authority in a conveyance of shares of insurance company stock as collateral security to sell the same at the brokers' board or at public sale at the creditor's discretion, and authori-

ty to use, transfer, or hypothecate the same at his option, the creditor being required on payment or tender at the proper time of the amount loaned and interest to return an equal quantity of such security, does not warrant a sale of the stock made before any default and without any notice of any kind to the debtor, but where the pledgee upon demand returns the same quantity of similar stock, no wrong is committed. *Ogden v. Lathrop*, 85 N. Y. 158.

So, the sale by a broker of stocks purchased by him for a customer and carried upon a margin, without making any demand for more margin, is wrongful and unauthorized, rendering him liable to a customer, though the contract between the parties authorized a sale in the event of a noncompliance with a demand for more margin without notice. *Stenton v. Jerome*, 54 N. Y. 480.

And one to whom collaterals have been pledged to secure a debt with authority under certain circumstances to sell them before its maturity must before sale give notice to the pledgeor to redeem in case he elects to sell upon the happening of a contingency of which the pledgeor may be in profound ignorance. *National Bank v. Baker*, 128 Ill. 533, 4 L. R. A. 586.

And a contract between a customer and a firm of stock brokers by which they undertook to purchase such stocks as he should direct and pay for, and hold them for him and resell as he should direct, for which they were to receive a fixed rate of interest and a commission, and he was to keep on deposit a margin of 5 per cent of the value of the purchase as security against depreciation and loss, while margin was to be constantly kept good, confers no right upon the broker to sell stock thus carried without notice to or knowledge of the customer, although the price sank so low that the collaterals deposited were no longer equal to the margin required. *Brass v. Worth*, 40 Barb. 648.

The notice required under a contract between stock brokers and a customer by which they were to purchase and carry stock for him and he was to maintain a margin of 5 per cent security, where the security sinks below 5 per cent, is not a notice to redeem, but a notice to make the margin good, or that the brokers would proceed to sell and apply the proceeds to reimburse themselves for money advanced with interest and commissions. *Ibid*.

On this subject, see also cases *supra*, II. c. 1.

e. Sufficiency of.

The sufficiency of the demand and notice would seem to depend upon the differing circumstances of each particular case.

Reasonableness of the time and place of sale seems to be the primary requisite. See *Markham v. Jaudon*, 41 N. Y. 235.

Thus, a demand of payment by a pledgee by letters which were received and a subsequent letter sent to the pledgeor demanding payment and giving notice of the sale of the stocks pledged, thirty-four days before the sale, specifying that the property would be sold at an appointed time, is sufficient as to property originally pledged, but would not include property subsequently pledged as an additional security. *Lewis v. Graham*, 4 Abb. Pr. 110.

And a notice of the sale of municipal bonds pledged as collateral security for money loaned, published in a newspaper printed in the city where the bonds were issued thirty days before the sale, and also in a newspaper published in a neighboring city in which they were sold for more than they could have been sold for in the city where they were issued, is sufficient to ren-

der the sale valid, where no fraud is shown. *Stokes v. Frazier*, 72 Ill. 428.

So, the notice required in case of failure to redeem a pledge is not of the time and place of sale but of the intention of the pledgee to enforce his lien, so as to warn the pledgeor that he must redeem in time, and a notice that if the pledgeor did not pay the amount and take the property pledged away the pledgee would sell it according to agreement, to which the pledgeor made no objection, but promised to call the following week and arrange it, is sufficient to constitute a defense in an action of trover for the conversion of the pledge by a sale thereof. *Haskins v. Patterson*, 1 Edm. Sel. Cas. 120.

And two days' notice of sale of stock held as collateral security to a promissory note under an authority containing no restrictions as to the mode of selling the stock in case of nonpayment to be made at a board of brokers in the city of New York will be deemed sufficient to support the sale where there was no objection either to the length of the notice or the place of sale. *Willoughby v. Comstock*, 3 Hill, 389.

And a formal written notice of sale with a copy of the advertisements thereto annexed, signed by the auctioneer by whom the sale was made and left at the place of business of the pledgeor with a person in charge thereof two days before the sale, is sufficient to justify a sale by a pledgee of stock pledged, though the pledgeor testifies that he had no recollection of having received the notice. *Bryan v. Baldwin*, 7 Lans. 174.

And a notice by a pledgee, given on the 13th of the month, to return the whole of a loan on the 14th thereof, is sufficient under a contract for return of the loan upon one day's notice, and that if the loan was not promptly paid the pledgee was authorized without further notice to sell the said collateral for payment of the debt to justify a sale of the collateral made on the 20th of that month. *Maryland F. Ins. Co. v. Dairymple*, 25 Md. 242, 89 Am. Dec. 779.

So, a notice sent by a pledgee to a pledgeor to inform him of the sale of his pledge consisting of stocks by mail is sufficient to bind him, though upon the day it was sent he was in the place from which it was sent, and did not receive it until later. *Worthington v. Tormey*, 34 Md. 182.

And a pledgeor who relies upon his distance away as an objection to the sufficiency of a notice of the sale of stock pledged must show that the time of transmission by mail was such as to deprive him of the benefit of the notice in order to invalidate the sale made on such notice. *Lewis v. Graham*, 4 Abb. Pr. 110.

So, refusal to submit to the jury the question as to what was a reasonable time, in an action by a customer against a stock broker for the illegal sale of securities belonging to him, is not error where the time covered by the evidence was thirty days. *Coit v. Owens*, 90 N. Y. 368.

But two hours' time after notice by a broker to a customer that his margin is diminished requiring a further margin before selling, where no time is specified for compliance, cannot be held, as matter of law, to be reasonable time for performance. *Hanks v. Drake*, 49 Barb. 186.

And where in a former transaction between the same parties brokers had given to a customer notice that his margin was diminished, and made a demand that it be made good, which demand was complied with the next morning, which was satisfactory to the brokers, the customer in a subsequent transaction has the right to suppose that the same course of dealing

would be expected upon receiving a similar notice, and if a quicker compliance is required the notice should so specify in order to validate a sale made for noncompliance. *Ibid.*

So, a sale of securities by a pledgee to reimburse himself is not rendered invalid for want of personal notice to the pledgeor, where it appears that the pledgeor was absent in Europe, and that notice was given at his place of business to a person appointed his agent during his absence, with full power to do all things that he might do if personally present. *Potter v. Thompson*, 10 R. I. 1.

And a notice by a pledgee of stock to the pledgeor that the stock would be sold is not rendered insufficient to support the sale by the fact that it named no place, where it appears that that particular stock was for sale generally at one place only, and that the pledgeor had knowledge of that fact. *Worthington v. Tormey*, 34 Md. 182.

But the object to be attained by the giving of notice of sale of a pledge by the pledgee to the pledgeor is to afford the debtor an opportunity to redeem and to be present at the sale to see and know that it is fairly conducted and the property disposed of to the best advantage, and a disposition after notice of intention to sell without saying when, or where, or in what manner it will be made, deprives the debtor of the substantial right and is illegal. *Wheeler v. Newbould*, 16 N. Y. 392.

And a notice without date or signature left in the office of a pledgeor of stock, that if a specified amount of the loan was not paid the stock would be used, does not constitute a demand which will mature the loan which was payable on demand, and authorize a sale of the stock. *Genet v. Howland*, 45 Barb. 560.

Nor is a notice by a pledgee that he will sell unless an excessive sum is paid immediately, such a notice as will justify a sale or relieve him from liability as for a conversion in case he sells. *Pigot v. Cubley*, 15 C. B. N. S. 701, 33 L. J. C. P. N. S. 134, 10 Jur. N. S. 818, 9 L. T. N. S. 804, 12 Week. Rep. 467.

And an offer by a pledgee of stock as collateral to an indebtedness, which he was about to sell because the debtor declined to pay another debt to another person not included in the pledge, to accept the amount of his own debt, will not render the sale valid and prevent its being a conversion of the stock, where it was made immediately before the sale so that the debtor did not have reasonable time within which to comply with the offer. *Blood v. Erie Dime Sav. & L. Co.* 164 Pa. 95.

So, a notice by a pledgee, given after the debt has matured, that if it is not paid within a specified time the pledgee will make the best disposition he can of the notes pledged to raise the money either by public or private sale, is not sufficient under a power to make the money out of the notes in the best way he can, and to sell the notes for that purpose. *Goldsmidt v. First M. E. Church*, 25 Minn. 202.

And a sale of dock warrants for brandy in dock by a pledgee with whom they were deposited as security for a loan made on the 28th day of January, and the delivery of the warrants to the purchaser on the 29th, the purchaser taking possession on the 30th, is a conversion of the warrants by the pledgee, though the owner was bankrupt and would not have redeemed. *Johnson v. Stear*, 15 C. B. N. S. 330, 33 L. J. C. P. N. S. 130, 10 Jur. N. S. 99, 9 L. T. N. S. 538, 12 Week. Rep. 347.

And a bank holding stocks as collateral security, with the right to sell them if the indebtedness was not paid within a reasonable time, with no arrangement as to the time or manner

of sale, which made a conditional sale of the stocks without previous notice, which was to take effect if the debtor did not pay on a certain day, giving him notice to that effect, whereupon he remonstrated and asked to be allowed another day, which was refused, is liable to him for damages for such disposition of the stock where he procured the means and was ready to pay the greater part of the debt on the day following. *Stevens v. Hurlbut Bank*, 31 Conn. 146.

So, one who furnished a margin and directed a broker to purchase stock and bonds for him with his own money upon a commission, under an agreement that the broker could hold them until a specified day and then sell them, and that the customer should watch the margin value of the stock and bonds while they were so held and keep the margin good, is not in default where the margin was good on Saturday, but prices fell on that day, so that on Monday it was not good, by reason of not having anticipated the decline and given additional security on that day, and a sale thereof by the brokers upon the meeting of the board is unauthorized and illegal, rendering them liable for the market value of the stock and bonds on the last day of the period during which they had agreed to hold them. *Andrews v. Clerke*, 3 Bosw. 585.

And under an agreement between a stock broker and a customer that the broker was to purchase and carry stocks for the customer upon his direction, and be allowed therefor interest upon the money until reimbursed, and commissions, and that the customer should maintain a distinct margin if the broker has a right to sell the stocks purchased on the failure of the customer to maintain the required margin, a sale made upon a particular day, when there was a clear understanding between the parties that the customer was to make good his margin on that day and in default thereof the stock should be sold, is wrongful, and leaves the broker liable for the damages caused thereby, as the understanding would constitute a waiver of the customer's default in failing to maintain the margin, and he would not be at liberty to sell until after that day. *Morgan v. Jaudon*, 40 How. Pr. 366.

Proof that a pledgee had been pressing a pledgeor for payment, and that he was making efforts to raise money, is sufficient to show a demand for payment, which in case of failure to make it would authorize a sale of the stock pledged by the pledgee. *Carson v. Iowa City Gas Light Co.* 80 Iowa, 638.

And an offer by a pledgee of stock as collateral, made to the pledgeor, to take a specified amount of money for the collateral, which the pledgeor entertained and tried to raise the money to pay it, and proof that the note secured by the pledge had been sent to the pledgeor, and that papers had been put in the hands of an attorney for collection, sufficiently show a demand for payment of the note to mature it and warrant a sale of the pledge by the pledgee. *McDougall v. Hazelton Tripod Boiler Co.* 60 U. S. App. 209, 88 Fed. Rep. 217, 31 C. C. A. 487.

IV. Conduct of sale.

The general rule is that in the absence of a special authority property pledged can only be sold at public auction. *Diller v. Brubaker*, 52 Pa. 498, 91 Am. Dec. 177; *Davis v. Funk*, 39 Pa. 243, 80 Am. Dec. 519; *Wheeler v. Newbould*, 5 Duer, 29; *Rankin v. McCullough*, 12 Barb. 103; *Little v. Barker, Hoffm. Ch.* 487; *Morgan v. Dod*, 3 Colo. 551; *Sharpe v. National Bank*, 87 Ala. 644. And see *Brown v. Ward*, 3 Duer, 660, *supra*, II. b. 3; *Indiana & I. C. R. Co. v. McKernan*, 24 Ind. 62, *supra*, III. a.

And that in the absence of express authority a pledgee has no legal right to dispose of stock pledged at private sale, and in case he does so the pledgeor is entitled to maintain his action therefor either in trover or in case. *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269. And see *Nabring v. Bank of Mobile*, 58 Ala. 204, *supra*, III. a.

Thus, a party with whom stock is hypothecated after having called for a redemption, and apprised the pledgeor of his intention to sell and after offering it at the board of brokers in New York, cannot sell at private sale without any notice to the pledgeor of the time and place. *Castello v. City Bank*, 1 N. Y. Legal Obs. 25.

And the sale by a pledgee of bonds specifically pledged as security for an advance at private sale is unauthorized and wrongful, and the pledgeor may elect either to affirm it and claim the benefit thereof or repudiate it and hold the pledgeor responsible for the bonds. *Strong v. National Mechanics' Bkg. Asso.* 45 N. Y. 718.

But a pledgeor whose property pledged as security is sold at private sale with his consent or by his direction cannot afterwards object that such sale was not authorized by law. *Hamilton v. State Bank*, 22 Iowa, 306.

So, a sale of bonds deposited with a bank as collateral by the cashier at private sale to a director of the bank, who was also security for the debt secured for a sum clearly less than their value, is fraudulent and void. *Dana v. Buckeye Coal & C. Co.* 38 Ill. App. 371.

And where a sale is made of a negro boy held in pledge for an indebtedness of the owner without notice to him, which was not a public sale at auction, and the purchase was made by one who had full knowledge of the fact, he at most acquires only the title of his vendor, the pledgee, and the owner is entitled to redeem. *Luckett v. Townsend*, 3 Tex. 119, 49 Am. Dec. 736.

And a usage and custom in a city to sell notes and drafts pledged after demand of payment and notice that such sale would be made in default of payment, at private sale for the best price that could be obtained and not at public sale or auction, is inadmissible in evidence in an action for conversion of the pledge by such disposition, as the usage is in contradiction of the fair legal import of the contract between the parties. *Wheeler v. Newbould*, 16 N. Y. 892.

And in *McLemore v. Hawkins*, 46 Miss. 715, it was doubted whether a valid sale of a note pledged could be made by the pledgee to the maker at private sale without the consent of the pledgeor.

As to special authority for private sale, see *Jeanes's Appeal*, 116 Pa. 573; and *Smith v. Lee*, 84 Fed. Rep. 557, *supra*, II. c. 1.

So, a sale of stocks pledged as security at a board of brokers is a private, and not a public, sale, and a clear violation of the duty owed by the pledgee to the pledgeor. *Brass v. Worth*, 40 Barb. 648; *Rankin v. McCullough*, 12 Barb. 103.

And a sale of stock held in pledge at the board of brokers upon default in payment of the principal debt is not valid in the absence of an express stipulation authorizing it. *Castello v. City Bank*, 1 N. Y. Legal Obs. 25.

And authority to a pledgee of stock to sell it at the board of brokers for the payment of the debt secured if it was not paid when due does not authorize the pledgee, even if he had retained the stock in his own hands, to put it up secretly; it should be sold openly to the highest bidder at the board of brokers after stating that it was the stock which had been pledged for the security of that particular debt, with authority to sell in that manner. *Dykers v. Allen*, 7 Ill. 497, 42 Am. Dec. 87. 43 L. R. A.

Where authority is given a pledgee of stock to sell without notice at public or private sale in case of default, however, a sale at the board of brokers is valid. *Wicks v. Hatch*, 6 Jones & S. 5, Affirmed 62 N. Y. 535.

And a sale of stock or bonds pledged as collateral security for nonpayment of the debt secured after proper demand and notice may lawfully be made in the city of New York at the merchants' exchange. *Brown v. Ward*, 3 Duer, 660.

It will be inferred from an allegation of due notice of intention to sell and of sale pursuant to notice, in an action by a broker against a customer whose stock had been sold for failure to maintain a margin, that the sale was made at the time specified in the notice at the gold board. *Schepelev v. Eisner*, 3 Daly, 11, Affirmed, 54 N. Y. 875.

As to sale by board of brokers, see also *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242, 80 Am. Dec. 779; and *Bryson v. Rayner*, 25 Md. 424, 90 Am. Dec. 69, *supra*, II. c. 1.

A postponement of the exercise of the right of a pledgee to sell the thing pledged upon failure to pay the original indebtedness cannot be complained of by the pledgeor, as it merely enlarges his opportunity to redeem and thereby prevent any sacrifice that would result from a forced sale of the pledge. *Robinson v. Hurley*, 11 Iowa, 410, 79 Am. Dec. 497.

And the time when bonds pledged as security for the payment of a note, which is in turn pledged as security for the payment of acceptances, may be sold for nonpayment, is determined by the maturity of the note, and not of the acceptances. *Chouteau v. Allen*, 70 Mo. 290.

And the sale of stock hypothecated to secure a three months' note under which the pledgee agreed to hold three months, at the end of the three months, is not a wrongful act, though the three days of grace allowed on the note had not expired. *Rankin v. McCullough*, 12 Barb. 103.

But a transfer by a pledgee of a bond and mortgage held as collateral security for a sum sufficient to pay the principal debt but grossly inadequate to the value of the bond and mortgage, which were thus canceled, constitutes a conversion of such bond and mortgage for which the pledgee is liable in an action of trover. *Campbell v. Parker*, 9 Bosw. 322.

And while stock transferred as collateral security with power to sell at public or private sale may, on default of payment of the debt, be sold by the pledgee after demand of payment and notice of the time and place of sale, the sale must be conducted in good faith, and if it is made in an unusual mode, or on short notice, or without notice, it will be declared invalid, and the pledgee will be held liable for the damages caused. *Bates v. Wiles*, 1 Handy (Ohio) 532.

And where the officers of a bank are empowered to sell collateral security upon the failure of the maker of a note to comply with its terms, and the option is given by which they can dispose of the stock held as security at public or private sale, and they choose to make the sale public, they must conform to the rules governing public sales so far as publicity is concerned, and the power of sale must be exercised with a view to the interests of the pledgeor as well as the pledgee, and the sale should not be forced for barely sufficient money to secure the payment of the debt, when the securities are known to be much more valuable. *Foot v. Utah Commercial & Sav. Bank*, 17 Utah, 283.

So, a commission merchant receiving goods to sell at a certain limited price, who makes an

advance upon them and is expressly authorized to sell and thereby to reimburse himself, no limit being placed upon the time when the sale is to be made, must wait a reasonable time if the sale could not be made for the price limited, but after a reasonable time has elapsed, and a demand has been made upon the consignor to repay the money advanced, which he refuses to do, he may sell them at a fair market price though below the limit. *Parker v. Branner*, 22 Pick. 40.

But sales of stock below the market price, by brokers holding the same in pledge when duly authorized, does not render them liable for the difference between the selling price and the market price, unless made with an intent to injure the principal beyond the mere regulation of the amount due the brokers. *Durant v. Einstein*, 35 How. Pr. 231.

And brokers who are mere pawnees are not bound in disposing of a pawn to use even the same diligence as an agent to obtain the best price, and will not be held liable except for extraordinary negligence, which must be proved and not presumed. *Ibid*.

And a pledgee of property hypothecated to secure a debt, having a right to sell it on notice or demand, no time having been fixed for payment, may do so at public auction, and is under no legal obligation to wait until a depressed money market is better in order to obtain a higher market price therefor, as the parties will be presumed to have taken the risk of fluctuations when the pledge was made. *King v. Texas Bkg. & Ins. Co.* 58 Tex. 669.

So, one who places money in the hands of a broker as a margin for the purchase of pork and lard on the board of trade, and who is notified that his margin has become exhausted and fails to produce the necessary margin, and after such failure and within a reasonable time according to the customs and usages of the board of trade the stock is sold by the broker, cannot recover the margins thus deposited, if the sale was regular according to the agreement, or in the absence of an agreement to the rules of the board of trade. *Denton v. Jackson*, 106 Ill. 433.

And an owner of stock which he exchanges for other stock pledged to secure a debt past due cannot complain of want of proper care on the part of the pledgee in protecting his interests as pledgee in making a sale thereof and that the sale was made for less than the real value, where in the preceding month other shares of the same stock had been sold by the pledgee at the same price, and the pledgee had said that the price was satisfactory, and there was nothing to show that the parties had learned any facts showing a change in the value of the stock or in the situation of the property. *Smith v. Lee*, 84 Fed. Rep. 557.

And a sale of promissory notes and a draft held in pledge as collateral security for reimbursement is not rendered invalid by the fact that it was made in Providence instead of New York, where the contract of hypothecation purported to be a Rhode Island contract, and it does not appear that any objection was ever made to the place of sale. *Potter v. Thompson*, 10 R. I. 1.

But where the maker of a promissory note pledges a chattel to a surety thereon, and the surety transfers it to the payee for the purpose of discharging the debt, the transfer does not change the status of the property, and the pledgee has the right to redeem even after maturity. *Morgan v. Dod*, 3 Colo. 551.

V. Purchase by pledgee.

The doctrine of the principal case on this subject seems to be general, if not universal. 43 L. R. A.

Thus, while a sale by the pledgee of the thing pledged to himself is illegal and ineffectual to pass title, it does not break up the bailment except at the election of the pledgeor. The title to the property remains as before, and where the property remains in the possession of the pledgee the transaction does not work a conversion, but the bailment continues as if nothing had been done. *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779; *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269; *Bryan v. Baldwin*, 52 N. Y. 232, 7 Lana. 174. And see *Greer v. Lafayette County Bank*, 128 Mo. 559, *supra*, III. b; *Earle v. Grant*, 14 R. I. 228, *infra*, VII.

And authority given to a pledgee to sell the pledge to any person, persons, or corporation does not authorize him to become himself the purchaser, and in case he does so the pledgeor may redeem by paying the debt with interest notwithstanding the sale; authority to the pledgee to become the purchaser must be given in very plain terms. *Hamilton v. Schaack*, 16 N. Y. Week. Dig. 423.

A purchase by a pledgee of the thing pledged is voidable but not void; the pledgeor has the option to affirm or to repudiate the sale. If he affirms the sale his action validates it and passes the title to the collaterals to the pledgee, and entitles the pledgeor to the amount bid at the sale, but to no more, and if he repudiates it, the sale is void, and the pledgee has the collaterals under the original pledge with the same rights and subject to the same liabilities as if no sale had been attempted, and cannot be charged with conversion until he wrongfully parts with the possession of and control over them. *First Nat. Bank v. Rush*, 56 U. S. App. 556, 85 Fed. Rep. 589, 29 C. C. A. 333.

So, a pledgee who takes notes secured by a mortgage as collateral security for a debt represented by the mortgage is not liable as for a conversion of the pledge for procuring a judgment of foreclosure of the assigned mortgage in his own name; he is merely liable to account for the proceeds when collected and for the payment to the debtor of any surplus remaining after the application of the proceeds of sale under his own mortgage and the payment of the balance from the proceeds of the assigned mortgage. *McArthur v. Magee*, 114 Cal. 126.

And a sale of stock pledged by a pledgee without notice to the pledgeor, in which the original certificates were surrendered and new certificates issued in the name of the purchaser, which were indorsed in blank by him and remained in the possession of the pledgeor, the purchaser never paying anything or claiming them, and his name having been used as a convenience in order to effect a sale, the pledgee being the real purchaser, is not a conversion of the stock where it was all the time within the power of the pledgee to return the stock to the pledgeor upon payment of the indebtedness secured up to the time when the pledgee subsequently made a valid sale thereof upon notice to the pledgeor. *Terry v. Birmingham Nat. Bank*, 98 Ala. 599.

And an instruction in an action on a promissory note to secure which stock had been pledged, which pledge had been sold and purchased by the pledgee, that the defendant was entitled to set off the full value of the stock at the time of the sale without regard to the amount realized from the sale, in effect declares that because the stock was sold to the pledgee instead of a third person and might for that reason be avoided it was *ipso facto* a conversion, although it might have been made in good faith and is therefore erroneous, the rights of the pledgeor being to disavow the sale and re-

claim his stock upon paying his note. *Killian v. Hoffman*, 6 Ill. App. 200.

So, a pledgee of stocks cannot recover in trover against a purchaser thereof from the pledgee where the pledgee had first sold them and himself become the purchaser, if he sold them publicly at the board of brokers in parcels to different persons fairly and in the usual way, though a recovery might be had in an action *ex contractu* for any excess that might remain in the hands of defendant arising from the sale of the stock, or dividends received therefrom. *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 770.

The rule has been laid down, however, that a pledgee to whom stock was conveyed as collateral security for a debt which was afterwards paid, who sells the stock at auction and bids it in, is liable in trover for the value of the stock at the time of the alleged sale, and for dividends received by him thereon and interest, deducting therefrom the amount of assessments paid and expenses of sale. *Freeman v. Harwood*, 49 Me. 195.

And a sale by a bank of stocks pledged to it by a debtor as collateral security for existing and future liability to its own officers without notice or judicial sale is a violation of its duties to the pledgee, and an illegal mode of dealing with the collateral held in trust, which will render it liable for the value of the securities which may be offset against its claim. *Sitgreaves v. Farmers' & M. Bank*, 49 Pa. 359.

So, it has been held that where a pledgee takes a conveyance of securities pledged to him without a judicial sale he is properly held for the value of the property received by him. He may be held as trustee for the reason that he had taken title to property without the owner's consent and in violation of his rights, or he may be treated as wrongfully converting the same, and held for its value. *Kelly v. Matlock*, 85 Cal. 122.

No duty devolves upon a special partner in a firm which took a pledge of stocks as collateral security in reference to the bailment, and a purchase by him individually of the stock pledged at a sale thereof terminates the bailment, and will not be deemed a purchase by the firm. *Lewis v. Graham*, 4 Abb. Pr. 110.

VI. *Tender of payment to render conversion actionable.*

The general rule is that no tender of the debt due by the pledgee is necessary as a preliminary to an action by him against the pledgee for the conversion of the pledge by an unauthorized sale thereof made before the debt was due, as by making such sale the pledgee disabled himself from returning the property. *Kilpatrick v. Dean*, 19 N. Y. S. R. 837; *Read v. Lambert*, 19 Abb. Pr. N. S. 428; *Cortelyou v. Lansing*, 2 Cal. Cas. 200; *Stearns v. Marsh*, 4 Denio, 227, 47 Am. Dec. 248; *New York, L. E. & W. R. Co. v. Davies*, 38 Hun, 477; *Wheeler v. Newbould*, 16 N. Y. 392; *Sheridan v. Fressas*, 18 Misc. 180; *Work v. Bennett*, 70 Pa. 484; *Walley v. Deseret Nat. Bank*, 14 Utah, 305.

Thus, a wife whose watch is pledged by her husband under an authority to raise money thereon, which is sold by the pledgee without notice, may recover therefor without paying or offering to pay the money borrowed. *Van Arsdale v. Joiner*, 44 Ga. 173.

And the defense of a conversion of stock pledged by a pledgee by a sale thereof without notice in an action brought by the pledgee upon the principal debt may be made without demanding restitution of the collateral, or tendering payment of the debt secured thereby. *Waring v. Gaskill*, 95 Ga. 731.

43 L. R. A.

And a pledgee who is sued upon the principal debt need not tender payment, but he can maintain a counterclaim for damages for a sale of his collaterals to a third person who had transferred them beyond the control of the pledgee without notice to the latter that he holds them as the agent of the pledgee who is the real purchaser. *First Nat. Bank v. Rush*, 56 U. S. App. 556, 85 Fed. Rep. 539, 29 C. C. A. 333, 36 U. S. App. 248, 71 Fed. Rep. 102, 17 C. C. A. 627.

Nor is a tender of a debt secured by a pledgee necessary to the maintenance of an action to redeem where the pledgee had disposed of the property pledged by private sale without notice, though the purchaser had knowledge of the facts. *Luckett v. Townsend*, 3 Tex. 119, 49 Am. Dec. 723.

So, a complaint in an action against stock brokers for selling a customer's stock purchased by him payable on time, at his option, in violation of his instructions, need not allege a demand upon defendant and an exercise of the plaintiff's option, or a tender of the amount due on the purchase of the stock. *Clarke v. Meigs*, 22 How. Pr. 340.

And where a pledgee disposes of things pledged separate from the debt, and thereby incapacitates himself from returning the pledge on demand, the pledgee may sustain an action to recover therefor without a tender of the amount advanced. *Felt v. Heye*, 28 How. Pr. 359.

And where a firm of brokers which purchased stock for a customer becomes insolvent and has no stock which it can deliver, the customer is at liberty to claim the market value of the stock by way of credit on account, without making a demand for the stock and tendering payment of the amount due, as in such case a demand would be an idle ceremony. *Chamberlain v. Greenleaf*, 4 Abb. N. C. 178.

So, the fact that stock brokers, who had purchased stock for a customer on a margin and held it as security, converted a part of it by pledging it for their own debt, which was afterwards sold by the pledgee, will not prevent a recovery by them from the customer of the purchase price of the stock so pledged, though the stock was never tendered to him or the amount due thereon demanded, as the pledge and sale of the stock did not constitute a failure to perform a condition precedent, but was a breach of a condition subsequent to the purchase, so that they were entitled to credit for it, but were liable for damages sustained by the customer by reason of the subsequent conversion. *Capron v. Thompson*, 86 N. Y. 418.

And a complaint in an action for an advance or loan is sufficient where it simply states that the defendant was indebted to the plaintiff for a designated amount of money loaned or advanced; and where the plaintiff goes further, and states that an advance of money was made, and that stock was received as collateral, and that it was sold and produced a certain sum, which being deducted from the advance left a balance, which with the accrued interest amounted to the sum stated, the complaint is not demurrable because it was not also alleged that demand for the advance and notice of the contemplated sale of securities was made, as such matter is matter of defense. *Wallace v. Berdell*, 24 Hun, 370.

The right to the possession of property pledged follows from the extinguishment of the debt secured or a sufficient tender of payment of such debt, however, and a tender of what is due is essential to the establishment of the right of the pledgee to recover for a conversion of the thing pledged; and if no tender is made

by the pledgeor he cannot maintain an action as for conversion where after the debt was due and unpaid the pledgee disposed of it without notice. *Reardon v. Patterson*, 19 Mont. 231.

And a sale of bonds held as collateral security by a pledgee to reimburse himself is not invalid because made after the pledgeor had offered to redeem, where the offer was not accompanied by a tender of the bonds themselves or the money to pay for them and the money to pay for their depreciation. *Potter v. Thompson*, 10 R. I. 1.

And one who gave canal scrip to a creditor as collateral security for his note, authorizing the creditor to sell the security and apply the avails in payment if the note was not paid at maturity, which scrip was sold and assigned by the creditor to another, who afterwards sold the same at auction after maturity and nonpayment of the note, cannot recover against the last holder of the scrip as for a tort or illegal conversion, where he simply offered to pay him the amount due without making any tender thereof. *Lewis v. Mott*, 36 N. Y. 395.

So, a sale by one who loaned a sum of money on a promissory note of the borrower payable on demand and on the security of scrip certificates for shares of stock after the borrower became bankrupt, without demand or notice to repay the debt, does not reveal the immediate right to the possession of the shares in the assignee of the borrower so as to enable him to maintain trover, either for the whole value of the shares or for nominal damages, without making any payment or tender of the amount of the debt. *Halliday v. Holgate*, L. R. 3 Exch. 299, 37 L. J. Exch. N. S. 174, 18 L. T. N. S. 656, 17 Week. Rep. 13.

And a tender made by a pledgeor after the satisfaction of the debt secured by the pledge by a sale thereof properly made is too late to be available in an action of trover brought for its conversion. *Loomis v. Stave*, 72 Ill. 623.

So, a pledgeor of bonds which have been sold by the pledgee cannot, after waiting some time after the sale and the bonds have risen in value, maintain an action in equity to recover their value, where he had never made any tender for the purpose of redeeming them or any effort to reclaim them. *Lacombe v. Forstall*, 123 U. S. 562, 31 L. ed. 255.

And a demand by a pledgeor for a return of stock pledged or for its present value will be deemed a stale demand, and to have been barred by unreasonable delay in its assertion, where it was made more than thirteen years after the original deposit, and at one time during the period the stock was pledged it was worth but very little, and at the time of its sale by the pledgee it was not above par, and when the bill was filed it had rapidly increased in value and during the progress of the cause reached eight times its par value and nearly forty times the lowest rate to which it had once fallen. *Gilmer v. Morris*, 80 Ala. 78, 60 Am. Rep. 85.

But in *Gilmer v. Morris*, 35 Fed. Rep. 682, which was a subsequent action brought upon substantially the same facts, it was held that where stock is pledged to secure a present indebtedness and future advance, the statute of limitations will not begin to run until notice is given that sale will be made in default of payment.

So, while no tender and demand are necessary to the maintenance of an action for the conversion of bonds purchased and carried by a broker for a customer and transferred by him to a stranger for a larger amount than was due from the customer, a tender should be made where he had merely passed the bonds over to the pledgee for an amount not greater than that 43 L. R. A.

which the customer owed him thereon. *Rankin v. McCullough*, 12 Barb. 103.

And an owner of railroad bonds, who transfers them to stock brokers to be held as margins in stock transactions, which stock brokers deposit them with a bank as security, upon the faith of which the bank makes advances, after which the brokers fail, cannot recover of the bank where no offer to repay the advance or redeem the bonds was made and the bank afterwards sold them, realizing less than the amount of the advance. *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325.

And a pledgeor of bank stock cannot recover of the bank as for a conversion of the stock where the pledgee procured a sale of the stock without notice, and itself purchased at the sale and procured the transfer of the stock to itself on the books of the corporation, on the ground that the corporation participated in converting the stock by transferring it on its books to the pledgee, where the pledgeor still owes the pledgee the original indebtedness. *First Nat. Bank v. Mings*, 11 Tex. Civ. App. 302.

To put the pledgee of a stock note in default, and to subject him to the consequences of a conversion thereof by an unlawful sale, the pledgeor is bound to pay or offer to pay his note on the day it becomes due, though that would not be necessary in case of an action to redeem. *Butts v. Burnett*, 6 Abb. Pr. N. Y. 302.

And a request by a debtor to his creditor to present the note representing the principal indebtedness for payment is not such an offer of payment as will sustain an action for a conversion by the creditor of securities held by him by a sale thereof. *Ibid.*

See also *Fisher v. Brown*, 104 Mass. 259, 6 Am. Rep. 235, *infra*, IX. b.

VII. Ratification of sale and waiver of conversion.

The question whether a pledgeor has ratified a sale or waived a conversion is one of fact depending generally upon all the facts of each particular case, and particularly upon the question whether he had knowledge of the facts at the time of the acts alleged to constitute a ratification or waiver.

Thus, where property pledged is sold by the pledgee at private sale, and the pledgeor knowingly accepts the proceeds of such sale, he cannot complain of it as a conversion of the pledge. *Hamilton v. State Bank*, 22 Iowa, 306.

And a sale of a pledge by a pledgee cannot be avoided on the ground that no demand was made on the pledgeor for payment, and that the pledgee did not give the pledgeor any notice of the time and place of sale, and that the sale was not at a public auction, where the pledgeor attended the sale and did not object to it, but made a bid, and after the sale the pledgeor with the pledgee and purchaser joined in drinking in celebration of the sale, and the sale was held in a room which, though generally open only to members of the board of trade, was open to the public at the time of the sale. *Earle v. Grant*, 14 R. I. 228.

And a pledgeor whose property was pledged with power of sale to the pledgee, who exchanges the same for other property, who brings an action for the recovery of the property taken by the exchange, thereby sufficiently ratifies the exchange; but if he brings suit to recover the original property it amounts to a repudiation thereof. *Strong v. Adams*, 80 Vt. 221, 73 Am. Dec. 805.

So, one who pledges a diamond pin to secure the payment of a debt, and afterwards calls upon the pledgee to redeem it, and tenders the

money due, which is refused on account of a difference of opinion as to the amount, and who then leaves the pledge in the pledgee's possession, taking no immediate steps to recover it, when it is afterwards disposed of by the pledgee, abandons his right thereto based upon the tender, and authorizes others to regard the pledge as still subsisting, and cannot thereafter recover it of the person to whom it is subsequently pledged, without tendering the amount for which the pledge was given and demanding its return. *Bradley v. Parks*, 83 Ill. 169.

And a debtor pledging a bond as collateral security for his indebtedness, which bond is collected by the pledgee instead of being kept for return upon payment of the debt, who brings an action for money had and received, thereby waives the tort and ratifies the act of the pledgee in collecting the bond. *Hancock v. Franklin Ins. Co.* 114 Mass. 156.

And the maker of a promissory note who pledged a policy of life insurance as collateral security for its payment, with power to sell the same at public or private sale, who, upon being pressed for payment, wrote to the payee fifteen months after the maturity of the note that he would pay him a certain sum for the policy, which the payee refused to take and demanded a larger sum, stating that unless it was paid he would sell it, to which the maker made no reply, and seven months later the payee sold the policy and notified the maker, who made no objection or complaint for over seven years, will be deemed to have waived further notice. *Downer v. Whittier*, 144 Mass. 448.

Where a pledgee of scrip sells more than is necessary to pay the indebtedness due, however, the pledgee does not forfeit his right to recover damages therefor by accepting the excess price of scrip so sold. *Fitzgerald v. Blocher*, 32 Ark. 742, 29 Am. Rep. 3.

But the right to bring an action for trover for the unlawful sale of a pledge will be deemed to have been waived, where after the sale the pledgee accepted from the pledgee the estimated difference between the real value of his stock pledged and what it sold for, and afterwards demanded his stock note on the theory that it had been paid by the sale of his stock, and neglected to bring action until six years after the sale. *McDowell v. Chicago Steel Works*, 124 Ill. 491, 22 Ill. App. 405.

And a pledgee of securities as collateral to a stock note, who after knowledge of a sale thereof by the pledgee presents to him a statement showing the balance due him, accompanying it with an offer to receive it in satisfaction, waives the tort, and cannot maintain an action for the conversion. *Butts v. Burnett*, 6 Abb. Pr. N. S. 302.

And an owner of securities pledged with power of sale is not entitled to an accounting by the pledgee and purchasers thereof, or to a declaration of trust with respect to it on the ground that the stock was sold for less than its true value, where in the following month sales were made of shares of the same stock, at the same figure, which the pledgee said were satisfactory, and there is nothing to show that he had learned any facts showing a change in the value of the stock, or in the situation, which should have given him a different opinion. *Smith v. Lee*, 84 Fed. Rep. 557.

So, one who deposits securities with a bank with power of sale, who is informed of the purpose of the bank to sell them and of the proposition of three directors of the bank to purchase them, must give expression in some form to his disapproval, and if he makes no objection and permits the sale to take place without objecting, he cannot maintain an action 43 L. R. A.

in equity against the bank for the redemption of the securities and to compel it to retransfer them to him. *Hayward v. Elliot Nat. Bank*, 96 U. S. 611, 24 L. ed. 855.

And a pledgee of mining stocks who knew in advance of a contemplated sale thereof and of the time and place, and made no objection, and was presented with an account after the sale, in which he was credited with the amount received at the sale, and knowing all the facts admitted the correctness of the account, and even approved of the sale, and afterwards repeatedly promised to pay the balance, and never objected to the correctness of the account or to the sale, or on account of want of notice, or for any other reason, will be held to have ratified it, and to have estopped himself from objecting that sufficient notice of the time and place of sale was not given. *Child v. Hugg*, 41 Cal. 519.

And the maker of a note who pledged stock as collateral security therefor with power to sell the same at public or private sale, who after maturity of the note received letters from the payee stating that he must sell the stock unless something is paid, and afterwards received notice that he would sell the stock on a certain day, which was seven days later, to which he makes no reply, on which day the stock was sold and the proceeds applied in part payment of the note, will be deemed to have waived any further notice where the old certificate was sent to the maker, who was the treasurer of the corporation issuing the stock, which he transferred on the books of the corporation and issued a new certificate, and afterwards, when the corporation sold out to another company of which he was also treasurer, he issued new stock to the purchaser in exchange for the old, without at any time making any objections to the sale or to the notice given him. *Downer v. Whittier*, 144 Mass. 448.

But a wrongful sale of stocks carried by a broker for a customer without a demand for more margin is not assented to or ratified by the payment by the customer of an account showing the sale and the balance due, which was demanded, where the customer demurred, but made the payment upon the threat of the broker to sell other securities belonging to her which she needed for use. *Stenton v. Jerome*, 54 N. Y. 480.

And the failure of a customer to dissent from a sale made by stock brokers carrying stocks for him upon a margin, upon learning of it, is not a ratification and confirmation of their action, where he did not know at the time that the sale had been made privately at the board of brokers instead of at public auction. *Brass v. Worth*, 40 Barb. 648.

A principal whose stock is sold by a broker, which sale is reported to him and he expresses no dissatisfaction with it, however, is not entitled to damages on account thereof. *Gallagher v. Jones*, 129 U. S. 193, 32 L. ed. 658.

An owner of stocks which were sold by his broker for failure to make good his margin, desiring to claim that the sale was void because prematurely made, should have dissented at once and notified his brokers of such dissent, and where he received information of the sale in May, and remained silent until September, and demanded in the meantime an account of sales, which was sent him with a check for the balance due which he indorsed and collected, he will be held to have ratified the sale. *Hanks v. Drake*, 49 Barb. 186.

And where stocks held by a broker on a margin are sold by the broker and an account rendered to the customer, his failure to object to the sale within a reasonable time after notice

amounts to an implied ratification, and the account will be treated as an account stated. *Vanhorn v. Gilbough* (Pa.) 21 Am. L. Reg. N. S. 171.

And one whose stock was sold by his broker, and who repudiated and disavowed the sale, and the broker acceded to such disavowal and agreed that he would consider the sale as his own, and that it was to be subsequently treated as a nullity, thereby waived his right to recover against the broker as for a conversion of the stock at that sale, and he cannot recover therefor where the stock is subsequently sold by the broker on due notice for failure to maintain the margin. *Stewart v. Drake*, 46 N. Y. 449.

But a complaint in an action by a broker against a customer for a balance due, alleging that the plaintiff had sold stock carried by him and applied the proceeds in payment of the original indebtedness as security for the payment of which it was held in pledge, does not preclude the plaintiff from showing that he had not sold and disposed of the stock, where at the trial he was permitted to prove what in fact had been done without objection, as in such case the court will determine the case from the facts proved irrespective of the allegations of the pleadings. *Bryan v. Baldwin*, 52 N. Y. 232.

Whether a customer whose stock had been sold out by a broker carrying it for failure to maintain the margin, making certain extra charges for carrying the stock, agreed to repay such extra charges is a question for the jury in an action of assumpsit by the customer against the broker, where there was evidence that he assented to the sale of his stock after being made acquainted with the charges, for the reason that they were rapidly eating up the margins, and afterwards received the balance due without objection. *Wagner v. Peterson*, 93 Pa. 238.

And where a private sale is made of stock pledged, and the pledgee becomes the purchaser, and the evidence leaves in doubt the time when the pledgee was informed of the fact, the question of his ratification of such sale by a subsequent settlement with the pledgee should be submitted to the jury to be determined from the conduct of the pledgee and the entire evidence in the case. *Sharpe v. National Bank*, 87 Ala. 644.

So, where, after a private sale of a pledge is made without notice to the pledgee, he is informed that his stock was sold at par, and receives a statement of his account showing a credit of the proceeds of the sale, and a few days afterwards, without objection or further inquiry, he settles with the pledgee by giving his note for the unsatisfied balance, such settlement is not a waiver of the right to object to the private sale and the purchase by the pledgee. If made in ignorance of the fact that the pledgee was the purchaser, but would be so if, after being informed of the facts, he retained the benefits of the sale for some time without objection brought home to the pledgee. *Ibid.*

And a sale by a pledgee of property pledged in which he himself becomes the purchaser cannot be avoided and set aside in equity, where the pledgee, after full knowledge of all that had been done, acquiesced and remained silent for more than eleven years, during which time there had been great changes in the value of the property, there having been a rise in value at the time of the application. *Marsh v. Whitmore*, 1 Haskell, 391, 21 Wall. 178, 22 L. ed. 482.

And a pledgee whose stock pledged as collateral security had been sold, and purchased at such sale by the pledgee, who remained silent 43 L. R. A.

for nearly two months after he was informed of the facts, and until the stocks had risen to a very high price, will be deemed, as matter of law, to have ratified such sale. *Hill v. Finigan*, 77 Cal. 267.

Merely leaving a pledge in the hands of a pledgee with no offer to redeem when no attempt by the creditor for the payment was made, however, is not of itself enough to justify submitting the question of its abandonment to the jury on the question whether or not a sale thereof amounted to a conversion. *Reynolds v. Cridge*, 181 Pa. 189.

But while mere silence irrespective of lapse of time might not amount to an election or ratification on the part of the pledgee, whose stock pledged as collateral security had been sold by the pledgee to himself, where he commenced to treat with the pledgee for the purchase of a portion of the property with knowledge of his rights it would be sufficient. *Hill v. Finigan*, 77 Cal. 267.

And an instruction in an action for the conversion of a pledge by a sale thereof, that if a pledgee upon being informed of the fact that the pledgee had purchased the property at such sale did not within a reasonable time object to such purchase it would be deemed to have been ratified, and be valid, is not subject to the objection that ratification is a fact which the jury should not be told they could infer from other facts, or that ratification implies affirmative action, as the substance of it is that if the jury believe that there was unreasonable delay they must find a ratification; though it might have been better to have charged that the pledgee had a right of election to treat the sale as invalid, and that he would lose this right by failing to exercise it within a reasonable time. *Ibid.*

And an instruction in an action by the pledgee against the pledgee for the conversion of stock pledged by a sale thereof, that if the defendant caused the property pledged to be offered for sale at public auction but without notice, and if at the sale the property was bid in by him for a fair market price, and higher prices were not obtainable at the time, and if the plaintiff upon being informed of such sale made no objection thereto, but commenced to treat with the defendant for the purchase of a portion of the property pledged, the jury should find that the sale was so ratified, is not subject to the objection that it is an instruction as to what inferences of fact should be drawn by the jury, as all the jury could have understood from it was that if the plaintiff did certain things those things amounted to a sufficient election to treat the sale as valid, and having once made his election he was bound by it. *Ibid.*

So, the omission to enumerate the pledgee's knowledge of the law as one of the elements of the ratification of the sale of his securities by his pledgee to himself, in an instruction as to what would constitute a ratification of the sale, is not error whether such knowledge is essential to ratification or not, where there is nothing in the record to show that the pledgee did not know the law, as the presumption is that he did know it. *Ibid.*

One for whom a broker purchased stock, who admits that he was not acting in good faith and never intended to pay for it, is estopped from complaining of want of notice of sale thereof, or any other formality in connection with it. *Vanhorn v. Gilbough* (Pa.) 21 Am. L. Reg. N. S. 171.

And a pledgee of stock cannot claim, in an action against the pledgee, that by depositing the stock in escrow under an agreement to con-

vey it upon the exercise of an option, that he converted the stock and so lost his lien as pledgee, where by his pleading he waived the tort of the pledgee if tort there was, and elected to treat the contract with the purchaser as one which the pledgee had authority to make. *Bixby v. Crafts* (Cal.) 53 Pac. 404.

So, an owner of securities, who places them in the possession of an agent, which agent wrongfully pledges them to a third party, who converts them by an unlawful sale thereof, may, on ratifying the pledge made by the agent, maintain an action for their conversion against the pledgee. *Smith v. Savin*, 69 Hun, 311.

And where stocks are bought for a customer by a firm of brokers which afterwards become insolvent, which can be identified in the hands of any pledgee of the firm who has sold it, such customer may elect to ratify such sale if he has done nothing inconsistent with his right to make such election, and claim the price at which it was sold. *Chamberlain v. Greenleaf*, 4 Abb. N. C. 178.

The provision of California Civil Code, § 306, forbidding a pledgee to sell any evidence of debt pledged to him, and limiting his right to collect the same when due, is designed for the benefit of the pledgeor, and may be waived by him. *McArthur v. Magee*, 114 Cal. 126.

VIII. Remedies.

a. By direct action.

Where a pledgee violates the terms of his pledge, and converts the thing pledged by a sale thereof, the pledgeor has an immediate right to possession and immediate right of action, and may maintain trover or a special action on the case. *Smith v. Savin*, 69 Hun, 311, 30 Abb. N. C. 192; *Donnell v. Wyckoff*, 49 N. J. L. 48.

A pledgeor whose property pledged has been wrongfully disposed of by a pledgee has an election of remedies for such conversion, and may maintain either trover or assumpsit. *Stearns v. Marsh*, 4 Denio, 227, 47 Am. Dec. 248.

So, where a cashier of a bank holds stock in trust for another, and uses it with other securities as collateral in obtaining a loan from a bank, without its present knowledge or approval, and the bank afterwards accepts such note and security, and sells the collateral to itself to pay the note, after it has received notice of the interest of the *cestui que trust* therein, when the security left by the cashier outside of the trust fund is more than doubly sufficient to pay the loan if sold with proper care and diligence, the *cestui que trust* may by proper proceeding have the sale of his stock set aside and a decree entered transferring the stock to his own use. *Foot v. Utah Commercial & Sav. Bank*, 17 Utah, 283.

And where stock is purchased by brokers for a customer, and pledged by them, after which they fail, which can be identified in the hands of the pledgee who has sold it, the customer may reach the proceeds of the stock thus identified when they come into the receiver's hands. *Chamberlain v. Greenleaf*, 4 Abb. N. C. 178.

So, a pledgee who sells collaterals in his hands, though publicly, and purchases them himself, holds them after the sale as he did previously, as a mere security, and the pledgeor may redeem or require him to account for their market value. *Register v. Sellers*, 4 Pa. Co. Ct. 490, 44 Phila. Leg. Int. 502.

And a holder of collateral securities, who sells them on default of payment of the principal debt, and purchases at his own sale, holds them subject to the original trust, though the sale is entirely regular, and cannot sue upon them after his debt is paid; and the pledgeor 43 L. R. A.

may maintain an action for an accounting or for the return of the securities. *Hestonville, M. & F. Pass. R. Co. v. Shields*, 3 Brewst. (Pa.) 257.

And a pledgee of stock who without special authority causes the same to be offered for sale at the board of brokers and becomes the purchaser thereof, and continues to hold it, will be regarded as still maintaining the character of bailee, and holding the pledge to secure the payment of the loan with interest, and will be required to account for all dividends on the stock received by him in the meantime. *Bryson v. Rayner*, 25 Md. 424, 90 Am. Dec. 69.

And where a debtor secures his promissory note payable on demand at a bank by a transfer of shares of stock, and the bank makes other advances and receives other notes from him, and demand is made for the payment of the note but no notice of intention to sell the security is given, three days after which the debtor assigns to a trustee for the benefit of his creditors, and subsequently the bank sells the stock held as security, the trustee and the debtor waiving notice and consenting to the sale, and the proceeds are more than sufficient to pay the note, the trustee can recover such surplus in an action against the bank. *Brown v. New Bedford Inst. for Sav.* 137 Mass. 262.

Unliquidated damages for the unauthorized sale of pledged stocks or securities, however, can form no part of an account for the purpose of giving jurisdiction to a court of equity. *Durant v. Einstein*, 35 How. Pr. 231.

And one whose securities have been wrongfully disposed of by a pledgee has an adequate remedy at law in an independent action of trover or assumpsit, and a bill in equity seeking an application of his damages to the debt secured will not be sustained while an action is pending by the creditor for the recovery of the debt. *Bulkeley v. Welch*, 31 Conn. 339.

And a bill in equity to redeem stock, pledged to a bank as security for the payment of a note with absolute power to sell, which was transferred by written assignment to another, who made a general assignment for the benefit of creditors, and the assignee notified the bank that he would pay the note at maturity, and claimed the stock, but the bank afterwards sold it and applied the proceeds to the payment, first of that note, and afterwards of other notes of the pledgeor, will not lie at the suit of the assignee, as he has a full, adequate, and convenient remedy at law. *Roland v. Lancaster County Nat. Bank*, 135 Pa. 598.

A court of equity, however, in which an action has been commenced for the redemption of the pledge, where it appears that no good ground therefor existed and that nothing remained but an action for tort in improperly disposing of the pledge, for which an ample remedy exists at law, may order the cause to be tried by a jury at the circuit. *Genet v. Howland*, 45 Barb. 560.

And where a pledgee purchased stock pledged at a sale thereof, made because the debtor refused to pay another debt to another person not included in the pledge, and sold it after a bill was filed to compel a reconveyance, a court of equity has jurisdiction to enter a decree for damages against the pledgee for the conversion of the stock. *Blood v. Erie Dime Sav. & L. Co.* 164 Pa. 95.

But an equitable action for an accounting by a debtor against his creditor with whom he had deposited collateral security which collaterals had been sold, cannot be converted into an action at law for the recovery of damages, and judgment given therein as in an action for tort. *Lewis v. Varnum*, 12 Abb. Pr. 308.

Bonds of a city delivered to contractors making improvements upon which they borrowed money with which to prosecute the work, giving them as collateral security, the lender to be repaid the money advanced with interest and to have one third of the profits realized, no time for repayment or for sale of the collaterals being fixed, however, are so far in the nature of a trust fund as to give a court of chancery jurisdiction on the bill of one of the contractors for an accounting and to convert the securities and distribute the fund. *Stokes v. Frazier*, 72 Ill. 428.

So, the fact that a pledgee of stock borrowed money with which it was purchased from the pledgee does not affect his right to a reconveyance from the pledgee of the stock pledged, or, in case of a disposition of it by him, of an equal amount of stock of the same kind and value, where he had given his note for money borrowed, and was personally bound for its payment. *Krouse v. Woodward*, 110 Cal. 638.

And one who purchased stock to secure the payment of his note, which stock was disposed of by the pledgee who owned other stock in the same company and of the same value, is entitled to an order on the ground that he had no adequate remedy at law requiring the pledgee to convey to him an equal amount of his own stock in lieu thereof, where the stock had no market value and was purchased for investment with a view to an anticipated increase in value, and other shares could not be obtained because the holders would not sell. *Ibid.*

So, the rule has been laid down that a creditor who disposes of an article pledged as security for his debt loses his lien and the pledgee can recover its value without deducting the debt due. *Cooke v. Haddon*, 3 Fost. & F. 229.

And that an action by a pledgee against a pledgee for damages for an illegal sale or disposition of the thing pledged is one for conversion in which a counterclaim is not allowable. *Smith v. Hall*, 67 N. Y. 48.

But the prevailing rule would seem to be that a pledgee who has disposed of the property pledged may recover the debt of the pledgee when sued by him for conversion. *Nabring v. Bank of Mobile*, 58 Ala. 204; *Stearns v. Marsh*, 4 Denio, 227, 47 Am. Dec. 248; *Smith v. Savin*, 66 Hun, 311, 30 Abb. N. C. 192; *Donnell v. Wyckoff*, 49 N. J. L. 48.

Within this rule a conversion by a pledgee does not *per se* absolve the pledgee from the payment of the debt he has secured. *Beardon v. Patterson*, 19 Mont. 231.

And though a sale of a note held as collateral security by the pledgee amounts to a conversion, where the sum owing the pledgee by the pledgee is equal to the value of the paper, the pledgee would be entitled to nominal damages only. *Cole v. Dalziel*, 13 Ill. App. 23.

The allowance of the unpaid debt in abatement of damages in an action against the pledgee for a wrongful sale of the pledge does not rest upon recoupment, strictly speaking, but it is made upon the principle of avoiding circuity of action. *Donnell v. Wyckoff*, 49 N. J. L. 48.

And an action by a pledgee to recover damages of a pledgee for selling stock at private sale and without notice to the pledgee, is not an action for trover and conversion, but is one upon contract which will admit of a set-off. *Seaman v. Reeve*, 25 Barb. 454.

And a defense in an action by a pledgee against a pledgee for conversion of the property pledged, that the original debt was not paid and that it was equal to the value of the property pledged, need not be specially pleaded, but is fairly covered by the plea of nonassumpsit. 43 L. R. A.

Stearns v. Marsh, 4 Denio. 227, 47 Am. Dec. 248.

So, a pledgee to whom property is delivered as security for a debt under a contract reserving the right to the debtor to determine when and how it should be sold, but which he sells without the consent of the debtor, may recoup the amount of the debt for which the property was pledged, in an action against him for money had and received. *Belden v. Perkins*, 78 Ill. 449.

And where stock is pledged as collateral to an indebtedness with authority to the pledgee to sell in case of nonpayment, and the pledgee dies and the pledgee sells the property for a sum greater than the indebtedness, he cannot, as against the administrator, hold the balance to apply on another debt due him from the pledgee, under Tenn. Code. §§ 3219, 3242, and 3243, providing that the balance of accounts between the deceased and any creditor or debtor after allowing any just credits or set-off shall be taken as the true amount due to or from the estate, and in all suits by the executor or administrator of any deceased person, the insolvency of whose estate has been suggested, the defendant may plead a set-off of whatever amount may be due him from the testator or intestate at the time of his death. *Peters v. Nashville Sav. Bank*, 86 Tenn. 224.

And a debtor who secures his indebtedness by a pledge of a bond, and tenders the amount due shortly before the bond becomes due, has the right to treat the property pledged as discharged from the lien, and may maintain an action for the conversion of the bond in which the damages would be the value of the bond after deducting the amount of the pledgee's claim, but cannot set up that the pledgee had no right to collect the bond and apply it to his debt, and that the lien being discharged he had no right to set-off because the note was outlawed, and that therefore he was entitled to judgment for the whole amount received by the pledgee on the bond as so much money received to his use. *Hancock v. Franklin Ins. Co.* 114 Mass. 156.

So, an owner of stock pledged to a pledgee who becomes insolvent and makes an assignment is not entitled to payment in full out of the assigned estate on the ground that his stock was his property and its conversion was a breach of trust, which enabled him to follow the proceeds specifically, where it was converted prior to the assignment, though on the same day, not directly by the insolvent but by creditors with whom he had pledged it, and none of it came to the hands of the assignee. *Jamison's Estate*, 163 Pa. 143.

And a pledgee of stock should not be allowed a dividend on the entire value thereof without any deduction or set-off for the unpaid balance due by him to the pledgee, where such stock had been sold and the pledgee subsequently made an assignment for the benefit of creditors. *Ibid.*

And expenses incurred by a pledgee of railroad bonds in repairing damage done to the bonded railroad by a flood, which saves to them a large part if not the whole of their value, may be given in evidence in an action by a purchaser of the pledgee's interest against the pledgee for conversion by an unlawful disposition thereof, where previous to the expenditure the bonds were generally considered worthless and the amount realized upon them was based largely, if not entirely, upon such repairs, as the pledgee would be equitably bound to contribute his ratable proportion of the expenditure which produced such result. *Reynolds v. Cridge*, 131 Pa. 189.

A pledgee who is general creditor of the

pledgeor, to whom securities are pledged as collateral security for a personal debt, however, cannot set off his general demand against the pledgeor in an action against him for a disposition of the securities amounting to a conversion. *Lane v. Bailey*, 47 Barb. 399.

And debts due a pledgee in independent transactions cannot be set off against the claim of a pledgeor for the conversion of the property pledged by a sale thereof before the debt was due, as such cause of action arose on contract, and formed no part of the transaction set forth in the complaint as the foundation of the plaintiff's claim. *Kilpatrick v. Dean*, 19 N. Y. S. R. 837.

And trover will not lie against a depositary of township bonds as collateral security for the repayment of loans, to recover any surplus in his hands belonging to the depositor, where the bonds were sold pursuant to the terms of the agreement under which they were deposited. *Loomis v. State*, 72 Ill. 623.

An action for damages for a conversion of property pledged by a sale thereof is one in which a jury trial must be had unless waived by the parties in the manner prescribed by law. *Lewis v. Varnum*, 12 Abb. Pr. 308.

And a right of action by a pledgeor against a pledgee for the wrongful sale and conversion of property pledged does not die with the person upon death of the pledgeor as in other cases of personal tort, but survives to his representatives. *Cortelyou v. Lansing*, 2 Cal. Cas. 200.

And a claim for damage arising from wrongful conversion of personal property by the sale or other disposition of a pledge is a chose in action which is assignable, and action may be properly brought in the name of the assignee. *Genet v. Howland*, 45 Barb. 560.

But an assignment of stock subject to the payment of the amount due thereon is insufficient to transfer a claim for damages for a prior conversion thereof by a sale thereof by a pledgee. *Ibid.*

And where stock is transferred as collateral security for a note, and upon failure to pay the note the pledgee purchases it himself, and the pledgeor afterwards agrees to transfer his interest to another, who demands the return of the stock and tenders the amount of the note, which is refused, the arrangement between the pledgeor and his transferee is only an agreement to sell, leaving the title to the stock in the pledgeor so as to entitle him to maintain trover against the pledgee for conversion. *Seymour v. Ives*, 46 Conn. 109.

So, the right of action for the conversion of mining stock held by a pledgeor in secret trust for another, which is sold by the pledgee, who takes it without notice of the secret trust, without previous demand and notice, is in the pledgeor, and not in the *cestui que trust*. *Thompson v. Toland*, 48 Cal. 99.

And the holder of a note, who also holds collateral securities for his payment, and who assigns the securities to a third person, is a necessary party to the debtor's action for an accounting as well as the assignee of the securities. *Lewis v. Varnum*, 12 Abb. Pr. 308.

And whether or not a stockholder whose shares have been duly transferred on the books of the company as security for a debt, may have such a legal title as will enable him to maintain trover against the pledgee for an unauthorized sale thereof, he may maintain a special action on the case, and a count in case may be added to the complaint in an action of trover by amendment. *Nabring v. Bank of Mobile*, 58 Ala. 204.

A pledgeor, who prosecutes an action against

his pledgee for a conversion of bonds pledged to judgment elects thereby to treat the refusal of the pledgee to deliver the bonds to him upon the tender of the debt for which they were pledged as a sale thereof, and cannot thereafter successfully maintain an action against the receiver of the pledgee for a recovery of a part of such bonds. *Deitz v. Field*, 10 App. Div. 425.

But the doctrine of election of remedies does not apply in an action by an owner of bonds and stocks which had been deposited with bankers as security for overdrafts, and pledged by the bankers for their own debt, and unlawfully sold by the pledgee, brought by the owner against the pledgee, where it was originally brought as an action to reach the proceeds of the sale, and changed by an amendment to the complaint to one of conversion, there having been but one action. *Smith v. Savin*, 69 Hun, 311, 30 Abb. N. C. 192.

And an instruction in an action by a pledgeor for the conversion of stock pledged by his pledgee that a conversion of personal property takes place whenever a person assumes the ownership or control of another's property in contravention of and against the rights of such other person and against his consent, is not subject to the objection that it ignores the pledgeor's right of election, where it appears that the pledgeor elected to treat the sale as invalid at the time mentioned in the instruction. *Hill v. Finigan*, 77 Cal. 287.

And a recovery cannot be had in an action against brokers holding stock purchased by them as security for advances upon proof that they had actually made the purchase but afterwards converted the stock by a sale thereof under an allegation that they had falsely pretended to make the purchase and falsely pretended to resell the stock, and also falsely pretended to sell the stock held as collateral security to make up a deficiency, as the variance between the cause of action for a fictitious purchase and sale and one for conversion is beyond the power of amendment. *Saltus v. Genin*, 7 Abb. Pr. 198, 3 Bosw. 257.

So, an allegation that the plaintiff deposited certain stocks with the defendant as collateral security for his indebtedness, and that it was the duty of the defendant to keep the stocks safely and hold them exclusively as such collateral security, and that the defendant fraudulently disposed of them, whereby the plaintiff lost them, sounds in tort, and cannot be joined with a count in assumpsit, and such misjoinder may be taken advantage of by writ of error. *Stevens v. Hurlbut Bank*, 31 Conn. 146.

And an allegation in an action for the conversion of stock pledged, that the plaintiff pledged certain stock to secure a loan, and that the defendant in consideration thereof undertook and promised to hold the stock as pledgee only, and not to sell or convert it without notifying plaintiff of his intention so to do, which he violated by a sale of the stock to the plaintiff's damage to the value of the stock, sets forth a cause of action *ex delicto* and not *ex contractu*, as the whole value of the stock pledged is made the measure of recovery, and not the mere excess of the proceeds of the sale thereof, and may therefore be amended by adding a count formally and substantially in case. *Sharpe v. National Bank*, 87 Ala. 644.

So, mere lapse of time is not a bar to an action by a pledgeor against a pledgee, for the conversion of the pledge by a sale thereof, in the absence of circumstances of equitable estoppel. *Reynolds v. Cridge*, 131 Pa. 189.

And while the holder of a note, to whom a bond has been pledged as collateral security,

may avail himself of the statute of limitations as a defense to a suit upon the note if he does not sell the bond and apply the proceeds to the payment of the debt but collects it, he cannot claim that the note was outlawed and that therefore he had the right to treat the collateral as his absolute property, but the proceeds of the bond will be held to go to the payment of the debt, and the balance of the money to belong to the pledgee, and can be recovered in an action for money had and received, the statute of limitations running against such an action only from the time when the pledgee received the money. *Hancock v. Franklin Ins. Co.* 114 Mass. 156.

But where a mortgage is assigned by the holder as security for his own promissory note, and there is a breach of the condition of the mortgage and assignment, and the assignee forecloses the mortgage and obtains seisin and possession of the land, after which the assignee sells the land, a bill in equity by the assignor to redeem the land, brought within twenty years from such sale and more than twenty years after possession is obtained, cannot be maintained. *Stevens v. Dedham Inst. for Sav.* 129 Mass. 547.

b. *By way of defense.*

While stock deposited as collateral security for an advance or loan may be disposed of for nonpayment thereof, its improper conversion constitutes a good defense to an action brought to recover the loan. *Wallace v. Berdell*, 24 Hun, 379.

And the pledgee may set up a wrongful conversion by sale of the pledge on the part of the pledgee by way of defense in an action by the pledgee for the debt for which the pledge was made. *Donnell v. Wyckoff*, 49 N. J. L. 48; *Bulkeley v. Welch*, 81 Conn. 339; *Waring v. Gaskill*, 95 Ga. 731; *Durant v. Einstein*, 35 How. Pr. 231; *Almsworth v. Bowen*, 9 Wis. 349.

Thus, a lender with whom a borrower deposited bonds as collateral security, who converts them to his own use by a sale, is not entitled to recover the money loaned without accounting to the borrower for the proceeds of the bonds. *Stuart v. Bigler*, 98 Pa. 80.

And the conversion of stock held by a broker for a customer does not operate as an extinguishment of the entire claim of the broker against the customer for advances, but simply gives the customer a cause of action for the damages which he sustained by reason of the conversion, which can be offset against any sum found due the broker. *Levy v. Loeb*, 15 Jones & S. 61, Affirmed, 75 N. Y. 609; *Gruman v. Smith*, 81 N. Y. 25. And see *Star F. Ins. Co. v. Palmer*, 9 Jones & S. 267, *supra*, II. b. 3; *Wicks v. Hatch*, 62 N. Y. 535, 6 Jones & S. 95, *supra*, II. c. 1; *Sitgreaves v. Farmers' & M. Bank*, 49 Pa. 359, *supra*, V.

He is liable for the conversion of the pledge, but whether this would equal the amount of the claim or not would depend upon the facts developed. *Gruman v. Smith*, 81 N. Y. 25.

And where securities deposited as collateral for a debt were under the control of the president and general manager of the corporation which was the creditor, and he fraudulently abstracted and disposed of them and deprived the corporation of the power of performing its obligation to return them on payment, a receiver of the corporation after insolvency cannot recover the amount of the original indebtedness without allowing for the value of the securities received. *Cutting v. Marlor*, 17 Hun, 573.

And it has been held that where a broker who had purchased stock on a margin for a customer

sells it without demanding additional margin, or giving notice that a sale will be made, it does not merely entitle the customer to a reduction of the broker's claim by the amount of loss proved to have been suffered because of the sale, but goes to the whole damages, as the broker, having failed to perform his contract, is not entitled to any recovery. *Gillett v. Whiting*, 120 N. Y. 402. And see *Merwin v. Hamilton*, 6 Duer, 244, *supra*, III. c.

In *Gillett v. Whiting*, 120 N. Y. 402, *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507, *infra*, IX. b, was distinguished upon the ground that that was a case in which the customer was suing the broker for damages he had sustained by reason of a conversion of stock by the broker.

So, where a broker purchases gold coin for a customer, to pay for which the customer advances the amount in currency and deposits with the broker a sum of money as a margin, and the market value declines and the margin is not kept good and not made good after due notice, and a sale is fairly and justly made upon notice in such a manner as to obtain the actual market value, the customer is liable to pay the difference between the amount of indebtedness and the amount received for the coin as money laid out and expended at his request and for his use. *Schepeler v. Eisner*, 3 Daly, 11, Affirming 54 N. Y. 675.

And the disposal by the pledgee of collateral notes left with him by a pledgee in a manner not within the purview of any power delegated to him and not within the manner prescribed by the policy and rules of law for the disposition and use of collateral security rendering the pledgee answerable as for a conversion thereof, is a violation of the contract of pledge and a part of the transaction leading up to the making of the original indebtedness, and is a wrongful conversion growing out of the same transaction, and is therefore a proper matter of set-off in an action upon the original indebtedness. *Richardson v. Ashby*, 132 Mo. 235.

And where stock is pledged as collateral security for the payment of a note, and the pledgee takes a mortgage as further security, the stock being at the time of greater value than the amount of the mortgage, and the pledgee disposes of the stock so as to be unable to redeliver it on redemption, the mortgage is to be credited on the foreclosure thereof with the value of the stock when executed. *Ashton's Appeal*, 73 Pa. 153.

So, a broker purchasing stock for a customer upon a margin, who sells it for failure to maintain the margin, is not prevented from recovering an unpaid balance of such customer by the fact that he had not paid for the stocks, where the purchase was made upon his credit and he was charged with and held liable for the price. *Worthington v. Tormey*, 34 Md. 162.

And an indorser of a note given by a debtor to a bank, which is secured to the bank by a pledge of certain stocks, which are afterwards sold by the bank to its own officers without notice, is entitled to avail himself of the equities between the bank and the principal debtor, in an action by the bank upon his indorsement. *Sitgreaves v. Farmers' & M. Bank*, 49 Pa. 359.

But an answer in an action upon a promissory note, as collateral security for which stock had been pledged, alleging that the plaintiff through its president had sold the stock and that he had purchased it stating the value thereof, is insufficient as a counterclaim, as upon such a state of facts the plaintiff would be entitled to recover the full amount due on the note and upon payment thereof the defendant would be entitled to his stock. *Star F. Ins. Co. v. Palmer*, 9 Jones & S. 267.

A sale of bonds secured by mortgage held as collateral security at which the pledgee becomes the purchaser, however, remits the parties to their original rights, and does not cancel the bonds, but leaves them with all their original vigor, and the pledgor has the right to set them up for the amount appearing on their face. *Chicago Artesian Well Co. v. Corey*, 60 Ill. 73.

And a sale of shawls held as collateral security for the payment of a note, the title remaining in the pledgor, and their purchase by the pledgee, though irregular, simply leaves the title to the shawls in the pledgee as such, and the pledgor is entitled to have their full value allowed upon the debt. *Duden v. Waltsfelder*, 16 Hun. 337.

So, in *Mott v. Havana National Bank*, 22 Hun. 354, it was held that one who sells an engine under a contract by which he retains title until payment must be treated as holding the engine after retaking possession as under a chattel mortgage or pledge, and where he himself purchased it at a sale to satisfy the indebtedness, the purchaser may prove the value thereof, and have it applied in satisfaction of the debt.

Trustees in insolvency of an original creditor who has wrongfully disposed of securities given him by his debtor stand in the same position with relation to the right of the debtor to set off the claim for such securities against the debt that the original creditor stood in. *Bulkeley v. Welch*, 31 Conn. 339.

And the burden of proof rests with the defendant, in an action upon a note brought by an indorsee against an indorser, to show that collateral securities received by the plaintiff for the payment of the note had been improperly disposed of. *Vose v. Yulee*, 4 Hun. 628.

See also, on this subject, *First Nat. Bank v. Rush*, 56 U. S. App. 556, 85 Fed. Rep. 539, 29 C. C. A. 333, 86 U. S. App. 248, 71 Fed. Rep. 102, 17 C. C. A. 627; *Capron v. Thompson*, 86 N. Y. 418, *supra*, VI.

c. As against purchasers from the pledgee.

The rule that a pledgee may recoup the amount of the debt secured by the pledge in an action for money had and received, brought by the pledgor upon his sale of the thing pledged, applies where the suit is against the purchaser of the property who has converted it into money. *Belden v. Perkins*, 78 Ill. 449.

A purchaser in good faith and for value of property pledged, consisting of personal chattels, from the pledgee, however, succeeds to the right of the original pledge, and the owner of the property cannot recover the pledge in the same manner as if the case was a naked tort. *Williams v. Ashe*, 111 Cal. 180.

A transferee of stock pledged, if he is a bona fide holder for value without notice, cannot be guilty of a tort in disposing of the stock, even if the party who transferred it to him had exceeded his authority or broken his contract with the pledgor. *Felt v. Heye*, 23 How. Pr. 359.

And an honest purchaser or bona fide holder of collateral that has been pledged by one who has converted it obtains a good title, and may be protected as against the real owner who has made the perpetration of the fraud possible. *Myers v. Merchants' Nat. Bank*, 27 Abb. N. C. 266.

Where the owner of property in pledging it confers upon the pledgee an apparent title to or power of disposition over it he is estopped, as against an innocent purchaser from the apparent owner, without knowledge of the claims of the true owner, from asserting his title. 43 L. R. A.

McNeill v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; *Crocker v. Crocker*, 31 N. Y. 507.

Thus, the pledge of a diamond in putting the pledgee into possession clothes him with the appearance of ownership, and a sale thereof to an innocent purchaser would be good; and in such case the pledgor does not estop himself from proceeding against the pledgee for the conversion of the diamond by purchasing the same from such innocent purchaser. *Hilgert v. Levin*, 72 Mo. App. 48.

And where stock pledged has been sold bona fide without notice it cannot be pursued into the hands of a bona fide holder without notice of the pledge. *Little v. Barker*, Hoffm. Ch. 487.

And a pledge of negotiable securities transferable by delivery should be treated as the agent of the owner, and the owner should be bound by his acts, and where he transfers such securities pledged to a third party who takes it in good faith the pledgor loses all right to them. *Colt v. Humbert*, 5 Cal. 260, 63 Am. Dec. 128.

Where one receives a note as collateral security for money advanced at the time of the indorsement, or for any consideration then arising, he is treated as having received it for value, and is entitled to recover the amount of the maker. *Tarbell v. Sturtevant*, 26 Vt. 513.

And that a note was held as collateral security by an indorsee, and that an assignee of the note had tendered to the indorsee the amount due him, are inadmissible as a defense in a suit by the indorsee against the maker of the note. *Ibid*.

But an innocent holder of collateral which has been converted by the pledgee will be allowed to use it only in such manner and to such an extent as will secure his own interests, and operate also to the protection of the original owner. *Myers v. Merchants' Nat. Bank*, 27 Abb. N. C. 266.

And while as a general rule a pledgee recovering on an instrument held as collateral is entitled to recover the entire amount, recovering any surplus for the use of the principal debtor, where the collateral is in the hands of a bona fide holder without notice of a good defense against his assignor, the rule is that the pledgee can recover the amount of his principal debt only. *Union Nat. Bank v. Roberts*, 45 Wis. 373.

And a purchaser of a watch at a pawn broker's sale, made without notice to the owner, is entitled when sued for the conversion of the watch to reduce the damages by the amount of money due the pledgee, where it was pawned by the husband of the owner under an authority to raise money thereon, but without authority to authorize a sale without notice. *Van Arsdale v. Joiner*, 44 Ga. 173.

A purchaser of notes from a pledgee with notice that they were merely held by him in pledge, however, is not protected by the fact that the pledgor at the time of making the pledge indorsed the notes in blank. *Goldsmidt v. First M. E. Church*, 25 Minn. 202.

And where stock is hypothecated to secure the payment of a note, and it is sold under execution on a judgment against the pledgee, the pledgor is entitled to relief where the purchaser had notice of the hypothecation before the sale. *Rogers v. New Jersey Ins. Co.* 8 N. J. Eq. 167.

So, an accommodation note executed for the purpose of being used as collateral to secure an indebtedness of the payee to a bank, and indorsed for that purpose, which is afterwards sold by an indorsee to satisfy his own debt, can be enforced only to the extent necessary to secure

the bank, where it was indorsed after maturity, and the holders under such indorsement took it with notice of the defense and equities of the maker. *First Nat. Bank v. Werst*, 52 Iowa, 684.

And non-negotiable paper transferred by a pledgee thereof is subject to the same defense in the hands of the assignee as in the hands of the pledgee, as he can convey no greater right to it than he himself possessed. *Chouteau v. Allen*, 70 Mo. 290.

And where a note is pledged on a tortious misappropriation by the agent of the owner, and the pledgee without notice of the owner's rights sells it and receives the proceeds, and the owner subsequently demands the note of him without effect, the evidence of the conversion is sufficient. *Keutgen v. Parks*, 2 Sandf. 60.

So, a pledgee cannot give away the pledge so as to affect the rights of a pledgeor, and a pretended and merely colorable sale without consideration will not divest the pledgeor of his rights as such, or confer upon the pretended purchaser any greater interest than that held by the pledgee. *Norton v. Baxter*, 41 Minn. 146, 4 L. R. A. 305.

And the act of the pledgee of two diamond rings in changing the settings of the diamonds and giving them away, constitutes a conversion thereof, and gives no right of possession to the rings to the donee as against the owner. *Sueridan v. Presas*, 18 Misc. 180.

And a creditor of a pledgee who takes property pledged with him in satisfaction of an antecedent debt of his own, is not a holder for value as against the pledgeor, but takes the title of the original pledgee, and cannot hold the property as against the pledgeor after a tender and an offer to redeem. *Torrey v. Harris*, 12 Daly, 385.

So, while the fact that a holder of bonds of a corporation as collateral security is a director thereof does not charge a purchaser from him with constructive notice of his want of power to sell, where the bonds are taken from a director in pledge for a precedent debt, the pledgee gets no better title than his pledgor. *Duncomb v. New York, H. & N. R. Co.* 84 N. Y. 190.

But the mere fact that a certificate of stock transferred by a pledgee was in the name of the pledgor is not sufficient to charge the transferee with notice, or to put him upon inquiry, where it was accompanied with a full power of attorney authorizing the transfer. *Felt v. Heye*, 23 How. Pr. 359.

And the equities of a pledgeor of a mortgage attach to it in the hands of a subsequent assignee for full value without notice. *Busa v. Lathrop*, 22 N. Y. 585.

And an implication that a holder of stocks has no authority to sell or hypothecate them in the usual course of business does not arise from the fact that the person holding the legal title is styled "trustee." *Brewster v. Sime*, 42 Cal. 139.

And there is nothing in the mere fact of the disposition by a bank of certificates of mining stock issued in the name of different parties and indorsed by them as trustees as collateral security, to put them upon inquiry as to the ownership of the stocks, and as to whether the bank held them as collateral or not. *Gass v. Hamp-ton*, 16 Nev. 185.

A pledgee of stocks as collateral to the payment of a note, who exchanges any of the collaterals with the maker of the note for other stocks of equal value, would take the latter as security for a pre-existing debt, but would be purchaser of them to the extent of the con-

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sideration given in exchange. *Cherry v. Frost*, 7 Lea, 1.

And a bona fide purchaser of stock or other property which had been held as collateral security for a usurious loan may be compelled to surrender it under the New York statutes of 1837, even where the assignee of the stock is not the assignee of the debt. *Little v. Barker*, Hoffm. Ch. 487.

On this subject with relation to transfers of stock, see also cases *supra*, II. c. 2. And see *Conyngham's Appeal*, 57 Pa. 474.

IX. Measure of damages.

a. As to personal property generally.

When property converted by a sale thereof by a pledgee has a fixed value, the measure of damages is that value with legal interest from the time of the conversion. *Douglass v. Kraft*, 9 Cal. 562.

The value of the pledge at the time of the conversion. *Alinsworth v. Bowen*, 9 Wis. 349; *Johnson v. Stear*, 15 C. B. N. S. 330, 33 L. J. C. P. N. S. 130, 10 Jur. N. S. 99, 9 L. T. N. S. 538, 12 Week. Rep. 347; *Belden v. Perkins*, 78 Ill. 449; *Cortelyou v. Lansing*, 2 Cal. Cas. 200.

The value of the article less the amount for which it was pledged. *Rosensweig v. Frater*, 82 Ind. 342; *Jarvis v. Rogers*, 15 Mass. 389.

Or allowed as a payment *pro tanto* for the debt. *Donnell v. Wyckoff*, 49 N. J. L. 48.

Thus, the measure of damages for the conversion of a watch pledged by a sale thereof without notice, in an action against the purchaser, is the value of the watch less the money advanced thereon by the pledgee. *Van Arsdale v. Joiner*, 44 Ga. 173.

And the measure of damages in an action of trover against a pledgee in disposing of gold coin pledged as security for becoming bail, which afterwards rises in value much above par, is the value of the coin at the time it was converted, and not its value when the verdict is rendered. *Frothingham v. Morse*, 45 N. H. 545.

And the damages in an action for money had and received must be limited to the amount received with interest, and cannot be enhanced by its increase in value as merchandise. *Ibid*.

So, a pledgee with power of sale which he has exercised, who refuses to account for the proceeds, will be charged with the goods pledged at the highest market price. *Simes v. Zane*, 1 Phila. 501.

So, where the owner of property pledged and converted has recovered it, the measure of his damage is the expense he has necessarily incurred, and the value of the time he has spent in recovering it, together with the value of the use of the property, if any, while he was wrongfully deprived of it, not exceeding the total value of the property at the time of the conversion. *First Nat. Bank v. Rush*, 56 U. S. App. 556, 85 Fed. Rep. 539, 29 C. C. A. 333.

The amount of damages in an action for conversion of property by a pledgee by a sale thereof is a question for the jury, and the jury is not limited to the price on the day of the conversion. *Douglass v. Kraft*, 9 Cal. 562.

b. As to stocks, bonds, and other securities.

The rule has been laid down generally, that the measure of damages in trover for conversion of stock pledged by an unlawful sale by the pledgee is the market value of the stock. *Seymour v. Ives*, 46 Conn. 109; *Brewster v. Van Liew*, 119 Ill. 554, 59 Am. Rep. 823; *Loomis v. Stave*, 72 Ill. 623; *Jamison's Estate*, 163 Pa. 143.

And not the amount of money which may

have been paid upon the contract by the customer with interest. *Brewster v. Van Liew*, 119 Ill. 534, 59 Am. Rep. 823.

And not the highest price which had been paid for such bonds in a particular case. *Loomis v. Stave*, 72 Ill. 623.

In some of the Pennsylvania cases it is held to be such value at the time of the conversion. *Jamison's Estate*, 163 Pa. 143; *Neller v. Kelley*, 69 Pa. 403.

With interest from the date of conversion. *Neller v. Kelley*, 69 Pa. 403.

Thus, the measure of damages for the conversion of stock pledged by a sale thereof, without notice and because the debtor declined to pay another debt not included in the pledge, is the real value of the collateral at the date of the sale. *Blood v. Erie Dime Sav. L. Co.* 164 Pa. 95; *Washburn v. Pond*, 2 Allen, 474.

And in adjusting an account between a pledgeor who had pledged stock as collateral to his note, and the pledgee who had sold the stock without proper notice and sued the pledgeor for the balance, the pledgeor is entitled to credit for the actual value of the collateral at the time of the sale. *Waring v. Gaskill*, 95 Ga. 731.

The ground work of an action for the conversion of stock pledged by a private sale thereof without authority is the sale and transfer of the stock, and not the refusal to accept the tender and comply with a demand for a return of the stock, and the proper measure of damages is the actual value of the stock at the time of such conversion deducting the amount of the debt due by way of recoupment, and not the value of the stocks at their highest market value on the day of the trial or any other date before that time, and after the demand. *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269.

Where a demand is necessary, however, the conversion of stock by a broker by a refusal to transfer it to a customer upon demand and tender occurs upon the refusal to deliver, and not upon his disposition of the stock, and the measure of damages therefor is the value of the property at the time of the conversion with damages for detention which should bear legal interest from the conversion to judgment, and any special damage which might legitimately arise out of matters in existence at the time of the conversion. *Boylan v. Huguet*, 8 Nev. 345.

And the owner of stock pledged as collateral security for an indebtedness, which stock was sold by the pledgee and the proceeds appropriated to his own use without authority, is entitled after demanding the stock and offering to pay his debt, which demand was refused on the pretense that the pledgee had a right to hold the stock pledged for the debt of a third person, to recover the market value of the stock on the day of the demand with interest, less the amount of his debt, without further demand or tender, though at the time of the demand he did not tender any money, the pledgee not objecting on that ground. *Fisher v. Brown*, 104 Mass. 259, 6 Am. Rep. 235.

And one who pledges stock as collateral security for a debt payable on demand, with authority, in case of a failure to meet any demand, to sell the stock or a sufficient portion thereof to pay the amount due and demanded, which stock is sold by the pledgee without demand or notice, is entitled to recover for such wrongful conversion the highest market value of the stock at any time between the time of the conversion and the time of the trial, especially where after the conversion an effort was made to procure the stock to be replaced and considerable time was consumed in correspondence and negotiations before the pledgee finally

refused to replace it. *Romaine v. Van Allen*, 28 N. Y. 309.

The sale of a pledge by the pledgee is not *ipso facto* a conversion which will create a cause of action in favor of the pledgeor, so as to require the plaintiff's damages to be the value of the certificate at that time, but it is wrongful, and the pledgeor may, at his option, so consider it, and tender or offer to pay his debt and demand his pledge or sue for damages for the sale thereof, so that the cause of action will not accrue until the demand and refusal, and the measure of damages is the value at that time. *Hopper v. Smith*, 63 How. Pr. 34.

In the above case, *Markham v. Jaudon*, 41 N. Y. 235, *Baker v. Drake*, 53 N. Y. 211, 18 Am. Rep. 507, and *Gruhan v. Smith*, 81 N. Y. 25, and similar cases were distinguished upon the ground that in those cases the stock was held by the pledgee subject to the order of the pledgeor, and for the express purpose of being sold at his direction, and the unauthorized sale was an entire destruction of the contract rendering a demand unnecessary. And it was said that all the cases in this state involving the right of the pledgee to maintain trover for a sale of the pledge are stock cases or cases in which the debt had been tendered or has been extinguished.

So, the general rule that the measure of damages for conversion is the market value of the property at the time of the conversion has been held not applicable to the conversion of stocks and bonds by a broker by an improper sale thereof, as they are commercial securities of a fluctuating value in the market. *Dimock v. United States Nat. Bank*, 55 N. J. L. 296; *Wilson v. Little*, 2 N. Y. 443, 51 Am.-Dec. 307.

And the rule has been adopted by some of the cases that where property converted by a sale thereof by a pledgee is of fluctuating value, the pledgeor may recover the highest value at the time of the conversion or at any time afterwards. *Douglass v. Kraft*, 9 Cal. 562; *Rankin v. McCullough*, 12 Barb. 103.

Within this rule the measure of damages in an action by a pledgeor against a pledgee for the unlawful sale of the stocks pledged where suit is brought without unreasonable delay, is the highest price of the stock between the date of the sale and commencement of the suit. *Wilson v. Little*, 1 Sandf. 851; *Bates v. Wiles*, 1 Handy (Ohio) 532.

Or, as it is given in some of the cases, the highest market value of the stock between the date of the conversion and the trial. *Markham v. Jaudon*, 41 N. Y. 235; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307; *Lawrence v. Maxwell*, 64 Barb. 102; *Conyngham's Appeal*, 57 Pa. 474.

Especially where time was given to the pledgee at his request to replace the stock, and the pledgeor failed to replace it at a reduced price, relying on the expectation that the pledges would do it. *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307.

The prevailing doctrine, however, and the one which seems to have been adopted by the later New York cases, is that the rule that a pledgeor is entitled to damages for the conversion by the pledgee of the thing pledged, measured by the highest market price between the time of the conversion and the time of the trial, does not apply where it was agreed between the parties that the property was to be sold when it reached a certain price, and it was of such a character that it would have been difficult, if not impossible, to have preserved it until a subsequent time when a higher price was reached. *Matthews v. Coe*, 49 N. Y. 57.

And that where stocks are held not as an investment, the object of the transaction being

the realization of profit by their sale, and the broker supplies all the capital embarked in the speculation except the margin, and the broker sells the same without notice, if upon becoming informed of the sale the customer desires further to prosecute the adventure, he has the right to disaffirm the sale and require the broker to replace the stock, and if he fails or refuses to do so, his remedy is to do it himself, and charge the broker with the loss sustained in doing so, which would be the advance in the market price of the stock from the time of the sale up to a reasonable time to replace it, after receiving notice thereof. *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507.

In the above case, *Markham v. Jaudon*, 41 N. Y. 253, was overruled so far as it holds that the measure of damages for the wrongful disposition of stocks pledged is the highest market value which it reaches after such disposition down to the date of the trial.

So, under this doctrine the measure of damages in an action by a customer against a stock broker for the conversion of stock purchased and held by him for the customer for speculation by a sale thereof without notice is what it would have cost the customer to replace the stock on a day within a reasonable time after the sale, deducting the sum due to the broker. *Baker v. Drake*, 53 N. Y. 518, 23 Am. Rep. 80.

And the measure of damages in an action by an owner of securities whose agent has pledged them without authority, which act he has ratified, for the conversion of the securities by the pledgee by an unlawful sale, is the market value of his securities within a reasonable time after his discovery of the conversion less the amount actually due the pledgee for money advanced upon them. *Smith v. Savin*, 69 Hun, 311.

And where stocks purchased and carried by a firm of brokers for a customer, and others deposited by the customer to secure his margin, are wrongfully sold by the broker, the measure of the customer's damage is the value of the stock deposited as security for the margin at the time when its return was demanded, with interest, and the difference between the market value of the stock purchased and carried at a reasonable time after the sale and the cost price of the broker's purchase thereof with interest after allowing and deducting therefrom interest upon the cost of the stock purchased and carried from the date of the purchase, and the commissions earned. *Brass v. Worth*, 40 Barb. 648.

So, the measure of damages for the conversion of stocks by a pledgee to whom they were pledged as collateral security by selling them before the maturity of the principal debt is the highest intermediate market value between the time of the conversion and a reasonable time after notice of the conversion within which to replace the securities. *Dimock v. United States Nat. Bank*, 55 N. J. L. 296.

And the measure of damages for the conversion of stock of a principal by a broker by selling the same without directions is the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of the conversion, to enable him to replace it. *Gallagher v. Jones*, 129 U. S. 193, 32 L. ed. 658; *Wright v. Bank of the Metropolis*, 110 N. Y. 237, 1 L. R. A. 289.

Less the debt secured thereby with interest. *Wright v. Bank of the Metropolis*, 110 N. Y. 237, 1 L. R. A. 289.

And the question as to what is reasonable time for an owner of pledged stock which had been unlawfully sold to replace it, is one of law 43 L. R. A.

for the court, when the facts are undisputed, and different inferences cannot be reasonably drawn from the same facts. *Ibid*.

So, the measure of damages in an action for selling more pledged scrip than was necessary to pay the indebtedness is the difference between the price for which the scrip was sold and the price paid by the pledgor to replace it. *Fitzgerald v. Blocher*, 32 Ark. 742, 29 Am. Rep. 3.

And where a broker sells stock of his principal of his own motion, and without notice to the principal, he is only liable for any advance on the stock that takes place up to the time when the principal received notice of the sale, and had time to replace it by the purchase of new stock. *Gallagher v. Jones*, 129 U. S. 193, 32 L. ed. 658.

And a stock broker who purchased and carried bonds on marginal security for a customer, and sold them without authority, becomes liable for the subsequently enhanced market value of the bonds and coupons less the amount of his own claims. *Bead v. Lambert*, 10 Abb. Pr. N. S. 428.

A broker who has converted stock of a customer held on a margin by selling the same without notice is entitled to a reasonable time after notice of the sale to replace the stock, and if in the meantime it advances in price, the customer would be entitled to the difference in price. *Gruman v. Smith*, 81 N. Y. 25.

But a customer for whom a broker purchases and carries certain shares of stock under agreement, which stock is sold without authority, after which the customer is notified of the sale, is entitled to recover nominal damages only, where it appears for thirty days after the sale the stock could have been purchased in the market at the price for which it was sold, or for a less price. *Colt v. Owens*, 90 N. Y. 363.

And the dismissal of the complaint in an action by the assignee of stock brokers against a customer for an alleged balance due on a speculative account on the ground that the stock brokers had sold stock purchased by them for the customer on a margin without notice, is error where there was evidence in the case tending to show that the stock sold could have been repurchased in open market within the next fifteen days below the price realized on the sale. *Minor v. Beveridge*, 141 N. Y. 399.

Where pledgees convert the subject of the pledge to their own use by making an unauthorized sale of it, the transaction operates as a payment of the debt to the extent of the value of the property, and if the value exceeds the debt the pledgees are entitled to damages for the market value of the property converted less the amount of the debt, the measure being the difference between the two amounts. *Kilpatrick v. Dean*, 19 N. Y. S. R. 837.

And where a broker sells, without due notice, stock purchased by him for a customer on a margin, holding it in pledge to secure the advance made by him for the purchase, he does not thereby, as matter of law, extinguish all claim against the customer for the advance, but the customer is entitled to be allowed as damages the difference between the price for which the stock sold and for which he received credit and its market price then or within such reasonable time after notice of sale as would have enabled him to replace the stock in case the market price exceeded the price realized. *Minor v. Beveridge*, 141 N. Y. 399.

In the above case, *Gillett v. Whiting*, 120 N. Y. 402, *supra*, VIII. b, was distinguished upon the ground that in that case the sole question presented on the appeal was, the customer's right to have the jury charged that a sale of his stock by a broker without notice was a conver-

sion, and the effect of the conversion if found by the jury was not presented on the appeal.

So, the rule has been laid down that a pledgee of collateral security who makes an unauthorized sale thereof is chargeable with what would have been received for it had he retained it until the equity of redemption had been foreclosed by a sale upon notice according to law. *Conyngnam's Appeal*, 57 Pa. 474.

The owner of stock pledged as collateral security and wrongfully sold by the pledgee is entitled to be placed in the same position as if the sale had not been made, and the pledgee may be charged with the market value of the shares at the time of filing a bill in equity to redeem though it was sold for the full market price at the time. *Fowle v. Ward*, 113 Mass. 548, 18 Am. Rep. 534.

And the measure of damages where stock is purchased by a broker on a margin and sold for failure to keep the margin good without giving the customer an opportunity to redeem, is the difference in the market price of the stock on the day fixed for its delivery to the customer, and the contract price. *North v. Phillips*, 89 Pa. 250.

And a pledgee of stock which has been unlawfully sold by the pledgee is at liberty, where there were several applications made to the pledgee for the return of the stock, to regard the last application, and the omission then to return it, as the final breach of duty, and he may recover for the value of the stock at that time. *Wilson v. Little*, 1 Sandf. 351.

The nonwarranted sale of stock purchased by a stock broker for a customer, however, does not entitle the customer to recover back money deposited with which to make the purchase and maintain a margin, but simply leaves the pledgee liable for damages, if any, sustained by the pledgee through such sale. *Morgan v. Jaudon*, 40 How. Pr. 386.

And the sale by a pledgee of stocks pledged at private sale without authority is a breach of a legal duty arising out of a contract, and the damages therefor should be compensatory only. *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269.

And only the amount received can be recovered in an action for money had and received brought by a customer against a broker who had sold stock which he was carrying for him upon a margin in which overcharges of interest were alleged, as such an action waives the tort. *Wagner v. Peterson*, 83 Pa. 238.

Upon the other hand, however, it has been held that the measure of damages for the conversion by a broker of stocks purchased for a customer and held subject to his order, by an illegal sale thereof, does not depend upon the form of the action, but is the same whether it is for the conversion or in assumpsit. *Brewster v. Van Liew*, 119 Ill. 554, 59 Am. Rep. 823.

And that the measure of damages for the conversion of stock pledged by an unauthorized private sale thereof is the same whether the action therefor is treated as a special action in case or as an action in trover. *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269.

Damages to which a pledgee of stock is entitled for its conversion by an illegal sale thereof may be established by showing its dividend-paying capacity, where there is no evidence of the market value. *Greer v. Lafayette County Bank*, 128 Mo. 559.

And an agreement between a pledgee of stock deposited to secure the payment of his note and another by which the other was to take the stocks and allow the pledgee \$75 per share on an indebtedness due him, does not set the value of the stock at \$75 per share as a meas-

ure of damages in an action by the pledgee against the pledgee for its conversion by an unlawful sale at \$60 per share, that being the highest market price of the stock during the period covered by the transaction. *Seymour v. Ives*, 46 Conn. 109.

The damages for the conversion of dock warrants by a pledgee with whom they were deposited as security for a loan by a sale thereof are to be measured by the losses actually sustained, and the interest of the pledgee at the time of the conversion is to be taken into account. *Johnson v. Stear*, 15 C. B. N. S. 330, 33 L. J. C. P. N. S. 130, 10 Jur. N. S. 99, 9 L. T. N. S. 538, 12 Week. Rep. 347.

And a pledgee of a receiver's certificate who pledged it under a contract that the pledgee would redeliver it to him when the debt was paid, or if collected would pay the balance to him after deducting the costs of collecting, who tenders the debt and interest and demands a certificate, and is informed that it had been sold, is entitled to recover the value of the certificate as of the time of the tender and demand. *Hopper v. Smith*, 63 How. Pr. 34.

And while the disposition of a warrant pledged by the pledgee without giving the pledgee an opportunity to redeem it or any notice of sale after the indebtedness secured is due, is a conversion which would render the pledgee liable for the value of the warrant at the time of the conversion with legal interest from that day, the recovery of the value of such warrant cannot be had where the pledgee has credited the pledgee with the full value of the warrant, and he has received the benefit of what he would recover if the action could be maintained. *Reardon v. Patterson*, 19 Mont. 231.

c. As notes and other choses in action.

Collateral securities are held by a creditor as the agent or trustee of his debtor to be collected for the benefit of the debtor in discharge of the principal debt, and if he undertakes to transfer them to third persons without the authority of the principal debtor he will be held to have elected to take them for the amount due upon their face in satisfaction to that extent of the principal debt. *Hawks v. Hinchcliff*, 17 Barb. 492.

And the amount expressed upon the face of notes placed in the hands of another as collateral security for a specified purpose with interest from their maturity up to the time of the conversion and then interest on the aggregate from that time to the verdict, is the proper measure of damages for their conversion where the pledgee puts it out of his power to redeliver them when the purposes for which they were pledged are satisfied. *St. John v. O'Connell*, 7 Port. (Ala.) 466. And see *Hassard v. Duke*, 64 Ind. 220, *supra*, II. b. 4.

It is the value of the pledge at the time of the conversion in excess of the demand secured by it with legal interest thereon from the time of the conversion. *Gay v. Moss*, 34 Cal. 125.

So, the measure of damages in an action against the maker of a note, brought by an indorsee to whom it had been delivered as collateral security for the payment of notes discounted for the benefit of the indorser, is the amount due on the debts embraced by the security, and it is incumbent on the plaintiff to show what debts were intended to be secured by the pledge, and the amounts remaining due thereon. *Mattland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620.

And a pledgee of a mortgage note in whose hands it had been placed to secure a debt due him from the pledgee, who sells the property mortgaged for a sum less than the amount of

the note, and immediately resells it for a larger sum than that of the amount of the note, becomes liable to the pledgee, not for the price at which the property was resold, but merely for the amount of the note. *Richardson v. Mann*, 30 La. Ann. 1060.

But while an obligor is usually entitled prima facie to the face value of money securities converted by a pledgee, the pledgee has the right to show, in reduction of damages, the payment in whole or in part, the inability of the maker to pay, a release, invalidity of the instrument, or any other matter which would legitimately affect or diminish its value, the proper measure of damages being the value of such security at the time of the conversion, with interest to the time of trial. *Walley v. Deseret Nat. Bank*, 14 Utah, 305.

And the measure of damages in an action by a pledgee against the pledgee for damages for the wrongful conversion of a note where there was evidence that the maker of the note, though honest, was regarded as in failing circumstances, and that the best paper in the country was at a large discount, is not the face value of the note, but its market value. *Brightman v. Reeves*, 21 Tex. 70.

And the measure of damages for a disposition by a pledgee of notes pledged as collateral security not authorized by law or by any agreement of the parties by way of set-off in an action on the original indebtedness, where it appears that the collateral was not worth its face value, is its actual value at the time of the disposition of the same by the pledgee. *Richardson v. Ashby*, 132 Mo. 238.

So, the fact that the maker of a note pledged as security kept his property concealed or covered up in the name of other parties, where it could not be found or reached by execution, would tend, if shown, to affect the value of his paper, and is properly admissible on the question of the amount of damages in an action by the pledgee against the pledgee for the conversion of the note. *Walley v. Deseret Nat. Bank*, 14 Utah, 305.

And it is competent for the defendant in an action by a pledgee against a pledgee of a note for the conversion of the note to show in his defense, in reduction of damages, the insolvency or inability of the maker to pay, or any other matter which would legitimately affect or diminish its value, or which would tend to show insolvency or want of business integrity. *Ibid.*

And the proper return of executions *nullo bono* issued upon valid judgments against the maker of a note is prima facie evidence of his insolvency at the time, in an action by the pledgee of the note against the pledgee for a conversion thereof. *Ibid.*

And the testimony of the maker of a note in an action by a pledgee against a pledgee thereof for its conversion, to the effect that he had a short time before stated that he had no property that creditors could reach, is admissible as tending to show his financial ability and as affecting his credit as a witness, and as contradicting and qualifying his testimony in chief, where he had given testimony to show his solvency and ability to pay his debts. *Ibid.*

The defendant in an action by a pledgee against the pledgee for the conversion of notes pledged is limited in his proof, however, to the market value of the notes and the solvency or insolvency of the maker for a period between the date of the pledge and the date of the alleged conversion, and is precluded from showing their value or the insolvency of the maker during the following year. *Ibid.*

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Claribel IVES, *Piff. in Err.*,
v.

Margaret C. McNICOLL.

(.....Ohio.....)

- *1. A child begotten by parents who were at the time not intermarried, and who could not then enter into a legal contract of marriage, may be legitimated, under § 4175, Rev. Stat., by subsequent legal marriage of the parents, and the acknowledgment of the child by the father as his child.
2. M., an unmarried man, had a child by R., a married woman. R. afterwards became divorced from her husband, and thereafter M. intermarried with her, and acknowledged the child as his child. Held, that the child was thereby legitimated, and upon the death of M. the child had all the rights of an heir of his body.

(January 17, 1899.)

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a judgment of the court of Common Pleas in favor of plaintiff in an action brought to obtain the partition of certain real estate. *Affirmed.*

Statement by Burket, J.:

Margaret C. McNicoll commenced her action against Claribel Ives for the partition of certain real estate situate in the city of Cincinnati, and fully described in the second item of the will of Peter McNicoll, deceased. The cause was heard in the court of common pleas, and there was a finding of facts made, separate from the conclusions of law. The entire will of Peter McNicoll appears in the finding of facts, but only so much thereof is given here as relates to the controversy in hand. The court finds as follows:

(1) That Peter McNicoll a citizen and resident of Hamilton county, Ohio, died in the year 1852, leaving his will, which was duly admitted to probate in said county, the second item of which is as follows: "I give and devise unto my son, Henry McNicoll, for the term of his natural life, and at his decease to go to the heirs of his body in fee, the following described real estate, to wit." (Here follows a description of the real estate sought to be partitioned.)

(2) That the testator's son, Henry McNicoll, in the year 1855, was married to Mary Galbraith, and the defendant, Claribel Ives, is the only offspring of such marriage. In the year 1863, Mary Galbraith McNicoll, the mother of the defendant, was granted a decree of divorce from Henry McNicoll by the court of common pleas of Hamilton county, Ohio.

(3) That Elizabeth Meyer, who is the mother of the plaintiff, Margaret C. McNicoll, was married in Newport, Campbell county, Kentucky, on the 10th day of De-

*Headnotes by the Court.

NOTE.—As to legitimation of children by marriage, see *Adams v. Adams* (Mass.) 13 L. R. A. 275, and also cases in note thereto.

cember, 1867, to Samuel P. Reasoner, who was then a soldier in the United States army, stationed at the Newport Barracks. That said Samuel P. Reasoner was discharged July 13, 1869, at Newport Barracks, Kentucky, but he again enlisted in the army of the United States on the 27th day of December, 1869, at Cincinnati, Ohio, for a period of five years, and served in Company H. of the 18th regiment of the United States infantry. On January 10, 1870, Samuel P. Reasoner went with his regiment to the state of South Carolina, where he continued in the service of the United States, in the army, until the 27th of December, 1874, when he was duly discharged at Columbia, South Carolina, and where he was again married on the 7th day of January, 1875. He then became domiciled in Columbia, South Carolina, where he has ever since continued to reside; and he never left the state of South Carolina, or returned to the state of Kentucky, after the 10th day of January, 1870. The court finds as a matter of fact that there was absolutely nonaccess and nonintercourse between said Samuel P. Reasoner and Elizabeth Reasoner, his wife,—that is to say, they never saw each other, never met each other, and never lived or cohabited together,—after the 13th day of July, 1869, up to and including the time of the present trial.

(4) Elizabeth Reasoner continued to reside in the state of Kentucky from July 13, 1869, until the year 1878, and was not absent from that state or the state of Ohio during that entire period of time. The testator's son, Henry McNicoll, an unmarried man, who then and thereafter was a citizen of, and resided and had his domicile in, Cincinnati, Ohio, became intimate with Elizabeth Reasoner in Newport, Kentucky, in 1875 and thereafter, and was the father of the plaintiff, Margaret C. McNicoll, who was born in Newport, Kentucky, on the 10th day of September, 1876.

(5) About the year 1878, Elizabeth Reasoner removed with her daughter, the plaintiff, to Cincinnati, Ohio, and on the 23d day of April A. D. 1899, she obtained a divorce from her husband, Samuel P. Reasoner, by the judgment of the common pleas court of Hamilton county, Ohio.

(6) On the 27th day of June, 1889, the said Henry McNicoll and Elizabeth Reasoner, mother of the plaintiff, were married in the city of Covington, Kenton county, Kentucky. They thereafter lived for one year in Cincinnati, Ohio, and then for two years in Dayton, in Campbell county, Kentucky, when they removed to Clermont county, Ohio, and there resided until the 19th day of December, 1893, when Henry McNicoll died. That said Henry McNicoll was a citizen of, and resided and had his domicile in, the city of Cincinnati, Ohio, continuously from the year 1870 up to and including the period of one year after his said marriage on the 27th day of June, 1889.

(7) At all times from her birth, in September, 1876, until his death, in December, 1893, Henry McNicoll recognized and acknowledged the said Margaret C. McNicoll
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as his daughter, and after his marriage with her mother she resided in the family of Henry McNicoll, who provided for her education and support, and by and in his last will and testament, which was duly admitted to probate, he recognized her as his daughter, and named her in his said will and testament as one of his heirs and devisees.

(8) The plaintiff, Margaret C. McNicoll, and Claribel Ives are the only children or descendants of Henry McNicoll who survived him. The property described in the petition is the property devised by Peter McNicoll in the second item of his will to Henry McNicoll for life, and to the heirs of his body upon his death.

(9) During all the time mentioned the following provision has been a part of the statute law of the state of Kentucky (Kentucky Rev. Stat. § 1398): "If a man having had a child by a woman shall afterwards marry her, such child, or its descendants, if recognized by him before or after marriage, shall be deemed legitimate." And the court of appeals of Kentucky, which is the court of last resort in that state, in the year 1887 decided in the case of *Sams v. Sams*, 85 Ky. 396, that the foregoing statute of Kentucky does not apply to a case where a man had children during the coverture of the man with another woman, and who might afterwards marry; which said case and the statement of the law contained in said decision is now the law of the state of Kentucky. And the court makes the decision of the case of *Sams v. Sams* a part of this finding of fact, which, by agreement of parties in open court, may be considered as a part hereof as fully as though the same were herein set forth at large. And the said case of *Sams v. Sams*, as it appears reported in said volume of said Kentucky reports, may be referred to as constituting a part of this finding of facts.

Upon the facts so found the court found as a conclusion of law that Margaret C. McNicoll is seized in fee as a tenant in common with Claribel Ives of the undivided one half of the real estate in controversy, and ordered partition, to all of which Claribel Ives excepted, and filed her petition in error in the circuit court, seeking to reverse the judgment of the court of common pleas. The circuit court affirmed the judgment, one judge dissenting. Thereupon Claribel Ives filed her petition in this court seeking to reverse the judgment of the courts below.

Messrs. Kittredge & Wilby, for plaintiff in error:

If Margaret is not the legitimate daughter of Henry McNicoll, she cannot take under the will of Peter McNicoll as one of the heirs of the body of Henry McNicoll.

Margaret was begotten and born in Kentucky, and at the time of her begetting and birth her mother, Mrs. Reasoner, resided in Kentucky; and the subsequent marriage of Henry McNicoll to Mrs. Reasoner was in Kentucky.

The court of appeals of Kentucky has construed the Kentucky statute in *Sams v. Sams*, 85 Ky. 396, holding that it does not

confer legitimacy upon an adulterine bastard.

A proper construction or application of the Ohio statute excludes from its operation an adulterine bastard; and the interpretation given to the like Kentucky statute by the Kentucky court of appeals in the *Sams Case*, *supra*, was correct.

2 Pingrey, Real Prop. 1895, p. 1184, art. 3; 1 Ballard, Real Prop. § 344; *Cope v. Cope*, 137 U. S. 682, 34 L. ed. 832.

To read the statute as claimed by our adversaries leads to absurd consequences, disturbing principles of policy and of the general law protecting the marriage relation.

United States v. Kirby, 7 Wall. 482, 19 L. ed. 278; *Stone v. Elliott*, 11 Ohio St. 252; Maxwell, Interpretation of Statutes, 95.

In Scotland, where the practice of legitimating by subsequent marriage has long prevailed, the theory upon which such legitimating of bastards proceeds is by means of the assumption that at the date of the cohabitation which produced the bastard valid promises to marry had been exchanged between persons who at that time were capable of performing such promises to marry, and that the subsequent marriage between those parties was in performance of those promises, and related back, therefore, to the date of the cohabitation.

Munro v. Munro, 7 Clark & F. 872.

The correct statement of the purpose of the legislature in passing this statute may be found in *Wallace v. Rappleye*, 103 Ill. 229.

The doctrine is one founded in public policy, which has in view, partly, at least, the discouragement of illicit commerce between the sexes and the fostering of marriage and the sustaining of the interests of the family created by lawful marriage.

The marriage necessary to legitimate previously born bastards must be a valid marriage.

Adams v. Adams, 154 Mass. 290, 13 L. R. A. 275; *Greenhow v. James*, 80 Va. 636.

Messrs. Robert Ramsey, Joseph W. O'Hara, and John Nichols, for defendant in error:

It is not allowable to interpret what has no need of interpretation.

2 Vattel, Law of Nations, chap. 17, § 263; *Patton v. Pickaway County Sheriff*, 2 Ohio, 396; *Hurd v. Robinson*, 11 Ohio St. 232; *Woodbury v. Berry*, 18 Ohio St. 456; *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37; *Decm v. Millikin*, 6 Ohio C. C. 357; *Shellenberger v. Ransom*, 41 Neb. 631, 25 L. R. A. 564, 39 Cent. L. J. 217; *Carpenter's Estate*, 170 Pa. 203, 29 L. R. A. 145, 41 Cent. L. J. 377.

It is reasonable to suppose that the legislature, in adopting this provision, did so in view of the construction which had been put upon it, and with the intention that it should receive the same construction here.

Favorite v. Booker, 17 Ohio St. 555; *Maltby v. Cooper*, Morris (Iowa) 60; *Potter's Dwarr*, Stat. p. 274, note, 4; *Sutherland*, Stat. Constr. § 256.

The statute in question was taken bodily from the statute book of Virginia. 43 L. R. A.

12 Hening's Stat. at L. 139, passed in October, 1785.

The legislature, conceiving that the rule of descents by the common law was not well adapted to the genius of the people and the form of our government, totally changed it by the act of October, 1785, which appears to have provided for every possible case.

Broune v. Turberville, 2 Call (Va.) 391.

The issue of a woman by a second marriage which took place during the lifetime of her first husband, are legitimate after the death of their father.

Stones v. Keeling, 5 Call (Va.) 143; *Templeman v. Steptoe*, 1 Munf. 339; *Davis v. Roue*, 6 Rand. (Va.) 355; *Garland v. Harrison*, 8 Leigh, 368.

The identity of both parents being established by a subsequent formal marriage and recognition on the father's part, the child shall inherit from both, whether it be an adulterine child or not.

Penn v. Cox, 16 Ohio, 32; *Drake v. Rogers*, 13 Ohio St. 21; *Wright v. Lore*, 12 Ohio St. 619; *Morris v. Williams*, 39 Ohio St. 554.

The provisions of a statute ought to receive such reasonable construction, if the words and subject-matter will admit of it, as that existing rights of the public or of individuals be not infringed.

Moore v. Vance, 1 Ohio, 12; *Allen v. Little*, 5 Ohio, 71; *Brown v. Farran*, 3 Ohio, 140.

The particular question before us has been settled by weight of authority.

Sutphin v. Cox, 1 Western Law Monthly, 346; *Hawbecker v. Hawbecker*, 43 Md. 516; *Carroll v. Carroll*, 20 Tex. 731; *Scanlon v. Walshe*, 81 Md. 118; *Schouler*, Dom. Rel. 4th ed. 1889, § 226; *Blythe v. Ayres*, 96 Cal. 570, 19 L. R. A. 40; *Brewer v. Blougher*, 14 Pet. 178, 10 L. ed. 408.

The law of the place where the property is situate governs the descent and alienation of real estate.

Morris v. Williams, 39 Ohio St. 554; *Jones v. Robinson*, 17 Ohio St. 171; *Hutchinson Invest. Co. v. Caldwell*, 152 U. S. 65, 38 L. ed. 356; *Harvey v. Ball*, 32 Ind. 98; *Story*, Conf. L. § 428; *Wharton*, Conf. L. § 273; 2 Wait, Act. & Def. p. 644; 3 Am. & Eng. Enc. Law, p. 563; *Birtwhistle v. Vardill*, 7 Clark & F. 895; *Munro v. Munro*, 1 Rob. App. 492; *Jones v. Marable*, 6 Humph. 116; *Potter v. Titcomb*, 22 Me. 300; *Stolts v. Doering*, 112 Ill. 234; *Loring v. Thorndike*, 5 Allen, 257; *Blythe v. Ayres*, 96 Cal. 532, 19 L. R. A. 40.

Where the will disposes of real property, the laws of the place where the real estate is situate are to govern.

1 Redf. Wills, 4th ed. 398, and note; 1 Jarman, Wills, Bigelow's ed. 1893, 1.

The testator's domicile governs.

2 Wait, Act. & Def. p. 646; *Harrison v. Nison*, 9 Pet. 483, 9 L. ed. 201; *Story*, Conf. L. §§ 404, 405; 3 Am. & Eng. Enc. Law, pp. 632, 635, 637; *Dannelli v. Dannelli*, 4 Bush. 51; *Gibson v. McNeely*, 11 Ohio St. 131.

The domicile of the father determines the capacity of the child for legitimation.

Jacobs, Domicil, §§ 30 et seq.; *Blythe v.*

Ayres, 96 Cal. 532, 19 L. R. A. 40; *Ross v. Ross*, 129 Mass. 249, 37 Am. Rep. 321; *Munro v. Munro*, 1 Rob. App. 492; Wharton, Conf. L. §§ 240-247; 5 Am. & Eng. Enc. Law, p. 861.

Wright v. Lore, 12 Ohio St. 619; *Morris v. Williams*, 39 Ohio St. 554; *Sneed v. Fwing*, 5 J. J. Marsh. 460, 22 Am. Dec. 41; *Harris v. Harris*, 85 Ky. 49; and *Leonard v. Braswell*, 99 Ky. 528, 36 L. R. A. 707,—are very much in point and on principle conclusive.

There is always a disposition to shield and favor the innocent children, and to lend them a helping hand towards obtaining their inheritance.

Bingham v. Miller, 17 Ohio, 445, 49 Am. Dec. 471; *Kniffin v. Schaffer*, 12 Ohio C. C. 753; *Re Matthias*, 63 Fed. Rep. 523; *Cope v. Cope*, 137 U. S. 682, 34 L. ed. 832; *Stones v. Keeling*, 5 Call (Va.) 143; *Hawbecker v. Hawbecker*, 43 Md. 516; *Green v. Green*, 126 Mo. 17; *Blythe v. Ayres*, 96 Cal. 532, 19 L. R. A. 40.

The statute legitimates for every purpose.

Kniffin v. Schaffer, 12 Ohio C. C. 753; 13 Am. & Eng. Enc. Law, p. 227, note; *McKamie v. Baskerville*, 86 Tenn. 459; *Monson v. Palmer*, 8 Allen, 556; *Loring v. Thorndike*, 5 Allen, 257; *Miller's Appeal*, 52 Pa. 113; *McGunnigle v. McKee*, 77 Pa. 81, 18 Am. Rep. 428; *Brewer v. Hamor*, 83 Me. 251; *Hicks v. Smith*, 94 Ga. 809; *Williams v. Williams*, 11 Lea, 652.

Burket, J., delivered the opinion of the court:

While the court finds that Mr. Reasoner and Mrs. Reasoner were married at a certain time, and that she obtained a divorce from him at a certain time thereafter, there is no finding that he obtained a divorce from her; and as, in reviewing a judgment based upon a finding of facts, facts not found are regarded as not existing, this record must be construed as showing that Mrs. Reasoner was the wife of Mr. Reasoner at the time her daughter, Margaret C., was begotten. The court finds, in effect, that the child, Margaret C., is the offspring of Henry McNicoll, an unmarried man, and Mrs. Reasoner, a married woman. The child is, therefore, what is known as an "adulterine bastard," begotten of an adulterous connection between a man and woman who at that time could not make a valid contract of marriage. The legal obstacle to their marriage was afterwards removed by divorce obtained by her, and they were shortly thereafter legally married, and the child at once became a member of his family, and was recognized and acknowledged by him as his child, up to the time of his death, and was so treated in his last will and testament. The child now claims that she was and is thereby legitimated under our statute, and entitled to one half of the property devised by Peter McNicoll to Henry McNicoll for the term of his natural life, and at his decease to go to the heirs of his body; while Clairbel Ives, the only child of Henry McNicoll begotten in lawful wedlock, claims that an adulterine

bastard cannot become legitimated under our statute by the subsequent marriage of the parents, and that, therefore, Margaret C. McNicoll has no interest in the property, and is not entitled to have partition thereof.

By the civil law, the law of Scotland, and the Code Napoleon, an adulterine bastard could not become legitimated by the subsequent legal marriage of the parents. All bastards who were the offspring of parents who might legally marry at the time of begetting such bastards might become legitimated by the subsequent marriage of the parents followed by an acknowledgment of the child by the father as being his child. Under the common law of England there could be no legitimating of bastards, whether adulterine or otherwise. This was the state of the law in Europe as to legitimating bastards when our first statute on the subject was passed,—Feb. 22, 1805 (3 Ohio Laws, p. 281). Our statute of that date is a transcript of the statute of Virginia on the same subject passed in 1785, and entitled "An Act Concerning the Course of Descents," 12 Hening's Stat. p. 139. The bill was drafted and reported by a committee, of which Thomas Jefferson was one, after some years of deliberation, and was adopted by the Virginia legislature, omitting the exception of the civil law and the law of Scotland as to adulterine bastards, and disregarding the common law of England, which prevented all bastards from being legitimated. The statute of Virginia did not follow nor adopt any of the European laws as to bastards, but enacted a new statute on the subject, to be construed and enforced by reference to the words used in the statute itself, untrammelled by the rules of the civil law. The courts of Virginia, both before and after the adoption of our statute, construed the statute of that state as having abrogated the exception of the civil law as to adulterine bastards. *Stones v. Keeling*, 5 Call (Va.) 143; *Browne v. Turberville*, 2 Call. (Va.) 391; *Templeman v. Steptoe*, 1 Munf. 339; *Davis v. Rowe*, 6 Rand. (Va.) 355; *Garland v. Harrison*, 8 Leigh, 368. When we adopted in this state the Virginia statute as to bastards, we adopted with the statute the construction placed upon it by the courts of Virginia, and at each re-enactment of the statute we acquiesced in the constructions up to that time placed upon the statute by the courts of Virginia, no construction having in the meantime been placed upon the statute by our own courts. *Favorite v. Booher*, 17 Ohio St. 548. As the exception as to adulterine bastards existed in the civil law and in the law of Scotland, and was omitted from the Virginia statute, it must be presumed and held that such omission was intended, and that it was the purpose of the Virginia legislature to wipe out the exception as to adulterine bastards, and to permit them to be legitimated the same as other bastards. When the legislature of this state adopted the Virginia statute, in 1805, it was familiar, not only with the Virginia statute, but also with the civil law, the law of Scotland, the common law of England, and the Code Napoleon; and

the omission of the exception as to adulterine bastards was not in ignorance of those laws, but was with the purpose of wiping out the exception, and doing justice to the innocent offspring.

It is urged by counsel for plaintiff in error that, while the words of our statute are broad enough to include adulterine bastards, the general assembly could not have intended to include them, because to do so would be against public policy, would disturb the general law protecting the marriage relation, and lead to absurd consequences, and that married people should not be encouraged to forsake their marriage vows, and cohabit with others in anticipation of a future marriage with a view of making their offspring legitimate; and these considerations induced the decision in the case of *Sams v. Sams*, 85 Ky. 396. There can be no public policy in this state in conflict with a valid statute of the state. Public policy must always yield to a valid statute. The general assembly has the power to enact a law legitimating adulterine bastards, and there would be no absurdity in so doing. Neither would such a statute disturb the general law protecting the marriage relation, nor the law of crimes and misdemeanors, nor the law as to public morals. The subject of marriage and divorce, and the subject of adultery and fornication, and the subject of public morals, are all carefully provided for and protected by separate chapters and sections of our statutes; and, if the general assembly desired to prevent adulterine bastards from becoming legitimated, some provision to that effect would be found in some of the statutes. No such provision is found, but, on the contrary, § 4175, Rev. Stat., has been enacted, as follows: "When a man has by a woman one or more children, and afterwards intermarries with her, such issue, if acknowledged by him as his child or children, shall be deemed legitimate; and the issue of parents whose marriage is deemed null in law shall nevertheless be legitimate." The force and effect of this section begin after the sections as to marriage, divorce, adultery, fornication, and public morals have expended their force. After marriage and divorce, and after prosecutions for adultery and fornication, and to protect public morals, there are often adulterine bastards existing, whose parents have thereafter become legally married, and have recognized and acknowledged them as their children; and the purpose of our statute is to legitimate such children, and to permit them to inherit from the father as well as the mother. Thereby justice is done to the innocent offspring without in any manner impinging upon the laws as to the marriage relation or as to public morals. Those laws are allowed to have their full force and effect, and this statute as to bastards provides for a state of things existing after the other statutes have been fully executed. Neither would such a statute encourage married persons to forsake their marriage vows, and cohabit with others, in anticipation of a future marriage, with a 43 L. R. A.

view of thereby making their offspring legitimate. The adulterous connection is not had with a view to subsequent marriage and legitimating children, but with a view to present pleasure; and the ardent hope and desire usually exist that no offspring should result therefrom; and this section was enacted to enable parents, when all impediments to a legal marriage should be removed, to intermarry, and recognize and acknowledge their offspring, and thereby in a measure atone for the sins of the past, and do justice to their innocent and unfortunate children. Viewed in this light, the statute is a righteous enactment, while to visit the sins of the parents upon the innocent and helpless offspring would shock every sense of right and justice.

Again, it is clear that after the birth of an adulterine bastard, all obstacles being removed, parents may legally marry, and enjoy all the rights and privileges of marriage. They may inherit from each other under our statute, and to allow them to marry and enjoy all the fruits thereof, and deprive their offspring from inheriting from them, would seem rank injustice; and it cannot be presumed, without clear words to that effect, that the legislature intended such an unjust result. To so hold would be to reward the guilty parents and punish the innocent offspring. That our statute was intended for the benefit and protection of the innocent offspring, and not for their punishment on account of sins committed by their parents, is shown by the cases of *Wright v. Lore*, 12 Ohio St. 619; *Morris v. Williams*, 39 Ohio St. 554. If the purpose of our law is to punish the bastard children for the errors of the parents, to be consistent the children should be prevented from inheriting from the mother as well as the father after the marriage of the parents. It is said that the mother is always known, but the father is not. But when the father marries the mother, and recognizes and acknowledges the children as his own, he thereby makes himself known, and thereafter there is no more reason for denying inheritance to them from him than from the mother.

Again, the weight of authority in this country is in favor of the defendant in error. *Carroll v. Carroll*, 20 Tex. 731; *Hawbecker v. Hawbecker*, 43 Md. 516; *Blythe v. Ayres*, 96 Cal. 532, 19 L. R. A. 40; *Schoutier*, Dom. Rel. p. 226; *Sutphin v. Coar*, 1 Western Law Monthly, 346. Opposed to these authorities is the case of *Sams v. Sams*, 85 Ky. 396. That case is cited by Pingrey on the Law of Real Property, § 1143; by Ballard on the Law of Real Property, § 4175; *Cope v. Cope*, 137 U. S. 682-685, 34 L. ed. 832, 833; *Latin Maxims and Phrases* by John Trainer, 450; *Rapalje & Lawrence*, Law Dict. p. 118; *The Law of Persons and Personal Property*, by Dwight, 257. The only adjudged case is *Sams v. Sams*, 85 Ky. 396, and all the citations and references are to that case, and most of them refer to the case in language indicating a doubt as to its soundness.

Again, the language of the statute is too clear to require construction: "When a man

has by a woman one or more children, and afterwards intermarries with her," etc. "A man" means any man, and "a woman" means any woman. There are no exceptions. If he is a man and she is a woman, no matter what their previous lives may have been, they come within the language of the statute, and, when legally married, and the former issue acknowledged by him as his child, such issue becomes thereby legitimated, even though it is an adulterine bastard. Take the case at bar. Mr. McNicoll was a man, Mrs. Reasoner was a woman. He had a child by her, and afterwards intermarried with her, and acknowledged the child as his child. The statute says that in such case the child shall be deemed legitimate. Nothing is said in the statute as to whether the parents could or could not legally marry at the time the child was begotten. The general assembly having attached no such condition, the courts can attach none, and to do so would be judicial legislation.

Judgment affirmed.

CINCINNATI, NEW ORLEANS, & TEXAS
PACIFIC RAILWAY COMPANY, *Plff.*
in Err.,

v.

CITIZENS' NATIONAL BANK of Cincinnati, Ohio *et al.*

(56 Ohio St. 351.)

- *1. A certificate of stock of a corporation in the usual form is an assurance to the world that the person named is the owner of the number of shares of its capital stock stated therein, and that these shares will be transferred on the books of the company to one purchasing the same on a surrender of the certificate with a proper assignment; and one who purchases such certificate in the market, without knowledge of any fraud in its issue, is entitled to have it transferred to him on the books of the company, and if, on demand, such transfer is refused, may recover of the company its value at the time of the demand.
2. Where certificates of the stock of a company are required to be issued by the president and the secretary under the seal of the company, and no other mode is provided or can be used, and neither the secretary nor the president is prohibited from holding stock, and both, with its knowledge, do in fact hold stock, the fact that a certificate is issued in favor of the secretary is not, of itself, sufficient to put a party on inquiry as to whether the secretary is rightfully the owner of it.
3. By reason of what appears on the face of a certificate of stock, and the fact that, as a matter of general knowledge in the business world, such certificates of stock are extensively purchased as investments, with no other inquiry than as to the genuineness of the signatures of the officers

*Headnotes by the COURT.

NOTE.—As to the liability of a corporation for fraud or forgery of its officers in the issue of stock, see *note* to Fifth Avenue Bank v. Forty-Second Street & G. Street Ferry R. Co. 43 L. R. A.

to the certificates, and that such use of them adds to the value of the stock of a company, and is largely to its advantage, the company is charged with the duty of observing care in their issue, and of supervising their agents charged with the performance of the duty. This is a duty it owes to all persons dealing in its stock; and if, by reason of its negligence in this regard, spurious stock is issued, it is liable in damages to anyone purchasing it for value, without knowledge of its fraudulent character. And a failure of the party, under such circumstances, to inquire at the office of the company, is not such contributory negligence as will deprive him of the right to recover, although such inquiry would have disclosed the fraudulent character of the certificate.

(Shouck, J., dissents.)

(May 11, 1897.)

ERROR to a General Term of the Superior Court of Cincinnati reversing a judgment of the Trial Term in favor of plaintiff in an action brought to cancel shares of stock in the plaintiff corporation which were alleged to have been fraudulently issued by its secretary. *Affirmed.*

Statement by Minshall, J.:

At the time of his death, which occurred May 25, 1882, George F. Doughty was the secretary of the plaintiff in error, and had been such from the time of its incorporation in October, 1881. During this time he had fraudulently caused to be issued a large number of spurious certificates of the stock of the company, being shares in excess of its capital stock. These certificates were in the hands of various individuals, each of whom had either purchased what he held from Doughty, or taken it in pledge for money loaned him by the holder. Suits were brought by many of them against the company for the value of the stock, on its refusal to transfer the stock to them on the books of the company; and a judgment had been obtained in one case, and a verdict in another, when the suit below was commenced in the superior court, against all the individuals claiming to own such stock, asking that they be required to set up their claims to the stock held by them, and the certificates be delivered up and canceled. The defendants answered separately, each claiming that, whatever the character of certificates held by him, he was an innocent holder for value and entitled to recover of the company the value of his stock. Two set up former adjudications in their favor. The case was tried in special term on the issues. The court, at the request of the defendants, made a separate finding of the facts and the law, and rendered judgment in favor of the railway company. On error to the general term the judgment was reversed, and judgments rendered in favor of the defendants respectively. The finding of facts so far as material to the question here presented,—the right of the company to relief

(N. Y.) 19 L. R. A. 831. See also Knox v. Eden Musee American Co. (N. Y.) 31 L. R. A. 779 and Pennsylvania Co. for Insurance v. Franklin F. Ins. Co. (Pa.) 37 L. R. A. 780.

against innocent holders for value of the stock,—is as follows:

"First. That the plaintiff was incorporated under the laws of Ohio on October 8, 1881, with an authorized capital stock of \$3,000,000, divided into shares of \$100 each, all of which shares were lawfully subscribed for by bona fide subscribers, paid in full in cash, and proper certificates therefor duly issued to such subscribers on or before October 12, 1881, which certificates were duly signed by Theodore Cook, as president, and by George F. Doughty, as the secretary, of the plaintiff, and were evidenced by the genuine seal of the plaintiff corporation. That Theodore Cook was elected and qualified as president of the plaintiff corporation at the date of its organization, and George F. Doughty was elected and qualified as secretary of the plaintiff corporation at the date of its organization, and that the said Theodore Cook and George F. Doughty were re-elected and qualified as president and secretary, respectively, of said corporation on the first Monday in January, 1882, and the said Theodore Cook continued to be president thereof until January, 1883, and the said George F. Doughty continued to be its secretary until his death on May 25, 1882. That the plaintiff's capital stock has never been increased by any express action of the directors or of the stockholders, as provided by the statutes of the state in that behalf. That upon its organization the plaintiff corporation adopted, among others, the following by-laws in reference to the issue of its certificates of stock, which continued in force until January, 1883. 'Art. 8. Certificates of stock shall be issued to each subscriber for the number of shares which he may own, under the corporate seal of the company, signed by the president and secretary, setting forth the amount due upon each share. Art. 9. It shall be the duty of the secretary to keep the office of the company open during business hours. He shall be the custodian of the seal of the company, and shall affix the same with his attestation thereto whenever the official business of the company may require. He shall attend all meetings of the stockholders, directors, and executive committee, unless excused, and keep and record a full and true minute of their proceedings. He shall also attend the meetings of any committee appointed by the directors or stockholders if requested, and keep a record of their proceedings. He shall keep the stock ledger of the company, and make transfers of stock upon the surrender, and properly indorse and cancel all stock certificates which may be presented for transfer. He shall give bond for \$50,000, with two good securities, to be approved by the executive committee.'

"Second. All of the stock certificates of the plaintiff issued by it, and all the stock certificates of the plaintiff purporting to be issued by the plaintiff and held by the defendants, were in the same form, and were as follows, with the blanks for the number of

shares and the party in whose favor they were issued filled in writing, to wit:

Form of Certificate.

This is to certify that—is entitled to— shares of one hundred dollars each in the capital stock of the Cincinnati, New Orleans, & Texas Pacific Railway Company, transferable only on the books of the company, in person or by attorney, on the surrender of this certificate. Witness the seal of the company and the signature of the president and secretary at Cincinnati this — day of —, Secretary.
—, President.

[Corporate Seal.]

"That all of said certificates issued during the lifetime of George F. Doughty, were filled out and signed by George F. Doughty as secretary. They all bear the signature of Theodore Cook as president, with the exception of two, which were signed by John Scott, the vice president; and all bore the seal of plaintiff corporation, affixed by George F. Doughty, its secretary.

"Third. The certificates, before issue, were bound in two books called the 'Certificate Books,' with stubs, numbered from one to five hundred in the first and from five hundred to one thousand in the second. Each certificate bears the same number as its stub. The secretary, Doughty, was provided with a stock ledger and stock journal and register of transfers, and the books containing the blank certificates, regularly numbered, as above stated. There was no book designed to contain the actual transfer of the stock, but, instead of that, each certificate was indorsed with a blank form of assignment, to be filled out when assigned or surrendered, in form as follows:

For value received — sells to — the stock within mentioned, and authorize —, — attorney, to transfer the same on the books of the company.

Witness my hand and seal this — day of — A. D. 188—.

In presence of —.

"The register of transfers was a book containing a regularly ruled page with numbers on it to correspond with the numbers of certificates, and was arranged with reference to each, so as to permit the bookkeeper to show both the certificate from which and the one into which it was transferred. The stock ledger simply kept a ledger account with each stockholder and was posted from the stock journal in which the entries were journalized. The secretary's (Doughty's) mode of keeping the certificate books was to mark upon a stub of the new certificate the number of the certificate surrendered, in addition to the date, the names of the transferor and the transferee, and the number of shares. The stub had a place for the receipt of the transferee upon getting the new certificate.

"Fourth. The president, Theodore Cook, gave but little, if any, personal attention to transfers of stock, except to sign the certificates. After the issue of the certificates to the original subscribers to the capital stock of the plaintiff, the president was in the habit of signing a number of certificates in blank, and leaving them with Doughty, as secretary, to be filled out when necessary upon the presentation to said Doughty, as such secretary, of outstanding certificates for transfer duly indorsed as above provided, and for no other purpose. When the said Doughty died, there had been signed by the president and secretary, with the corporate seal affixed, and removed from the book, certificates for 34,000 shares of stock which had not been canceled or surrendered by them. The authorized stock was 30,000 shares.

"Fifth. Said George F. Doughty originally subscribed for 650 shares, and received therefor certificates Nos. 86, 87, 88, 89, 90, and 91. Of these Nos. 87, for 250 shares, and 88, for 50 shares, belonged to others, who paid the subscriptions therefor, and the certificates therefor, indorsed by Doughty, were at once delivered to them, and never again came into his possession. The certificates Nos. 89 for 50 shares, 90 for 100 shares, and 91 for 100 shares, were subscribed for by said Doughty on the equal joint account of himself and defendants Herman Klein & Son, and issued in the name of George F. Doughty. The subscription therefor was paid with funds borrowed on a pledge of said certificates 89, 90, and 91, and on October 8, 1881, by said Doughty and Herman Klein & Son, and such certificates were never afterwards in the possession of said Doughty and said Herman Klein & Son until the same were redeemed and returned to said Doughty on May 17, 1882. On November 9, 1881, Doughty issued certificates Nos. 255 and 256 to himself, and noted upon the register of transfers that they had been issued upon the surrender of certificate No. 86. No. 86 was then in the bank of Kuhn & Sons, and pledged as above stated. On May 20, 1882, the secretary, Doughty, delivered to Herman Klein & Son certificates Nos. 547 and 548, for 125 shares, but made no entry thereof on the books of the company. On May 5, 1882, Joseph Rawson & Sons purchased a note of George F. Doughty for \$7,500, secured by 100 shares of plaintiff's stock, represented by certificate No. 86 which they continued to hold until November 27, 1882, and then sold the same in the market. Subsequently to Doughty's death, to wit, on September 6, 1882, Herman Klein & Son, surrendered to the company certificates Nos. 547 and 548, and Theodore Cook, as administrator of George F. Doughty, surrendered certificate No. 89, for 50 shares, and 75 from certificate No. 90, for 100 shares, and the company issued to Herman Klein & Son certificates Nos. 597 and 598, for 125 shares. Said Doughty afterwards became the owner of 50 shares on December 23, 1881, represented by certificate No. 373, which he sold and transferred to other parties than the defendants herein. He also became the owner, by purchase, of 25 shares on December 31, 1881, represented 43 L. R. A.

by certificate No. 434, which was found indorsed by George F. Doughty, in an envelope marked 'George F. Doughty,' in the safe of the company, and came to the possession of Theodore Cook; and the court find that said certificate was the private property of George F. Doughty, and that it came into the possession of Theodore Cook as his administrator, and was subsequently transferred by said Theodore Cook, as administrator, to other parties than the defendants named in this case. He also became the owner by purchase, on February 27, 1882, of 100 shares evidenced by certificate No. 466, which he subsequently sold and transferred to parties other than the defendants in this case; and on April, 1882, said Doughty purchased 1 share of capital stock, evidenced by certificate No. 513, which was neither found in the possession of said Doughty nor of said plaintiff at the time of his death. The above were all the shares which the court find that the evidence shows were ever held or owned by said George F. Doughty.

"Sixth. The court further find the personal account of George F. Doughty in the stock ledger at the death of George F. Doughty was as follows:

"Dr. George F. Doughty, 1881, Oct. 15. To Meyer Bettman, 4, \$5,000. Dec. 8. Sundry parties, 10, \$1,000.

"Cr. 1881. Oct. 8. By Capital stock, 3, \$60,000. Oct. 8. By capital stock, 3, \$5,000. Nov. 11. By L. Markbreit, 7, \$1,000. Dec. 23. By Simon & Huseman, 10, \$5,000.

"But that the account, as shown by comparison with the stock-certificate books and the register of transfers, was neither complete nor correct. And the court find that the stock-certificate books and the register of transfers contain the only entries of the issue of fraudulent certificates by said George F. Doughty. That the entries upon the stock-certificate books and the register of transfers disclose from November 9, 1881, down to the death of said George F. Doughty, entry after entry that was suspicious upon its face, and was fraudulent in fact, and that very little investigation of these books would have disclosed the fraud which Doughty was engaged in perpetrating in issuing stock certificates hereinafter referred to, and found to be spurious by the court; and that the directors and president of the plaintiff company were negligent in the examination and supervision of the said certificate books and register of transfers, and of the certificates from time to time surrendered and in the possession of said company for cancellation, and of the use being made by said Doughty of certificates signed in blank, and that such negligence enabled said Doughty to commit the frauds hereinafter returned." To the latter part of which finding plaintiff excepted.

The seventh, to and including the eighteenth, findings are on the special facts of the case of each defendant, and are in general as summarized by the judge in delivering the opinion in general term: "That George F. Doughty, disregarding his duty in the premises and without the knowledge of the plain-

tiff or any of its officers other than himself, falsely and fraudulently filled up the certificates in his own favor that had been signed in blank by the president, and either falsely and fraudulently entered upon the books of the company that the certificate had been issued, or falsely and fraudulently made no entry of the certificate upon the books of said company. That the said George F. Doughty made and executed his promissory notes, and sold the notes through a banker, with the certificates properly indorsed by the said George F. Doughty for transfer. That the defendants bought said notes relying upon the representations in said certificates contained, and made no inquiry in respect to the validity of said certificates, or the issue thereof, of any officer of the company; and that no defendant had any knowledge of the issue of any notes or certificates by said Doughty, or in his favor, other than the notes and certificates bought by him. It also appears in these findings that, although the fraudulent certificates bore dates ranging from November, 1881, to May, 1882, yet no one of the defendants made his or her loan prior to February 18, 1882, and some of them as late as May 20, 1882." The nineteenth finding is as follows: "Nineteenth. The court further find that each of the above-named parties defendant are holders and owners, respectively, of said promissory notes; that they purchased the same in the ordinary course of business, without any actual knowledge of any fraud or irregularity of said Doughty in respect to or in the issue of, said certificates of stock, and relying upon them as genuine and valid security for the money advanced by them in the purchase of said notes; that each of said parties knew that the said George F. Doughty was the secretary of the said company; and that none of said parties made any inquiry of any of the officers, agents, or stockholders of said company in respect to said certificates of stock, or the issue thereof, before purchasing notes except as hereinafter stated. And the court find that, if any of the parties defendant, in the purchase of the foregoing notes, had made inquiry as to the genuineness of the certificates pledged to secure any one of said notes, such inquiry would have disclosed the fraudulent character of such certificates; to which conclusions each of the defendants severally except. The court further find that each of the said parties defendant presented his aforesaid certificates to the plaintiff corporation, and made demand for the transfer of the same at the dates alleged in their several answers and cross petitions, and that the plaintiff refused to make such transfers. The court further find that each of said parties defendant thereupon commenced an action in the superior court of Cincinnati, and in the court of common pleas of Hamilton county, as alleged by them in their several answers and cross petitions, and that the plaintiff filed its answers as therein set forth, and that several actions are still pending in said courts."

The court also found the market value of the stock at the time the demand 43 L. R. A.

for its transfer was made, and also made a finding designating the stock it found to be genuine and that which it found to be spurious. Its conclusions of law may be stated generally as follows: (1) That the presence of the name of Doughty—both as secretary and as owner—on each of the spurious certificates put the party in acquiring it on inquiry, and that a failure to inquire of some officer of the company other than Doughty was contributory negligence, depriving him of the right to recover. (2) That the signing of the spurious certificates by Doughty was not the act of the company, and imposed no obligation on it to recognize the holder as a stockholder. (3) That the plaintiff is entitled to have the spurious certificates delivered up and canceled. The plea of *res judicata* set up by two of the defendants was sustained. In general term, the finding "that if any of the parties defendant, in the purchase of the foregoing notes, had made inquiry as to the genuineness of the certificate pledged to secure any of said notes, such inquiry would have disclosed the fraudulent character of such certificate," was set aside as not sustained by the evidence.

Messrs. Harmon, Colston, Goldsmith, & Hoadly and Ramsey, Maxwell, & Ramsey, for plaintiff in error:

In view of the fact that stock certificates are not negotiable (*Hammond v. Hastings*, 134 U. S. 404, 33 L. ed. 962), and of the fact that even bona fide purchasers for value must therefore necessarily take instruments of that nature subject to all defenses (*Second Nat. Bank v. Walbridge*, 19 Ohio St. 419, 2 Am. Rep. 408), surely it is going far enough to hold that a corporation is estopped by the statements in a certificate actually issued by it in the regular course of business, when there is nothing to suggest any question of its possibly fraudulent character.

When on the very face of the paper a case was shown where Doughty's interest and his duty conflicted, what reason can be given why the well-known rule should not apply that persons dealing with him in the line of his interest should take the risk of his having violated his duty?

The person with specific knowledge before him, and free choice to act or refrain, should take whatever risk there may be.

New York Iron Mine v. First Nat. Bank, 39 Mich. 656; *King v. Sparks*, 77 Ga. 285; *Smith v. Los Angeles Immigration & Land Co.-Op. Asso.* 78 Cal. 289; *Strong v. Strauss*, 40 Ohio St. 94; *Moores v. Citizens' Nat. Bank*, 111 U. S. 156, 28 L. ed. 385.

The law of negligence, as applied to instruments issued without the authority of the obligor, applies only to negotiable instruments.

Swan v. North British Australasian Co. 2 Hurlst. & C. 175, 7 Hurlst. & N. 603; *Second Nat. Bank v. Walbridge*, 19 Ohio St. 419, 2 Am. Rep. 408.

There must be more than negligence to create estoppel.

Ensel v. Levy, 46 Ohio St. 255.

There is no rule of law which requires a

principal to supervise the conduct of his agent to prevent the agent from committing fraud or crime, either against his principal or third persons.

An instrument is either negotiable or non-negotiable. There is no middle ground. If non-negotiable, the maker is entitled to defend against it unless he have by his own fraudulent conduct, with reference to it, precluded himself from so doing.

Boalt v. Brown, 13 Ohio St. 364; *Manhattan Beach Co. v. Harned*, 27 Fed. Rep. 486; *Pollard v. Vinton*, 105 U. S. 7, 28 L. ed. 998; *The Freeman v. Buckingham*, 18 How. 182, 15 L. ed. 341; *Friedlander v. Texas & P. R. Co.* 130 U. S. 416, 32 L. ed. 991.

A stock certificate is a non-negotiable instrument.

Dewing v. Perdicaries, 96 U. S. 193, 24 L. ed. 654; *Mechanics' Bank v. New York & N. H. R. Co.* 13 N. Y. 599; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, 14 Am. Rep. 173.

The law of negligence, as applied to the creation of liability by carelessly allowing instruments to go into circulation, does not apply to non-negotiable instruments.

Swan v. North British Australasian Co. 7 Hurlst. & C. 603; *Second Nat. Bank v. Walbridge*, 19 Ohio St. 419, 2 Am. Rep. 408; *Bank of Ireland v. Evans's Charities*, 5 H. L. Cas. 389; *Western U. Tele. Co. v. Davenport*, 97 U. S. 369, 24 L. ed. 1047; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364, 23 Am. Rep. 751; *Arnold v. Cheque Bank*, L. R. 1 C. P. Div. 578; *Johnson v. Credit Lyonnais Co.* L. R. 3 C. P. Div. 32; *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 9 Am. Dec. 111; *Baxendale v. Bennett*, L. R. 3 Q. B. Div. 525.

Mere negligence never creates estoppel *in pais*, except in cases where a duty is cast upon one party to exercise care toward the other.

McKinzie v. Steele, 18 Ohio St. 38; *Separate School Dist. Bd. of Edu. v. Sinton*, 41 Ohio St. 504; *Henshaw v. Bissell*, 18 Wall. 255, 21 L. ed. 835; *Brant v. Virginia Coal & I. Co.* 93 U. S. 326, 23 L. ed. 927.

It is not negligent to rely upon the integrity and faithfulness of an agent of good reputation.

Baxendale v. Bennett, L. R. 3 Q. B. Div. 525; *Lehman v. Central R. & Bkg. Co.* 12 Fed. Rep. 595; *Ang. & A. Corp.* § 314; *Scott v. Depeyster*, 1 Edw. Ch. 513.

Merely affording another an opportunity to perpetrate a fraud is not actionable negligence, even if negligent.

First Nat. Bank v. Western U. Tele. Co. 30 Ohio St. 555, 27 Am. Rep. 485; *Lowery v. Western U. Tele. Co.* 60 N. Y. 198, 19 Am. Rep. 154; *Ogden v. Ogden*, 4 Ohio St. 182; *Lowell Five Cents Sav. Bank v. Winchester*, 8 Allen, 109; *Mussey v. Beecher*, 3 Cush. 511.

The corporation is bound only as an individual would be bound.

Ang. & A. Corp. § 382; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008; *Ranger v. Great Western R. Co.* 5 H. L. Cas. 72.
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Where an agent is known to be dealing for himself, the party dealing with him is put upon inquiry, if the dealing affects the principal in any way.

Bank v. Bank, 4 Am. L. Rec. 705; *Platt v. Birmingham Aale Co.* 41 Conn. 255; *Wright's Appeal*, 99 Pa. 425; *Winchester v. Baltimore & S. R. Co.* 4 Md. 241; *Clafin v. Farmers' & C. Bank*, 25 N. Y. 293; *Moore v. Citizens' Nat. Bank*, 15 Fed. Rep. 141, 111 U. S. 156, 28 L. ed. 385; *Separate School Dist Bd. of Edu. v. Sinton*, 41 Ohio St. 504.

A principal is liable for a misrepresentation by his agent only: (1) Where it is done in the course of his employment as agent; (2) within the scope of the agency; (3) where it is done upon behalf of the principal; or (4) where the principal voluntarily retains the benefit of the misrepresentations.

Wharton, Agency, §§ 129, 158, 472; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Bank of Kentucky v. Schuykill Bank*, 1 Pars. Sel. Eq. Cas. 180; *Charter Oak L. Ins. Co. v. Smith*, 3 Week. L. Bull. 608; *Lowell Five Cents Sav. Bank v. Winchester*, 8 Allen, 109; *Separate School Dist. Bd. of Edu. v. Sinton*, 41 Ohio St. 504; *Udell v. Atherton*, 7 Hurlst. & N. 172; *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *McGowan v. Dyer*, L. R. 8 Q. B. 141; *Swift v. Winterbotham*, L. R. 8 Q. B. 244; *Swift v. Jewsbury*, L. R. 9 Q. B. 301; *British Mut. Bkg. Co. v. Charnwood Forest R. Co.* L. R. 18 Q. B. Div. 714; *Vagliano Bros. v. Bank of England*, L. R. 22 Q. B. Div. 103; *McKay v. Commercial Bank*, L. R. 5 P. C. 394; *Kennedy v. McKay*, 43 N. J. L. 288, 39 Am. Rep. 581; *Western Bank v. Addie*, L. R. 1 H. L. Sc. App. Cas. 145; *Foster v. Essex Bank*, 17 Mass. 479.

The sale and delivery of stock certificates generally vest in the purchaser only an equitable title to the stock. The purchaser always takes subject to the equities of the corporation, until transfer upon the books of the company.

Conant v. Reed, 1 Ohio St. 298; *Union Bank v. Laird*, 2 Wheat. 390, 4 L. ed. 269; *Bridgeport Bank v. New York & N. H. R. Co.* 30 Conn. 231; *Haldeman v. Hillsborough & C. R. Co.* 2 Handy (Ohio) 101.

The maxim "Where one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it," — is usually employed in the discussion or decision of such cases, and it is perfectly plain that in all cases it only tends to create confusion and to mislead. The act of alleged agency was either an act for which the principal is liable according to the rules of law applicable to the subject, or it was not such an act. This question being determined, the subject is disposed of. And yet, before this maxim can be applied, that question must be settled. Hence, the maxim cannot aid in its settlement.

Arnold v. Cheque Bank, L. R. 1 C. P. Div. 587; *Isnard v. Torres*, 10 La. Ann. 103; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661.

The doctrine of estoppel *in pais* is a doc-

trine which applies in cases of fraud, and to the party guilty of it, and not to "innocent" persons.

Houck v. Minnick, 19 Ohio St. 467, 2 Am. Rep. 413.

Fraud, from its very nature, can exist only in connection with some form of contract.

2 Hilliard, Torts, p. 137; *Hern v. Nichols*, 1 Salk. 289; *New York Iron Mine v. First Nat. Bank*, 39 Mich. 653; *Friedlander v. Texas & P. R. Co.* 130 U. S. 426, 32 L. ed. 995; *British Mut. Bkg. Co. v. Charnwood Forest R. Co.* L. R. 18 Q. B. Div. 714; *Vagliano Bros. v. Bank of England*, L. R. 22 Q. B. Div. 103; *Bank v. R. Co.* 1 Ohio C. C. 199.

Messrs. J. B. Foraker, Frank R. Lawrence, and Gordon T. Hughes, also for plaintiff in error:

The law applicable to this case has its foundation, both in England and America, in decisions in which it is held that a ship-master, signing a bill of lading for goods which have never been shipped, is acting without the apparent, as well as the real, scope of his employment; and hence is not to be considered as the agent of the shipowner so as to render the latter responsible to one who has made advances upon the faith of bills of lading so signed.

Grant v. Norway, 10 C. B. 664; *Hubbersty v. Ward*, 8 Exch. 330; *Coleman v. Riches*, 16 C. B. 103; *Meyer v. Dresser*, 16 C. B. N. S. 646; *Jessel v. Bath*, L. R. 2 Exch. 267; *M'Lean v. Fleming*, L. R. 2 H. L. Sc. App. Cas. 128; *Brown v. Powell Duffryn Steam Coal Co.* L. R. 10 C. P. 562; *Cox v. Bruce*, L. R. 18 Q. B. Div. 147; *Walter v. Brewer*, 11 Mass. 99; *The Freeman v. Buckingham*, 18 How. 182, 15 L. ed. 341; *Sears v. Wingate*, 3 Allen, 103; *Union R. & Transp. Co. v. Yeager*, 34 Ind. 1; *Stollenwerck v. Thacher*, 115 Mass. 224; *Pollard v. Vinton*, 105 U. S. 7, 26 L. ed. 998; *Robinson v. Memphis & C. R. Co.* 9 Fed. Rep. 129; *Erb v. Great Western R. Co.* 5 Can. S. C. Rep. 179; *The Querini Staphalia*, 19 Fed. Rep. 123; *Williams v. Wilmington & W. R. Co.* 93 N. C. 42; *St. Louis, I. M. & S. R. Co. v. Knight*, 122 U. S. 79, 30 L. ed. 1077; *Friedlander v. Texas & P. R. Co.* 130 U. S. 416, 32 L. ed. 991; *National Bank of Commerce v. Chicago, B. & N. R. Co.* 44 Minn. 224, 9 L. R. A. 263; *Second Nat. Bank v. Walbridge*, 19 Ohio St. 419, 2 Am. Rep. 408; *Dean v. King*, 22 Ohio St. 118.

Applying the principles settled by cases involving the wrongful issue by agents of bills of lading and receipts for goods not in possession, it becomes clear that it is not within the apparent scope of the employment of the secretary of a railroad company to issue, in his own name and for his own purposes, stock certificates where the total authorized capital stock has been issued, where no certificates have been returned, and where the by-laws expressly provide that the power to issue certificates can only be exercised upon the return of prior certificates.

Moore v. Citizens' Nat. Bank, 15 Fed. Rep. 141, 111 U. S. 156, 28 L. ed. 385; *British Mut. Bkg. Co. v. Charnwood Forest R. Co.* L. R. 18 Q. B. Div. 714.

The secretary of a corporation has not 43 L. R. A.

wider apparent authority than the agents of carriers and warehousemen who issue bills of lading and receipts.

No court has held that stock certificates have the negotiability which attaches to bills and notes, so as to make a transfer of them to a purchaser in good faith equivalent to a passing of actual title, although such transfer was not made within the actual or apparent scope of the agency of the transferring party.

Know v. Eden Musee American Co. 148 N. Y. 441, 31 L. R. A. 779; *Hammond v. Hastings*, 134 U. S. 401, 33 L. ed. 960; *Lowell, Transfer of Stock*, § 129; *Cook, Stock & Stockholders*, 3d ed. § 412, and cases cited.

In *Manhattan L. Ins. Co. v. Forty-Second Street & G. Street Ferry R. Co.* 139 N. Y. 146, the court of appeals of New York goes far in the direction of modifying its previous views and placing itself in line upon this question with the other leading tribunals of this country and of England.

Goshen Nat. Bank v. State, 141 N. Y. 387; *Bank of New York Nat. Bkg. Assn. v. American Dock & Trust Co.* 143 N. Y. 559.

Messrs. E. W. Kittredge and J. W. Warrington, for defendants in error:

The issuing of a certificate of stock, signed by the president and secretary of the plaintiff in error, and under its corporate seal, is the corporate act of the company, and not the act of the president and secretary as the mere agents of the corporation. Such a certificate, to all intents and purposes, is the certificate of the defendant corporation in its corporate capacity.

Ohio Rev. Stat. 1880, § 3254; *Wilson v. Salamanca*, 99 U. S. 499, 25 L. ed. 330; *Pollard v. Vinton*, 105 U. S. 12, 26 L. ed. 1000; *Scotland County v. Thomas*, 94 U. S. 682, 24 L. ed. 219; *South Yorkshire R. & River Dun Co. v. Great Northern R. Co.* 9 Exch. 84; *Lewis v. Rochester*, 9 C. B. N. S. 426; *Pittsburgh, C. O. & St. L. R. Co. v. Lynde*, 55 Ohio St. 23.

The stock certificate is an instrument of evidence, recognized by the law, of ownership of its stock, created and issued by the corporation in the exercise of its franchise, and in the interest of the whole body of its stockholders, to enable its shares to be freely dealt in by the public.

The corporation is estopped to deny as against a bona fide purchaser for value the validity of such a certificate if it was not an overissue; and if an overissue, it is estopped to deny that the issue was a corporate act, and is responsible for the loss sustained by such a bona fide purchaser for value.

New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; *Bruff v. Mall*, 36 N. Y. 200; *Holbrook v. New Jersey Zinc Co.* 57 N. Y. 616; *Titus v. Great Western Turnp. Co.* 61 N. Y. 237; *Tome v. Parkersburg Branch R. Co.* 39 Md. 36, 17 Am. Rep. 540; *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 36; *Willis v. Fry*, 13 Phila. 33; *People's Bank v. Kurtz*, 99 Pa. 349, 44 Am. Rep. 112; *Bank of Kentucky v. Schuykill Bank*, 1 Pars. Sel. Eq. Cas. 248; *Machinists' Nat. Bank v. Field*, 126 Mass. 345; *Re Bahia & S. F. R. Co. L. R. 3 Q. B. 584*; *Shaw v. Port Philip & C.*

Gold Min. Co. L. R. 13 Q. B. Div. 103; Moores v. Citizens' Nat. Bank, 111 U. S. 156, 28 L. ed. 385; *Citizens' Sav. Bank v. Blakesley*, 42 Ohio St. 645; *Com. v. Reading Sav. Bank*, 137 Mass. 431; *Fifth Ave. Bank v. Forty-Second Street & G. Street Ferry R. Co.* 137 N. Y. 231, 19 L. R. A. 331; *Bank of New York Nat. Bkg. Asso. v. American Dock & Trust Co.* 143 N. Y. 559; *Goshen Nat. Bank v. State*, 141 N. Y. 379; *Bank of Batavia v. New York, L. E. & W. R. Co.* 106 N. Y. 195.

The negligence of the corporation in intrusting Doughty, as its secretary, with certificates signed in blank by the president, and with the corporate seal, and in failing to make any examination of the certificates in the certificate books, or other books showing the issuing of stock, and of the certificates surrendered from time to time to such secretary, in lieu of the certificates so signed in blank and left in his possession, or otherwise to investigate the use made of certificates, so signed in blank, continued almost daily for a period of seven months, until it constituted a course of business, whereby the directors are chargeable with knowledge of all the facts included in this course of business, renders the corporation liable for the injury occasioned by such neglect, to the same extent that it would be if its board of directors knew and approved of all the acts of Doughty.

New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; *Martin v. Webb*, 110 U. S. 15, 28 L. ed. 52; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008; *London & S. W. Bank v. Wentworth*, L. R. 5 Exch. Div. 96; *Pompton v. Cooper Union*, 101 U. S. 196, 25 L. ed. 803; *Dair v. United States*, 16 Wall. 1, 21 L. ed. 491; *Citizens Sav. Bank v. Blakesley*, 42 Ohio St. 645; *Fifth Avenue Bank v. Forty-Second Street & G. Street Ferry R. Co.* 137 N. Y. 231, 19 L. R. A. 331; *Bank of New York Nat. Bkg. Asso. v. American Dock & Trust Co.* 143 N. Y. 559; *Hanover Nat. Bank v. American Dock & Trust Co.* 148 N. Y. 620.

Under the circumstances of the case it was not legally incumbent upon the defendants to make inquiry at all before acquiring the certificates of stock in question.

Titus v. Great Western Turnp. Co. 61 N. Y. 237; *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 36; *Willis v. Fry*, 13 Phila. 33, Approved in *People's Bank v. Kurtz*, 99 Pa. 349, 44 Am. Rep. 112.

There are differences between bills of lading and certificates of stock.

Lee v. Sturges, 46 Ohio St. 153, 2 L. R. A. 556; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Worthington v. Sebastian*, 25 Ohio St. 1; *Sturges v. Carter*, 114 U. S. 512, 29 L. ed. 241.

Scrutton, in his work on Charter Parties and Bills of Lading (3d ed.) p. 5, note X, refers to several English decisions, where, notwithstanding the decision in *Grant v. Norway*, 10 C. B. 664, statements in bills of lading are held to bind the owner as against an indorsee for value, though such statements were made without the owner's authority.

Brooke v. New York, L. E. & W. R. Co. 108 43 L. R. A.

Pa. 529, 56 Am. Rep. 235; *Sioux City & P. R. Co. v. First Nat. Bank*, 10 Neb. 556, 35 Am. Rep. 488; *Coventry v. Great Eastern R. Co.* L. R. 11 Q. B. Div. 776; *Wichita Sav. Bank v. Atchison, T. & S. F. R. Co.* 20 Kan. 519; *Armour v. Michigan C. R. Co.* 65 N. Y. 111, 22 Am. Rep. 603; *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293; Bigelow, Estoppel, 5th ed. pp. 474-476; 5 Thomp. Corp. §§ 6332, 6333; *Walters v. Western & A. R. Co.* 56 Fed. Rep. 369.

When a corporation issues a certificate of stock it is delivering the intangible property, as distinguished from a mere symbol, to the person in whose favor it is issued, with the object of enabling him to sell it to third parties.

If the certificate contains the representation that it is fully paid-up stock, it is binding and conclusive both against the corporation and its creditors.

Nicholls' Case, 26 Week. Rep. 334, L. R. 3 App. Cas. 1004; *Steacy v. Little Rock & Ft. S. R. Co.* 5 Dill. 348; *Brant v. Ehlen*, 59 Md. 1; *Young v. Erie Iron Co.* 65 Mich. 111.

Minshall, J., delivered the opinion of the court:

Independently of any question of negligence in the issue on the part of the company or its agents, it would seem on the plainest principles that the company should be held liable to an innocent holder for value of any part of the stock issued by its secretary. The certificates were all signed by the president and the secretary, and had the corporate seal attached, as required by law and the rules of the company. If stock so issued is not to be regarded as issued by the act of the company, it is difficult to understand what would constitute an act of the company done in its corporate capacity. It is as much the act of the company as is the deed of a natural person, signed, sealed, and delivered by himself. This is so, or a corporation can do no act which can be regarded as done by itself. A corporation is a mere fiction created by law and must, therefore, act through some human agency, or it cannot act at all. These agencies necessarily differ in character. Many simply represent it as agents, others represent it as a corporation in what they do, and their acts are its acts as much so as the acts of an individual done by himself in his own behalf. This is so as to all acts appointed by the law and its own rules to be done by a particular agent or agents, and can be done by no other officer or agent of the company, as is the case in the issue and transfer of stock. In *Bank of Kentucky v. Schuykill Bank*, 1 Pars. Sel. Eq. Cas. 180, where the liability of a corporation for the acts of what is well termed its "statute agents" is considered, the court says (p. 240): "Although a bank corporation is compelled, by the incorporeal nature of its essence, to act by others, yet, when these are part of its organic machinery, like its cashier, it is as much responsible for their omissions and commissions as is a natural person who employs assistants in the execution of any commission." And it was there held that the Bank of Kentucky was liable

to the holders of its stock that had been fraudulently transferred by its transfer agent the Schuylkill Bank, situated in Philadelphia; and the latter bank was held liable to the Kentucky Bank for the frauds of its cashier to whom it had intrusted the service it had undertaken as the transfer agent of the Bank of Kentucky. It is required by the statute, and, in this case, by the by-laws of the company, that all certificates of stock should be issued by the president and secretary of the company, attested by its own seal. Stock certificates can be issued in no other way, and by no other agencies of the company. Rev. Stat. § 3254, and rule 10 of the by-laws of the company. In the absence of any knowledge of fraud in its issue, we know of no rule of diligence that requires one in purchasing such stock to inquire beyond the genuineness of the certificate on its face. If the signatures of the president and the secretary are genuine, and the seal has been affixed and the paper on its face is a certificate of stock, to require one without knowledge of any fraud in its issue, before purchasing it, to inquire of the company or any of its officers as to whether it is genuine would be to require a degree of care not exacted in any other similar business transaction, and not observed by the most careful business men in dealing in the stock of a company. And hence the omission to make such inquiry is not such negligence as to deprive the holder of stock innocently acquired of his remedy against the company on a refusal to transfer it as promised in the certificate. The fact that the certificate appears on its face to have been issued to the secretary as the owner of it cannot be regarded as a suspicious circumstance where, as in this case, he was not forbidden to hold stock, and, as found, 650 valid shares had been issued to him. *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 36; *Titus v. Great Western Turnp. Co.* 61 N. Y. 237. As the secretary had the right to hold stock and did hold it, and as but one mode is provided by statute and the rules of the company for the issue of stock certificates, the fact that a certificate is issued in his favor cannot, of itself, be adjudged a circumstance calculated to place an ordinarily prudent man on inquiry. This is shown by the fact that it did not excite inquiry in the minds of any of the numerous persons who became the owners of such stock, men accustomed to such business, and including some of the most careful business men of Cincinnati. Protection against the possibility of such frauds is provided in the requirement that the certificate shall be signed by the president as well as the secretary. Either, by this requirement, must be deemed a sufficient check on the dishonesty of the other, where the company itself has provided no other check. Where, then, one of the officers becomes negligent, or conspires with the other to commit a fraud on the company by the issue of spurious stock, which comes into the possession of an innocent holder for value, who should more reasonably suffer the loss than the company, who selected its president and secretary, and thus placed it in the power of one or both to

practice the fraud? The law has always been careful to protect the rights of the innocent third person under such circumstances. When one, by the fraud of another, is induced to make and deliver him a deed, who then sells and conveys the land to an innocent purchaser for value, the latter is protected against the fraud that had been practised by his grantor in acquiring the land, for the reason that, having no knowledge of the fraud, he had the right to rely on the deed held by his grantor. This is the doctrine of innocent purchaser for value, and is of very general application. It rests upon the principle that, where one of two innocent persons must suffer by the wrongful act of another, he must bear the loss that placed it in the power of such person to do the wrong. This is but the application of a principle sanctioned by time and the dictates of natural justice. Thus, in *Lickbarrow v. Mason*, 2 T. R. 70, it is said: "Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." The same principle is expressed in another form by Lord Holt in *Hern v. Nichols*, 1 Salk. 289, who there says: "For, seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger." The principle has recently been applied in two cases in this court: *Schurtz v. Colvin*, 55 Ohio St. 274; and *Stranahan Bros. Catering Co. v. Coit*, 55 Ohio St. 398.

So far we have considered the liability of the company to innocent parties as resting simply on the ground that the issue of the fraudulent certificates was an act done by the company in its corporate capacity, and affecting it, irrespective of any question of care, in the same manner that any similar act done by a natural person would affect him, whether done by agent or not. But there is another element in this case, presented by the finding of facts, on which the cross petitioners rely as fixing the liability of the company to them, and that is the negligence of the company and its agents in regard to the issue of these spurious certificates by its secretary. The facts in regard to this are set forth in the fourth and sixth findings contained in the statement of the case. From these findings it appears that the president signed from time to time a large number of certificates in blank, and intrusted them to the secretary, who fraudulently filled them up in his own favor, and obtained loans upon them by pledging them as security; that the president gave little, if any, personal attention to the transfer of stock; that from November 9, 1881, the books of the company showed entry after entry that was suspicious on its face, and that very little investigation of these books would have disclosed the fraud being practised by Doughty; and the court then expressly finds that the directors and president "were negligent in the examination and supervision of the certificate books and register of transfers, and the certificates from time to time surrendered and in possession of the company for cancelation and of

the use being made by Doughty of certificates signed in blank, and that such negligence enabled Doughty to commit the frauds" before referred to. The general rule is that a corporation, like a natural person, is liable for the negligence of its agents causing injury to others, where the act done is within the scope of their agency, whether the act be one of omission or commission. *Story, Agency*, § 452; *Tome v. Parkersburg Branch R. Co.* 39 Md. 36, 17 Am. Rep. 540; *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 36, 42. But in answer to the claim of liability on the ground of negligence the company asserts that there is no privity between it and third persons who may deal in its stock; that a certificate of stock is not negotiable; and therefore that neither the company nor any of its agents were under any legal obligation in favor of persons dealing in its stock to supervise the acts of its president and secretary in issuing or in transferring stock. It is not necessary to determine whether a certificate of stock is a negotiable instrument, like a promissory note or bill of exchange. It is not a promise to pay money, and it has no period of maturity as such instruments have; yet, as has been said, it is much like negotiable instruments. On its face, a certificate of stock is an evidence of the title of the person named in it to a certain number of shares, with an assurance to all persons that it will be transferred on the books of the company to anyone purchasing it, on surrendering the certificate. In *First Nat. Bank v. Lanier*, 11 Wall. 377, 20 L. ed. 174, it is said: "Although neither in form nor character negotiable paper, they [certificates of stock] approximate to it as nearly as practicable. . . . It is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him." *Re Bahia & S. F. R. Co. L. R. 3 Q. B. 584*, is to the same effect; and it is there shown that the power of giving certificates is for the benefit of the company in general, as the effect of it is to make the shares of greater value. It is said in *Cook, Stock & Stockholders*, § 416: "To such an extent has the law of estoppel been applied to protect a bona fide purchaser of stock that he is protected now in almost every instance where he would be protected if he were purchasing a promissory note or other negotiable instrument." The cases and authorities certainly show that the claim of the company that there is no duty (for that is all that can be meant by the use of the term "privity") resting upon it or its agents towards third persons to observe care in the issue and transfer of its certificates of stock, and that, as a

consequence, it is not liable to them for negligence in such matters, is not well founded. From the character of the certificate it must be held to contemplate and know that persons relying upon it will purchase the certificate in the market, and meet with loss should the person named in it not be the lawful owner of it. It must therefore be held to care in regard to this, and answer for any loss the result of its negligence, or of its agents.

There has been an effort to liken a certificate of stock to a bill of lading and a warehouse receipt, and to apply the rule as to liability that seems to obtain in those cases. The principal case cited is that of *Grant v. Norway*, 10 C. B. 665, where it was held that "the master of a ship signing a bill of lading for goods which have never been shipped is not to be considered as the agent of the owner in that behalf, so as to make the latter responsible to one who has made advances upon the faith of bills of lading so signed." This case, with many others like it, is placed upon the distinction that a bill of lading is simply a contract of carriage, and while it may be used as a symbol of property, it makes no representation to third persons, which they have a right to rely on, that the fact is as stated in the bill. In this there is a broad distinction between a bill of lading and a certificate of stock; the latter, as already shown, being an assurance to the world that the person named in it is the owner of stock in the company, and that it will be transferred on the books of the company to a purchaser on a surrender of the certificate. No case is cited in which the rule of this class of cases has been applied to certificates of stock. It has not been applied in England, where the case of *Grant v. Norway* was decided, as appears from *Re Bahia & S. F. R. Co. L. R. 3 Q. B. 584*. It was there held that a certificate of stock amounts to a statement intended by the company to be acted on by purchasers of shares in the market, that the person named in it is entitled to shares, and that the company is liable to one who in good faith acts upon it, though the certificate was void as between the company and the person named in it as owner. The case of *Grant v. Norway*, in its limited application, has not met with universal approval. *Bank of Batavia v. New York, L. E. & W. R. Co.* 106 N. Y. 195, 60 Am. Rep. 440. In *Mechem, Agency*, § 717, it is said, in commenting on the New York cases: "A different result has in some cases been reached upon the same state of facts, but the doctrine of the New York court seems most consonant with reason and justice." Among the cases so referred to he includes the case of *Grant v. Norway*. It is certainly much modified by the decisions of this court in *Ensel v. Levy*, 46 Ohio St. 255, where the maker of a warehouse receipt was held estopped from setting up a claim against a bona fide purchaser, inconsistent with a statement in the receipt that the property would be delivered on compliance with the conditions named therein.

There are many cases decided by courts of last resort of the highest character that either directly or in principle sustain a recovery,

in a case like this, on the part of an innocent purchaser for value of a certificate of stock, on the refusal of the company to transfer the stock on its books to him. Every distinction does not constitute a difference, for, as frequently observed by Lord Mansfield, the law does not consist in decided cases, but of general principles that run through them, and by which they have been decided. If it were different, the use of cases in applying the law would be of little help to the lawyer or judge. Cases are principally useful as tokens of what the law is in its generality. They bend to the principle, and not the principle to them. Therefore a difference in facts that does not amount to a difference in law must be disregarded in applying the rule of a case. These observations are made because counsel, in commenting upon many of the cases relative to the subject, seem to have seized upon the slightest difference in facts as calling for the application of a different rule. Some of the cases to which we refer as governing this one are as follows: *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 36; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Sel. Eq. Cas. 180, Affirmed on appeal by the supreme court; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548; *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. ed. 1008; *People's Bank v. Kurtz*, 99 Pa. 344, 44 Am. Rep. 112; *Titus v. Great Western Turnp. Co.* 61 N. Y. 237; *Bruff v. Mali*, 36 N. Y. 200; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, 14 Am. Rep. 173; *Holbrook v. West Jersey Zinc Co.* 57 N. Y. 616; *Bridgeport Bank v. New York & N. H. R. Co.* 30 Conn. 231; *Tome v. Parkersburg Branch R. Co.* 39 Md. 36, 17 Am. Rep. 540; *Willis v. Fry*, 13 Phila. 33; *First Nat. Bank v. Lanier*, 11 Wall. 369, 20 L. ed. 172; *Allen v. South Boston R. Co.* 150 Mass. 200, 5 L. R. A. 716; *Jarvis v. Manhattan Beach Co.* 148 N. Y. 652, 31 L. R. A. 776; *Fifth Avenue Bank v. Forty-Second Street & G. Street Ferry R. Co.* 137 N. Y. 231, 19 L. R. A. 331. Two of the cases above cited—*Bank of Kentucky v. Schuylkill Bank* and *New York & N. H. R. Co. v. Schuyler*—may be regarded as of the same family with this case. They both grew out of large overissues of stock by a transfer agent of the respective companies. The large sums involved secured the employment of the ablest of counsel, who seem to have exhausted every resource of skill and ingenuity in making a defense for the companies against the claims of innocent holders of the spurious certificates. Most, if not all, of the arguments advanced in subsequent cases, and now urged in this case, were there pressed upon the attention of the courts. But in each case, after the fullest consideration, and in opinions of unusual ability, they were rejected, and judgment given for the holders of the stock. In *Bank of Kentucky v. Schuylkill Bank* it was, however, directly for the plaintiff, the suit being for indemnity against its transfer agent, the Schuylkill Bank.

The principle on which the decisions have generally gone is the liability of a corporation

for the acts of its agents done within the scope of the agency conferred on them. There has been some controversy as to what is meant by "the scope of the agency" but it seems now well settled that an act, though wilfully, fraudulently, or negligently done by an agent, is within the scope of his agency, and charges the principal as to innocent third persons, where the acts done—the making of a contract, the disposition of property, the transfer of stock, and the issuing of certificates therefor—are within the powers conferred on him as an agent. The language of the court in *Bridgeport Bank v. New York & N. H. R. Co.* 30 Conn. 231, is applicable here: "It is said that Schuyler was the agent of the defendants only to do rightful acts, and when he did wrongful acts he ceased to be their agent. If he committed the wrongful acts in the course of his employment, if the doing of like acts was within the scope of his employment, then he was their agent throughout, so far as third parties were concerned. If this convenient doctrine is sound, when can a principal be held liable for the wrongful act of his agent? No man appoints an agent to do a wrong, and if the moment an agent transcends his authority his relation to his principal ceases, when can a principal be held for a wrongful act? And yet it is well settled that he can be so held." See also *Mechem, Agency*, § 739; *Story, Agency*, § 652; *Beach, Priv. Corp.* § 488; *Citizens' Sav. Bank v. Blakesley*, 42 Ohio St. 645, 652. In some of the cases importance has been attached to the negligence of the company, through its proper agents, in not supervising the conduct of its business, and whereby the particular agent has been enabled to perpetrate his frauds. But I apprehend that, upon an accurate analysis of the company's liability in such a case, it will be found to rest on its liability, for the acts of the agent who perpetrated the fraud. If the extent of his agency included the legitimate doing of an act of the kind done, then it will be liable though the act done was a fraud as to it and other persons. As to an innocent third person, affected by the agent's wrongful act, the negligence of the company in not discovering or preventing the fraud may accentuate his right of recovery, but does not, as I apprehend, add to nor create that right.

The plaintiff in error relies much upon the case of *Moore v. Citizens' Nat. Bank*, 111 U. S. 156, 28 L. ed. 385. We think it sufficient to distinguish that case from this that the court there found that the plaintiff made the cashier of the bank, who committed the fraud, her agent to procure and have transferred to her the stock on which she proposed to loan him the money, and that in doing so he acted for her, and not the bank; and therefore that she, and not the bank, was responsible for his wrongful act in filling up the certificate in fraud of the bank as well as of the plaintiff. If the court was right in its assumption as to the fact of agency, then the decision can have no application to this case, because there is no such feature in it. In the facts as found there is no suggestion that any of the defendants employed

Doughty to procure stock for them. If the court was wrong in its opinion as to the facts, then all that can be said of its decision is that it was upon a misconceived state of facts, and cannot apply here, although, as a matter of fact, the two cases should be found to be substantially alike in their facts. In the course of his opinion, the judge delivering it referred to a number of cases similar to this one, without any expression of disapproval, and placed the decision on the ground just stated. It may be further observed that the case does not seem to be in harmony with *Allen v. South Boston R. Co.* 150 Mass. 200, 5 L. R. A. 716, where, on a state of facts quite similar the court held the treasurer who committed the frauds to be the agent of the company, and not of the party purchasing the stock. The case of *Claffin v. Farmers' & C. Bank*, 25 N. Y. 293, has been cited as sustaining the contention of the railway company. But this case was distinguished from a case like the present one by the court delivering the opinion, as well as by the same court in the later case of *Titus v. Great Western Turnp. Co.* 61 N. Y. 243. In the former case the president of a bank, having a general authority to certify checks upon it as good, certified one in his own favor. This the court held was out of the ordinary course of business, and contrary to business and legal rules, and not within the scope of the agency, but was particular to distinguish it from the issuing or transfer of a certificate of stock. The recent case of *Knox v. Eden Musee American Co.* 148 N. Y. 441, 31 L. R. A. 779, needs to be noticed. In that case it will be observed that Jurgens, the wrongdoer, was not the agent of the company to issue or transfer stock. His employment was simply to cancel surrendered stock. Surrendered certificates were by him abstracted from the safe of the company, and pledged as security for a loan. With respect to this the court said: "If it can be said that the direction of the president to Jurgens to cancel the certificates made him the agent of the company for that purpose, it was an authority to destroy, and not use. His act in abstracting them from the safe and uttering them as valid certificates had no relation to the authority conferred. It was not an act of the same kind as that which he was authorized to perform. He had no apparent authority to issue them as genuine certificates, because he had no authority to issue certificates for any purpose." This broadly distinguishes the case from the one before us. No disposition is shown to modify the doctrine of the same court as announced in many previous cases as to the liability of a corporation for the acts of its agents done within the scope of their employment, although not only negligently, but even fraudulently done, and contrary to the purpose and instructions of the company. This clearly appears from the decision in *Jarvis v. Manhattan Beach Co.* 148 N. Y. 652, 31 L. R. A. 776, decided at the same term. The case draws the distinction between negotiable instruments and certificates of stock. The former, though lost or stolen, are available in the hands of an innocent purchaser for

value, whereas the latter are not; and the court treated the certificate abstracted by Jurgens as stolen from the company. The fact that the court in general term, on setting aside the finding made in special term that inquiry at the office of the company would have disclosed the fraudulent character of the stock in question, proceeded to render the judgment the special term should have rendered instead of remanding the case for a new trial, was not error, for the reason that the finding was immaterial, as such care was not required under the circumstances; and its omission was not contributory negligence on the part of the defendants, or any of them, depriving them of a right to recover. If the statements contained in a certificate of stock made by a company cannot be relied on by a purchaser in the market without further inquiry, it may well be asked, What real purpose does the certificate subserve? The language used by the court in *Bridgeport Bank v. New York & N. H. R. Co.* 30 Conn. 247, is pertinent to the question: "To require those who acted on the certificate to ascertain, at their peril, from the books of the company, subject to the possibility of false entries by officers of the company in those books, whether the certificates were correct, is repugnant to the face of the certificate, to the purpose of it, and to the duties committed to the officers of the company. It would defeat the transferability of the stock." And, as observed in *Willis v. Fry*, 13 Phila. 40: "Such an investigation is obviously superfluous where the officers of the corporation have done their duty, and will generally be unavailing when they are engaged in the perpetration of a fraud." And, in *Lovry v. Commercial & F. Bank*, Taney, 310, 329, where it was held that purchasers of stock are not bound beyond the certificate, or to examine the books of the corporation, to ascertain the validity of the transfer, Taney, Ch. J., said: "A different rule would render the right of every purchaser of stock in a bank insecure or liable to doubt, and greatly impair its value, and would, moreover, seriously disturb the usages of trade, and the established order of business in relation to this subject, in a manner highly injurious to the community; for purchasers always rely on the certificate of the bank in which it is held as conclusive evidence of the ownership." See also *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 71. The case of *Separate School Dist. Bd. of Edu. v. Sinton*, 41 Ohio St. 504, does not require a different rule of diligence. There the court found from the character of the act under which the bonds were issued that they might be redeemed before due, and for this reason held that Sinton should have inquired of the board before taking the bonds of the treasurer as security for a loan. The bonds had in fact been redeemed, and placed in the hands of the treasurer for cancellation, and inquiry of the board would have disclosed that fact. These particular bonds were regarded as not negotiable. We may add that the finding of fact set aside is, more properly, a conclusion of law, and, as such, is not warranted by the

findings made in the case. As the company did not discover the frauds until after the death of Doughty, it is difficult to see how an inquiry at the office of the company would have disclosed anything as to the fraudulent character of the certificates in question, but the authorities show, and reason suggests, that there is no such rule of diligence required of those who, in the market, for value, and in good faith, purchase certificates of stock that are genuine on their face. *Judgment affirmed.*

Shauck, J., dissenting:

The failure of Doughty's victims to make the investigation required of them by familiar rules of the law enabled him to perpetrate many frauds of much magnitude. Before the bringing of this suit by the company, numerous actions were brought against it by some of those who had loaned him money upon his notes, and accepted as security his own false representations touching his ownership of stock. In those cases and in this the superior court of Cincinnati and the circuit court of Hamilton county have denied the company's liability for Doughty's frauds, vindicating that conclusion in opinions of much research and accurate discrimination. *Force, J.*, in *Citizens' Nat. Bank v. Cincinnati, N. O. & T. P. R. Co.* 11 Ohio L. J. 86; *Taft, J.*, in this case, 24 Ohio L. J. 198; *Peck, J.*, same case, 22 Ohio L. J. 248, and *Cincinnati, N. O. & T. P. R. Co. v. Third Nat. Bank*, 1 Ohio C. C. 199. The same conclusion has been reached by the supreme court of the United States in a case not distinguishable from this by any fact of legal import, and by a court of equal authority in England. *Moores v. Citizens' Nat. Bank*, 111 U. S. 156, 28 L. ed. 385; *British Mut. Bkg. Co. v. Charnwood Forest R. Co.* L. R. 18 Q. B. Div. 714. For extended discussion of the principles involved and analysis of the cases cited in the opinion of the majority, these references are deemed sufficient. Attention to the precise case before us will make apparent the irrelevancy of the cases, and the inconclusiveness of the reasoning upon which the recovery is sustained. These certificates of stock are spurious. The full amount of stock which the company might lawfully issue had been issued. The company was therefore without authority to transfer the shares which Doughty thus falsely claimed to own, and his pledgees have no demand against it for any failure of duty in that regard. The precise nature of the demand appears very clearly in the record. There was no transaction

between the pledgees and the company. The demand is that, because Doughty was secretary and agent of the company, it shall answer to them for frauds perpetrated in transactions in which he borrowed money for his own use, upon his own notes, transferring false certificates, which bore upon their face conclusive notice that he had exercised his authority as agent for his own advantage, and adversely to the interest of his principal. The company derived no benefit from the transactions, and did not ratify them. Really, do the elementary principles of the law leave any occasion to doubt that in such a case a recovery should be denied? The case affords no place for the rule that when one of two innocent persons must suffer loss from the act of a third, it must be borne by him who enabled such third person to inflict it. The rule was not intended to penalize the ownership of property. Its terms presuppose two innocent persons. Can it be said that the defendants innocently disregarded the notice brought home to them that the agent was exercising his authority adversely to the interests of his principal? Unless the logical consequences of this recovery shall be averted by arbitrary exceptions, but little can remain of the familiar and salutary rules of law, founded on morals, and contrived to render fraud ineffectual, and prevent the divestiture of title by crime. Why may it not be said to every one who seeks to recover his stolen chattel from the vendee of the thief that he must fail because his ownership of the chattel enabled the thief to commit the wrong? No conclusive answer to that question can be given except by a court of last resort. In *Moores v. Citizens' Nat. Bank* the Supreme Court of the United States denied the liability of a corporation for the fraud of its issuing officer where he issued the stock directly to his pledgee with the false representation that it was a transfer of stock which he owned: while here the officer issued the stock to himself, and indorsed it to his pledgees. The cases do not otherwise differ. To say that the defense is cut off by the assignment of the certificates is to affirm that they have an attribute of negotiability. But the view that they are negotiable is disclaimed by the majority, and by counsel for the defendants. For obvious reasons, it could not be maintained. The attempt to distinguish the cases has therefore failed.

Spear, J., did not sit.

TENNESSEE SUPREME COURT.

John D. SHARP, Sheriff of Davidson County,
v.

STATE of Tennessee, ex rel. J. D. CASON.

(.....Tenn.....)

NOTE.—As to legislative power to abridge the power of courts to punish contempt, see *Hale v. State (Ohio)* 36 L. R. A. 254.
43 L. R. A.

The pardoning power of the governor extends to cases of contempt.

(January 14, 1899.)

A PPEAL by the sheriff from a judgment of the Circuit Court for Davidson County releasing relator from custody to which he had been committed for contempt of court. *Affirmed.*

The facts are stated in the opinion.

Messrs. Robert Vaughn and J. A. Pitts for appellant.

Messrs. Steger, Washington, & Jackson and Estes & Estes for appellee.

McAlister, J., delivered the opinion of the court:

This record presents the single question of the right of the governor to exercise the pardoning power in respect of fines imposed for contempt of court. It appears from the record that one W. A. Cason was under indictment in the criminal court of Davidson county for making false and fraudulent entries in the books of his employers. When the jury was being summoned by an officer of the court for the trial of W. A. Cason, his father, J. D. Cason, sought to have certain individuals, whose names were handed the officer, summoned. This misconduct on the part of J. D. Cason was reported to the judge, who, upon investigation of the facts, adjudged the contemner guilty of an attempt to pack the jury, and fined him \$50, and sentenced him to jail for a period of ten days. It appears that the court suspended its judgment in the case from June 20 until July 9, 1898. On the 8th day of July, 1898, the governor pardoned the said J. D. Cason of said offense. The judge of the criminal court, conceiving that the pardoning power of the executive did not extend to cases of contempt, refused to recognize the pardon, and ordered the prisoner into custody. Thereupon the prisoner, through his counsel, applied to the circuit court for the writ of habeas corpus. Upon an investigation of the case the circuit judge was of opinion that the prisoner was entitled to his liberty, and he was accordingly discharged. The sheriff appealed, and has assigned as error the action of the circuit court in discharging the prisoner.

The precise question here presented was adjudged by this court at its December term, 1893, in the case of *Garrett v. State*, in which it was held that the pardoning power of the governor does extend to cases of contempt. A similar ruling had been made by our predecessors in the case of *McCarty v. State*. Article 3, § 1, of the Constitution provides that "the supreme executive power of the state shall be vested in a governor." Section 6 provides, *viz.*: "He shall have power to grant reprieves and pardons after conviction, except in cases of impeachment." It will be observed that the only exception to the power conferred upon the governor to grant reprieves and pardons is in cases of impeachment, and the only limitation imposed is that the power cannot be exercised until after conviction. A judgment imposing a fine for contempt is a conviction, within the meaning of the Constitution. *Sinnot v. State*, 11 Lea, 281; *Bryns v. Woodward*, 10 Lea, 444; *New Orleans v. New York Mail & S. Co.* 20 Wall. 387-392, 22 L. ed. 354-357; *Fischer v. Hayes*, 6 Fed. Rep. 64; 3 Am. & Eng. Enc. Law, p. 796. Contempts of court are public offenses, and pardonable as such. 1 Bishop, Crim. L. § 913, subsec. 2; 1 McClain, Crim. L. § 9; *Ex parte Hickey*, 43 L. R. A.

4 Smedes & M. 751; *State, Van Orden, v. Sauvinet*, 24 La. Ann. 119, 13 Am. Rep. 115; *Re Mullee*, 7 Blatchf. 23; *Bates's Case*, 55 N. H. 325; *State v. Mattheos*, 37 N. H. 450; *Re Sims*, 54 Kan. 1, 25 L. R. A. 110; *Re Manning*, 44 Fed. Rep. 275. In the case of *State, Van Orden, v. Sauvinet*, 24 La. Ann. 119, 13 Am. Rep. 115, Judge Taliaferro said: "There being no exception found in our state Constitution precluding in such cases the exercise of the pardoning prerogative by the governor of the state, we feel no hesitancy in recognizing its existence. That the offense arising from a contempt of the authority of a court is one which, from its nature, should be summarily punished, to the end that an efficient and wholesome exercise of judicial powers may be had, no one will question. . . . A contempt of court is an offense against the state, and not an offense against the judge personally. In such a case the state is the offended party, and it belongs to the state, acting through another department of its government, to pardon or not to pardon, at its discretion, the offender." Again, in *Ex parte Hickey*, 4 Smedes & M. 751, the court said, *viz.*: "The whole doctrine of contempts goes to the point that the offense is a wrong to the public, not to the person of the functionary to whom it is offered, considered merely as an individual. It follows, then, that the contempts of court are either crimes or misdemeanors, in proportion to the aggravation of the offense, and as such are included within the pardoning power of the state," and the prisoner was discharged. It appeared in that case that Hickey had been sentenced to fine and imprisonment for contempt of the circuit court at Vicksburg, and was pardoned by Governor Albert Gallatin Brown. The prisoner was released upon habeas corpus, the court sustaining the right of the governor to exercise the pardoning power in such a case. *Re Mullee*, 7 Blatchf. 23, Blatchford, District Judge, said, *viz.*: "On a motion for an attachment against the applicant as a defendant in a suit in equity in this court, he was adjudged to have been guilty of a contempt of this court, by violating an injunction issued by this court; and on the 27th of June, 1868, a fine of \$2,500 was imposed on him as a punishment for such contempt, and it was ordered that he should stand committed until the fine should be paid. After having been imprisoned for some time under such sentence, he presented a petition to this court, praying for his discharge on the ground that he was unable to pay the fine. The decision of the court thereon was that it had no jurisdiction or power to grant the prayer of the petition, and that relief must be sought by an application to the President of the United States. I then said: By the Constitution (art. 2, § 2, subd. 1) the president is invested with power 'to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.' No such power is conferred upon any other officer or upon any court. A contempt of court is an offense against the United States. In the present case there is

a judgment judicially declaring the contempt and offense. . . . In the case of one Dixon, a fine was imposed upon him by the circuit court of the United States for the district of Mississippi for a contempt of court. He applied to the President for a pardon. The attorney general, Mr. Gilpin (3 Ops. Atty. Gen. 622), decided that the pardoning power extended to such a case, and that the contempt was an offense, within the language of the provision of the Constitution. I fully concur in this view; and it necessarily follows that, if the power of relieving from the sentence imposed on Mullee falls within the pardoning power of the President, it is exclusive in the President, and cannot be exercised by this court. . . . The inquiry made of the attorney general in the *Case of Dixon* was whether the executive authority to pardon properly extended to that case. In his opinion, given to the secretary of state in February, 1841, the attor-

ney general says: 'If we adopt, as the Supreme Court of the United States has decided we should do, the principles established by the common law respecting the operation of a pardon, there can be no doubt it may embrace such a case. A pardon has been held to extend to a contempt committed in Westminster Hall, under circumstances not materially different from those which occurred in the case submitted to the President. I am therefore of opinion that, should the President consider the facts such as to justify the exercise of his constitutional "power to grant reprieves and pardons for offenses against the United States," there is nothing in the character of this offense which withdraws it from the general authority.'

After a careful review of the authorities we are thoroughly satisfied with the former rulings of this court on this subject, and the judgment of the Circuit Court is therefore affirmed.

ILLINOIS SUPREME COURT.

Alexander H. REVELL, *Appt.*,
v.
PEOPLE of the State of Illinois.

(177 Ill. 468.)

1. The owner of premises bounded on Lake Michigan takes no title to any submerged land under the waters of the lake.
2. A purpresture may be enjoined and abated in a court of equity, although it is not injurious and is not a public nuisance.
3. Piers built into the waters of Lake Michigan to protect the land of a shore owner from erosion, and not in aid of navigation, the effect of which is also to reclaim submerged land of which the fee is vested in the state in trust for the people, constitute a purpresture which the state may require to be removed, although they are not detrimental to the public interest and will not become so until the state wishes to reclaim and use the land.

(December 21, 1898.)

CROSS-APPEALS from a decree of the Circuit Court for Cook County in favor of plaintiffs in an information in equity to remove purprestures which defendant had placed in a lake in front of his property; the defendant appealing from so much of the decree as held the erections illegal; and plaintiffs appealing from so much as refused to order their immediate removal. *Reversed on plaintiffs' appeal.*

Statement by **Craig, J.:**

This was an information in equity, brought in the circuit court of Cook county in the name of the people, by the attorney general, against Alexander H. Revell, as the owner of a certain tract of land bordering on Lake Michigan. The information alleges that so

much of Lake Michigan as is included by lines running north from the point where the eastern boundary of the state of Illinois strikes the southern bend of said lake, to a point in the middle of the said lake in north latitude 42 deg. 30 min., and thence west along that parallel, is within the state of Illinois; that the soil or submerged land lying or being under the waters of Lake Michigan aforesaid, within the limits of the state of Illinois, to the line or point on the shores of said lake within the limits aforesaid, belongs to, and the title thereto is, by virtue of the common law in force in said state, vested absolutely in, the state of Illinois, free from the obstruction and interference of private parties therein; that it is the duty of the state to preserve such waters and submerged lands for the use of the public, to be used and enjoyed by them free and unmolested by erections and inclosures of any kind thereon made by private individuals, or others claiming to own the adjoining shore, without the sanction or authority of said state of Illinois; that no municipal or private corporation or individual has any right, power, or authority to exercise exclusive control over the submerged land aforesaid, or to trespass and intrude on the same, by the erection of cribs, piers, jetties, breakwaters, bulkheads, obstructions, or inclosures of any kind, extending beyond the usual water line on the shore of Lake Michigan, or to reclaim by the means aforesaid, or otherwise, the submerged land so described, the same being subject to the supervision, ownership, and control of the state of Illinois as aforesaid; that Alexander H. Revell is now, and for a long time previous has been, the owner of, or interested in, a certain tract of land, described as follows: Sublot 1 in assessor's subdivision of lots 1 and 2 in the city of Chicago subdivision of the E. fractional $\frac{1}{2}$ of section 28, township

NOTE.—As to right to erect wharves, see *note* to *Madison v. Mayers* (Wis.) 40 L. R. A. 635. 43 L. R. A.

40, range 14, E. of the third P. M., and block 6 (except the west 7 feet thereof) in Gehrke & Brauckmann's subdivision of the S. $\frac{1}{2}$ of the N. E. fractional $\frac{1}{4}$ of the N. W. fractional $\frac{1}{4}$ of section 28, township 40, range 14, E. of the third P. M., bordering on said lake, in the county of Cook, Illinois; that said Revell has, by the construction of piers, reclaimed from the bed of the lake a large amount of land (about 250 feet) lying east of the premises described; that the land so reclaimed belongs to the state; that said Revell has further constructed piers of timber and stone 130 to 200 feet at right angles to the shore, upon the submerged land opposite said premises, for the purpose of filling in and reclaiming further large tracts, said piers being extensions of or similar to the structures above mentioned; that the said Revell claims the right, as riparian owner, to reclaim the said lands and to reclaim other lands by the means aforesaid, and disputes the title of the state to such reclaimed and submerged lands; that said structures are solely for the purpose of reclaiming submerged land, and not in aid of navigation or commerce, or to protect the land of said Revell from erosion; that said Revell has no right to construct such piers even for the purposes aforesaid; that the said structures are an irreparable injury to the state, and a purpresture, and should be abated, or seized for the benefit of the state; that there is no remedy at law for the injury aforesaid, wherefore the informant prays a perpetual injunction against said Revell from further filling in and reclaiming; that said piers be abated; that defendant be enjoined from building piers in the bed of Lake Michigan and from doing any work on said piers, or from filling in any of the bed or encroaching on the waters of Lake Michigan.

The answer of said Revell claims the ownership of the land in question from a time long prior to the filing of the information; denies that by the construction of piers he has reclaimed the whole or a large portion of said premises from the bed of said lake; denies he has constructed piers, as alleged in the information, for the purpose of reclaiming land from the lake; avers that he constructed a pier of a permanent character on the south line of his premises, at right angles to the shore, but denies it was made to reclaim submerged land; and avers it was built lawfully, to protect his land from erosion; that prior to its construction there had been violent erosion, and his land was threatened with further waste; that said pier was erected to save and protect his land, and does not extend into the waters proper of the lake; denies that it is an intrusion or an interference with navigation; denies that it is a purpresture, and insists that the people have no interest or right in its removal. The defendant further set up in his answer that the information was not brought on behalf of the people, but by the commissioners of Lincoln Park, who are interested in getting a decision as to the rights of littoral owners, whose lands they may desire

hereafter to condemn and acquire, and who, to get an expression of the courts on that subject, instigated this suit, which is therefore not brought in good faith. The answer concludes with a general denial of allegations not admitted, confessed, traversed, or denied. Subsequently a supplemental answer was filed, in which the defendant set up that since the filing of the answer the commissioners of Lincoln Park had prepared and adopted a plan for the enlargement of Lincoln Park, and the location of a boulevard over the bed of the lake opposite to, and about 1,200 feet east of, defendant's premises, the land under the water between said boulevard and the shore line as it existed at the time of the adoption of said plan to be reclaimed for park purposes, and had made an estimate of the cost of such improvement, all in accordance with an act of the general assembly approved June 15, 1895; that said plan was adopted and said action taken about March 20, 1896.

Replication was filed to the answer and supplemental answer, and the cause was referred to the master to take proofs. A hearing was had on the pleadings and evidence, and the court, in its decree, finds that the cribs, piers, breakwaters, or bulkheads described in said information and in the answer filed herein, constructed by the said defendant, Revell, as charged in said information and admitted by said answer to have been constructed, are trespasses on the submerged lands of Lake Michigan, the title of which lands was at the time of their erection in the state of Illinois, and that they are purprestures, but finds that they were built for the protection of the defendant's land from erosion by the waters of Lake Michigan; that they are not detrimental to the public interest, and will not become so until the state of Illinois wishes to reclaim and use the submerged lands on which they stand; "that the said defendant and all claiming through or under him, be, and hereby are, perpetually enjoined from building hereafter, opposite to or in connection with his land described in the information, any pier, crib, breakwater, bulkhead, or other artificial device or construction on the submerged lands under Lake Michigan for the purpose of making any land or reclaiming any submerged lands for the purpose of protecting the lands above described from erosion by Lake Michigan, or for any other purpose whatever; that the said piers, breakwaters, or bulkheads now existing, opposite and connected with the said land, are, so far as they stand on the submerged lands of Lake Michigan, purprestures, and subject to abatement by the state of Illinois whenever said state shall desire to reclaim or use the submerged lands on which the said piers, breakwaters, or bulkheads stand; that because of its finding that the said purprestures are not detrimental to the public interests, and will not become so until the state of Illinois wishes and undertakes to reclaim and use the submerged lands on which they stand, the court does not now order the said purprestures abated; that

the said defendant, and those claiming through, by, or under him, be perpetually enjoined and restrained from in any manner interfering with the state of Illinois, or with the commissioners of Lincoln Park, as the agents and trustees of the state of Illinois, in their taking possession of the submerged lands of Lake Michigan opposite to, eastward of, and adjoining the land of the defendant in said information described, up to the water's edge, and at the time such possession is taken, and reclaiming the same, and using the same for park purposes; that whenever the said state of Illinois, directly or by its said agents or trustees, may choose to take such possession and reclaim and use the said submerged lands up to the water's edge opposite and adjoining the land or lot of the defendant, it may abate and remove, without let or hindrance from the defendant, or those claiming by, from, or under him, any structure, piers, cribs, breakwaters, or bulkheads found standing on said submerged lands eastward of the said water line, and the said Revell, and those claiming by, through, or under him, is and are hereby perpetually enjoined and restrained from any interference with such abatement or removal." To reverse this decree the defendant prayed for and obtained an appeal. As will be observed, the court, in its decree, found from the evidence that the piers were built for the protection of defendant's land from the erosion of the waters of Lake Michigan, and that they were not detrimental to the public interest, and would not become so until the state of Illinois wished to reclaim and use the submerged land upon which they stood; and the court refused to order the said purprestures abated until the state of Illinois directly or indirectly took possession of, and reclaimed and used, the submerged lands adjacent to the defendant's holdings. Upon these points the appellee has assigned cross errors.

Messrs. Wilson, Moore, & McIlvaine, for defendant:

In the absence of any wrong or injury to the state or the public, there existed no ground for relief by injunction in a court of chancery.

People v. Davidson, 30 Cal. 379; 1 High, Inj. §§ 759, 760; 2 Story, Eq. Jur. §§ 924, 924a; 10 Am. & Eng. Enc. Law, p. 841, note; 2 Waterman's Ejen, Inj. 3d ed. p. 259; *Atty. Gen. v. Sheffield Gas Consumers' Co.* 3 De G. M. & G. 319; Gould, Waters, § 168; 1 Dan. Ch. Pl. & Pr. p. 5; *United States v. Hughes*, 11 How. 568, 13 L. ed. 816; *Russell v. Allen*, 107 U. S. 163, 27 L. ed. 397; *Fletcher v. Tuttle*, 151 Ill. 41, 25 L. R. A. 143; *People v. St. Louis*, 10 Ill. 374, 48 Am. Dec. 339; *Dunning v. Aurora*, 40 Ill. 484; *Lake View v. Letz*, 44 Ill. 84; *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 516, 28 Am. Rep. 264.

The court erred in decreeing that appellant had no riparian rights as against the state.

Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018; *Yates v. Milwaukee*, 10 Wall. 503, 19 L. ed. 986; *Dutton v. Strong*, 1 43 L. R. A.

Black, 31, 17 L. ed. 32; *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 288, 19 L. ed. 78; *Boston v. Richardson*, 105 Mass. 361; *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 79, 15 L. R. A. 618; *King v. Pagham & Co.* 8 Barn. & C. 355; *Atty. Gen. v. Lonsdale*, L. R. 7 Eq. 387; *Diedrich v. Northwestern Union R. Co.* 42 Wis. 261, 24 Am. Rep. 399; *Hanford v. St. Paul & D. R. Co.* 43 Minn. 105; *Bradshaw v. Duluth Imperial Mill Co.* 52 Minn. 61; *Province Steam-Engine Co. v. Providence & S. S. S. Co.* 12 R. I. 348, 34 Am. Rep. 652; Gould, Waters, § 160.

In England the Crown owns the tide lands, that is the lands between high and low water, and the owners of the upland cannot in any strict sense be said to be riparian owners or to own the land abutting on the sea.

Gould, Waters, § 24; *Atty. Gen. v. Tomline*, L. R. 12 Ch. Div. 214; *Nicholson v. Williams*, L. R. 6 Q. B. 632.

Messrs. Smith, Blair, & Smith also for defendant.

Messrs. Edward C. Akin, Attorney General, and **Edward O. Brown** for plaintiff.

Craig, J., delivered the opinion of the court:

It has been suggested in the argument of counsel for appellant that the people have no interest in this litigation,—that the real parties in interest are the commissioners of Lincoln Park. We do not regard this position as sustained by the record. The suit was instituted in the name of the people, by the attorney general. The commissioners of Lincoln park, as a board, have taken no action whatever in reference to the commencement or prosecution of the action, nor have they any interest in the result, except such as may be shared by the people at large. So far as appears, the attorney general, representing the people, brought the action in good faith for and on behalf of the people. The commissioners of Lincoln park were not made parties to the proceeding nor are they mentioned in the information. It is true that the defendant, by a supplemental answer, undertook to bring into the controversy the rights of the commissioners of Lincoln park under an act of the legislature; but that matter was not responsive to anything found in the information, and, in our opinion, it had no proper place in the record. When the commissioners of Lincoln park undertake to condemn or otherwise appropriate any part of the submerged lands of the lake fronting upon the premises of appellant, then will be the proper time to determine their rights and their powers, but until that time arrives nothing need be said upon that question.

The appellant, as a shore owner, constructed from his premises into the lake two piers, extending from the shore into the waters of the lake some 200 feet, and the main question involved here is his right to build and maintain those structures. A description of the structures so built by appellant in the lake will be found in appellant's argument, substantially as follows: "Defendant purchased the premises in question in July, 1890. The pier at Barry avenue was

built by Fitz Simons, at Revell's instance, in the fall of 1890, and the addition on the east end in 1891. The whole structure is about 220 feet in length,—20 feet on land, and 200 feet in water. The north side consists of close piling, and the south of piles 6 feet apart, with single sheeting. The two sides are about 8 feet apart, and the space between is filled with riprap, with two lines of planking on the top to walk on. The pier at George street is not quite so long, and is made of a single row of piling, spaced and sheeted and anchored to piles to the south. At the east end is a bulkhead 8 by 15 feet, filled with riprap, and covered with plank. The latter was built by the O. B. Green Dredging Company in 1893. Both piers are practically perpendicular to the shore."

The law is well settled in the different states that the title to and dominion over lands covered by tide waters within the boundaries of the several states belong to each state wherein the lands are located. The state holds the fee in trust for the public. The doctrine established in regard to lands covered by tide waters has also been held applicable to lands bounded by fresh water in our large lakes. *People, Moloney, v. Kirk*, 162 Ill. 138; *Shively v. Bowlby*, 152 U. S. 9, 38 L. ed. 335. In the case last cited it is said: "By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high-water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation, and improvement, and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion thereof, *jus publicum* is vested in him as the representative of the nation and for the public benefit." In *Illinois C. R. Co. v. Illinois*, 145 U. S. 452, 36 L. ed. 1042, speaking of this question, the court said: "That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subject to use. . . . It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein freed from the obstruction or interference of private parties." Indeed, the doctrine that the state holds the title to the lands covered by the waters of Lake Michigan in trust for the people is not controverted in the argument. It will not, therefore, be necessary to cite further authorities upon that question.

43 L. R. A.

The appellant here owned the premises bordering on the lake, but his title to the premises extended only to the water's edge, and the fee in and to the lands covered by the waters of the lake was vested in the state, and held by the state in trust for the people. The fee being in the state, the important question presented is whether appellant, without a grant or other authority from the state, had the right to go upon the submerged lands and erect the structures complained of in the information. This state has adopted the common law as it existed prior to March 24, 1606,—the fourth year of James I.; and, in the absence of any statute of the state changing the common law in regard to the rights of riparian or littoral owners, the common law as it then existed must control. Upon an examination of the authorities, we think it is clear that the act complained of in the information was a trespass upon the lands of the state; that the erection of the piers in the lake in front of appellant's premises was a purpresture. But it is said in the argument that the erection of the structures complained of was not injurious to the state, and hence there was no basis for the interference of a court of equity. We do not concur in that view. Although the act complained of was not injurious, and was not a public nuisance, still it was an unlawful act, of such a character as would properly authorize a court of equity to interfere, upon the information of the attorney general, as is well established by the authorities. Coulson and Forbes on the Law of Waters (p. 15) say: "Any unauthorized intrusion or encroachment upon the soil of the shore, such as the building of quays, piers, moles, etc., is termed a 'purpresture,' and may be abated by the Crown or the owner of the shore, or restrained by injunction at suit of the attorney general, whether they create a nuisance or not. Such purprestures may or may not be nuisances to navigation. Whether they are so or not is a question of fact." On page 670 the authors say: "Any invasion of the right of the Crown to the bed of the sea or navigable river is a purpresture, and may be restrained by injunction at the suit of the attorney general, whether it be a nuisance or not. If the act complained of be merely a trespass upon the property of the Crown, and not a nuisance to the navigation, the court will generally direct an inquiry whether it is more beneficial to the Crown to abate the purpresture or suffer it to remain." Wood on Nuisances (§ 84) says: "A purpresture purely, is not indictable; but, when a purpresture and encroachment is both a purpresture and a nuisance, it is indictable, abatable, and punishable as for a nuisance. The remedy for a purpresture, simply, is by information in equity at the suit of the attorney general or other proper officer." Eden on Injunctions (chap. 11, p. 259), in discussing the question, says: "Purpresture,—or more properly pourpresture,—is derived from the French *pourprise*, and, according to Lord Coke, signifies a close or inclosure; that is, when one encroacheth and makes that several

to himself which ought to be common to many. It is laid down by all the old writers, that it might be committed either against the King, the lord of the fee, or any other subject. But in its common acceptation, it is at present understood to mean any encroachment upon the King, either upon part of the demesne lands, or in the highways, rivers, harbors, or streets. The remedy for this species of injury is either by information of intrusion at common law, or by information at the suit of the attorney general in equity. In case of a judgment upon an information of intrusion, the erection complained of, whether it were a nuisance or not, was abated; but upon a decree upon an information in equity, if it appeared to be a purpresture, without being at the same time a nuisance, the court might direct an inquiry whether it was most beneficial to the Crown to abate the purpresture, or to suffer the erections to remain and be arrested." Story, in his *Equity Jurisprudence* (§ 922), says: "In cases of purpresture, the remedy for the Crown is either by an information of intrusion at the common law or by an information at the suit of the attorney general in equity. In the case of a judgment upon an information of intrusion, the erection complained of, whether it be a nuisance or not, is abated. But upon a decree in equity, if it appear to be a mere purpresture, without being at the same time a nuisance, the court may direct an inquiry to be made, whether it is most beneficial to the Crown, to abate the purpresture, or to suffer the erections to remain and be arrested." Gould on Waters (§ 21) declares: "There is a broad distinction between a violation of the public right and an invasion of the proprietary interest of the Crown. The one creates a public nuisance; the other, a purpresture. Any encroachment upon the King, either upon part of the demesne lands or any public rivers, harbors, or highways, is called a purpresture. If a littoral proprietor, without grant or license from the Crown, extends a wharf or building into the water in front of his land, it is a purpresture, though the public rights of navigation and fishery may not be impaired. . . . The remedy for a purpresture is either by an information of intrusion at common law, or by information in equity at suit of the attorney general." In Angell on Tide Waters (p. 200) will be found this language: "A wharf or pier or other erection may therefore be below high-water mark, or even below low-water mark, but not necessarily a nuisance, though a purpresture. The remedy for a purpresture, it is laid down, is either by information of intrusion at common law, or by information at the suit of the attorney general in equity. The judicial department of the English court of exchequer is divided into one of equity and one of law, and the primary business of the former is to recover any lands belonging to the Crown, so that purprestures upon arms and creeks of the sea are proper subjects of information in the court of exchequer. The King's attorney general, on the part of the Crown,

may proceed, for the purpose of protecting either the *jus privatum* of the King from the purpresture or the *jus publicum* of the subject from nuisance, by information on the King's remembrancer's side of the exchequer by English bill, praying a personal decree against the defendant in the suit." See also *Atty. Gen. v. Terry*, L. R. 9 Ch. 423; *Atty. Gen. v. Burridge*, 10 Price, 350; *Atty. Gen. v. Parmeter*, 10 Price, 378; *Atty. Gen. v. London*, 8 Beav. 270. In opposition to the above authorities the case of *People v. Davidson*, 30 Cal. 379, is cited and relied upon. In that case it was held that the district courts of California have no power to decree the destruction, or to enjoin the erection of a wharf, unless it is or will be a nuisance, or is or will be followed by some form of irreparable damage, or unless it is or will be an appreciable hindrance to the execution of some legislative act relating to fishery or to commerce or navigation. So far as this case is in conflict with the rule established by the authorities cited, we are not inclined to follow it. We think the decided weight of authority is that a purpresture may be enjoined or abated in a court of equity, although it is not injurious or not a public nuisance.

But, aside from this position, it is apparent from an examination of this record that the construction of the piers was injurious to the state. It is true, the appellant testified that the piers were constructed to prevent erosion, and protect his shore bordering on the lake; but it is apparent from the evidence that the effect has been to add new land to his premises, and that the accretions resulting from the construction of the piers have extended the boundary of his premises into the lake. In other words, the erection of the piers has increased appellant's land, and diminished the land belonging to the state. This being so, it cannot be said that the construction of the piers was not injurious to the state. The appellant had no right to build piers or "wharf out" into the lake for the purpose of making land or increasing the boundary of his premises, nor had he the right to do any act which would produce that result. As has heretofore been said, the lands covered by the waters of the lake belong to the state, and appellant had no right, by any device whatever, to extend his boundary line beyond the water's edge; and when he did so an injury was inflicted on the rights of the state, which might be inquired into and abated in a court of equity on the application of the attorney general.

It is, however, insisted that the court erred in decreeing that appellant had no riparian rights as against the state. We do not understand that the decree goes to the extent claimed in the argument. But, however that may be, the main question presented by the record and discussed in the argument is, What are the riparian rights of appellant, as a shore owner, on Lake Michigan? There is one riparian right, which existed at common law, which is not disputed or called in question in the argument, and that is: Where land bordering on the lake gradually

and imperceptibly encroaches upon the water, the accretion thus made belongs to the shore owner. This riparian right of appellant was not disturbed or interfered with by the decree. The shore owner also has another riparian right which is undisputed,—the right of access from his land to the lake; in other words, the right to pass to and from the waters of the lake within the width of his premises as they bordered on the lake. This right cannot be diverted or taken from the shore owner without just compensation being made therefor as provided by law. These are common-law rights, and, as we understand the law, they are the only common-law rights possessed by the shore owner. Other rights may have been conferred in different states by statute, usage, or custom, but the question involved here is whether such additional rights exist in this state. In the well-known case of *Shively v. Bowlby*, 152 U. S. 9, 38 L. ed. 335, the Supreme Court of the United States, after a thorough examination of the authorities, held that the common law of England is the law of this country upon the question of the rights of a shore owner, except where it has been modified by the Constitutions, statutes, or usages of the different states, or by the Constitution and laws of the United States. The court also held that the rights of these owners have been committed to the several states, and that each state has dealt with the lands under tide water within its boundaries according to its own notion of right and public policy. We are aware of no statute of this state changing the common law, nor has there been established any custom or usage which modifies the common law. What, then, is the common law in regard to the right of a shore owner to build out from the shore into the waters of the lake, as was done by appellant in this case? In *Shively v. Bowlby*, 152 U. S. 9, 38 L. ed. 335, after declaring that it is settled in England that the title to the soil of the sea, or arms thereof, below ordinary high-water mark, is in the King, it is said: "It is equally well settled that a grant from the sovereign of land bounded by the sea, or any navigable tide water, does not pass any title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention. . . . By the law of England, also, every building or wharf erected, without license, below high-water mark, where the soil is the King's is a purpresture, and may, at the suit of the King, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation. [Citing many cases.] By recent judgments of the house of lords, after conflicting decisions in the courts below, it has been established in England, that the owner of land fronting on a navigable river in which the tide ebbs and flows has a right of access from his land to the river; and may recover compensation for the cutting off of that access by the construction of public works authorized by an act of Parliament, which provides for compensation for 'injuries affecting lands,' including easements, in-

terests, rights, and privileges in, over, or affecting lands.' The right thus recognized, however, is not a title in the soil below high-water mark, nor a right to build thereon, but a right of access only, analogous to that of an abutter upon a highway. *Buccleuch v. Metropolitan Bd. of Works*, L. R. 5 H. L. 418; *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 662. "That decision," says Lord Selborne, 'must be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the *lex loci*.' *North Shore R. Co. v. Pion*, L. R. 14 App. Cas. 612-620. Affirming 14 Can. S. C. 677. The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or usages of the several colonies and states, or by the Constitution and laws of the United States." Under the common law as declared in this case,—and it is fully sustained by the authorities,—it is apparent that appellant, as owner of premises bounded on Lake Michigan, took no title to any submerged lands under the waters of the lake; nor did he, by virtue of being a shore owner, have any right to construct piers upon the submerged lands without the consent of the state.

It is, however, suggested in the argument that this court, in passing upon the rights of riparian owners upon the Mississippi and other rivers in the state navigable in fact, but not navigable at law, has held that the shore owner may "wharf out" from the shore into the stream, and that the same doctrine should be extended to a shore owner on Lake Michigan. Those cases have no bearing here, for the reason that they all are predicated on the theory that the line of the riparian owner extends to the center thread of the stream. Being the owner of the soil under the water, he had the right to build such structures on his own land as he might desire, except such as might interfere with the navigation of the stream. Under the rule established in those cases, beginning with *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112, it was held in *Ensminger v. People*, 47 Ill. 384, 95 Am. Dec. 495, that a riparian owner in the Ohio river, having the title to the land between high and low water mark, and the right to the exclusive use thereof, had the right to establish a private wharf on his land, and make reasonable charges for its use by those navigating the river. The right, however, as is apparent from the rule established in the case, rests upon the ownership of the underlying soil. Much reliance is, however, placed, in the argument, in *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018. It is true that the majority of the court in that case held that a littoral owner of lands bordering on Lake Michigan had the right to wharf out from his premises into the lake, in aid of navigation; but upon an examination of that case it will be found that the decision is predicated largely upon *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *St. Paul & P. R.*

Co. v. Schurmeir, 7 Wall. 272, 19 L. ed. 74; and *Dutton v. Strong*, 1 Black, 23, 17 L. ed. 29, or two of them; and in *Shively v. Bowlby*, 152 U. S. 9, 38 L. ed. 335, decided two years after the *Illinois Central Case*, the doctrine laid down in the three cases above cited seems to have been substantially repudiated. It is there said: "Some passages in the opinions in *Dutton v. Strong*, . . . *St. Paul & P. R. Co. v. Schurmeir*, . . . and *Yates v. Milcaukee* . . . were relied on by the learned counsel for the plaintiff in error, as showing that the owner of land adjoining any navigable water, whether within or above the ebb and flow of the tide, has, independently of local law, a right of property in the soil below high-water mark, and the right to build out wharves, so far, at least, as to reach water really navigable. But the remarks of Mr. Justice Clifford in the first of those cases, upon which his own remarks in the second case and those of Mr. Justice Miller in the third case were based, distinctly recognized the diversity of laws and usages in the different states upon this subject. . . . And none of the three cases called for the laying down or defining of any general rule, independent of local law or usage, or of the particular facts before the court. . . . In *Dutton v. Strong* . . . there can be no doubt of the correctness of that decision, for, even if the pier had been unlawfully erected by the defendants as against the state, the plaintiffs had no right to pull it down or injure it, and, upon the facts of the case were mere trespassers upon the defendant's possession. . . . In *Schurmeir v. St. Paul & P. R. Co.* . . . the question in controversy was whether the plaintiff's patent was limited by the main shore, or extended to the outside of the island. The supreme court of Minnesota held that, by the law of Minnesota, land bounded by a navigable river extended to low-water mark, at least, if not to the thread of the river; and that the plaintiff's title therefore extended to the water's edge at low-water mark and included the island, and gave judgment for the plaintiff. 10 Minn. 82 (Gil. 59) 88 Am. Dec. 59. This court affirmed the judgment, saying: '. . . express decision of the supreme court of the state was, etc.', . . . In *Yates v. Milcaukee* . . . the point adjudged was that the mere declaration of the city council that the wharf already built and owned by the plaintiff was a nuisance did not make it such, or subject it to be removed by authority of the city. It was recognized in the opinion that by the law of Wisconsin, established by the decisions of its supreme court, the title of the owner of land bounded by a navigable river extended to the center of the stream, subject, of course, to the public right of navigation. . . . And the only decision of that court, which this court considered itself not bound to follow was *Yates v. Judd*, 18 Wis. 119, upon the question of fact whether certain evidence was sufficient to prove a dedication to the public. . . . The later judgments of this court clearly establish that the title and rights of riparian or littoral proprietors in 43 L. R. A.

the soil below high-water mark of navigable waters are governed by the local laws of the several states, subject, of course, to the rights granted to the United States by the Constitution." If the three cases cited did not call for the laying down of a general rule independently of local law or usage in the states, as was held in the *Shively Case*, the doctrine laid down in the *Illinois Central Case* could not be predicated upon those cases. Moreover, we regard the rule established by the common law as the safer and better doctrine, and as each state has the right to determine for itself the title and rights of riparian owners within its border, we regard it a better policy for all concerned to adhere to the common-law rule rather than follow the doctrine laid down in the *Illinois Central Case*. Moreover, the learned justice who delivered the opinion of the court in the *Illinois Central Case*, in *Weber v. Board of State Harbor Comrs.* 18 Wall. 57, 21 L. ed. 798, practically concedes the correctness of the doctrine laid down in the *Shively Case*. Mr. Justice Field, in delivering the opinion of the court, while recognizing the correctness of the doctrine that a riparian proprietor whose land is bounded by a navigable stream has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier into the stream, subject to such general rules and regulations as the legislature may prescribe for the protection of the public, said: "In the absence of such legislation or usage, however, the common-law rule would govern the rights of the proprietor, at least in those states where the common law obtains. By that law the title to the shore of the sea, and of the arms of the sea, and in the soils under tidewaters is, in England, in the King, and, in this country, in the state. Any erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a purpresture, which he may remove at pleasure, whether it tend to obstruct navigation or otherwise."

Cases from other states have been cited by the appellant and appellee as sustaining their respective views of riparian rights, but it would extend this opinion to too great a length to enter upon a review of those cases. Moreover, local laws, customs, and usages enter so largely into the decisions of the courts in the different states that such decisions cannot, as a general rule, control as precedents here. But if the right to wharf out in aid of navigation existed, as held in the *Illinois Central Case*, the rule thus established could have no application here, as the piers erected by the appellant in this case were not constructed in aid of navigation. That is not claimed or pretended from anything appearing in the record. It is, however, insisted that owners of land bordering on Lake Michigan have the right, as riparian owners, to wharf out in order to protect the shore of their lands from erosion. If a right of this character exists, it is one not recognized by the common law. As we understand the common law, any structure placed

upon the land of the state below or beyond the water's edge in the waters of the lake is a purpresture, and may be abated in a proceeding instituted on behalf of the people. A shore owner may, no doubt, erect on his own land such structures as may be necessary to protect his land from erosion, provided such structures do not interfere with navigation, but he has no right to intrude upon the lands of the state, unless authorized by the state. Tyler, in his work on Boundaries (p. 95), states the doctrine of protection in the following language: "There can be no doubt that by the law of England encroachments cannot be made on the property of the Crown or its grantee. . . . But if an embankment which is lawfully made on a man's own land cause a silting up of sand and mud, whereby soil is gradually gained from the sea, the owner of the embankment would appear to be entitled to this increase, upon the principle laid down in respect to alluvion and reliction. . . . An encroachment upon the King, or upon part of the demesne lands, or in the highways, public rivers, harbors, or common streets, is called a purpresture. This word frequently occurs in the judicial reports of both this country and England, and invariably signifies an encroachment of this kind. . . . A man may raise an embankment on his own property to prevent the encroachments of the sea, although the effect of his doing so may be to cause the water to beat with violence against the adjoining land, thereby rendering it necessary for the adjoining landowner to enlarge or strengthen his defenses." Wood on Nuisances (sec. 494) says: "Every proprietor of land exposed to the inroads of the sea may erect on his own land groins or other reasonable defenses, for the protection of his land from the inroads of the sea. . . . But a man has no right to do more than is necessary for his defense, and to make improvements at the expense of his neighbor." Gould on Waters (§ 160) says: "The owners of lands exposed to the inroads of the sea or of inland waters may erect walls and embankments to prevent the wearing away of the land or to protect it from overflow. . . . If a sea wall or embankment is erected in tide waters beyond the limits of the owner's land, it is doubtless illegal at common law as being a purpresture, since it does not appear that littoral proprietors are authorized, as against the Crown, or without its sanction, to erect even defenses against the sea below high-water mark." Reliance is, however, placed by appellant in *King v. Pagham River Comrs.* 8 Barn. & C. 355. Expressions may be found in that case that seem to sustain the view of appellant; but upon an examination it will be found that what was said was not necessary to a decision of the case, or applicable to the facts involved therein, and we do not regard the expressions used in deciding the case as authority on the question. See Coulson & Forbes, Waters, 32. It may be conceded that under the doctrine of protection a shore owner may erect structures on his own land for protection against erosion, but, as we understand 43 L. R. A.

the law, he has no right to enter upon the lands of the state and erect thereon such structures, and when he undertakes to do so he is a trespasser. The state, holding the submerged lands of the lake in trust for the people of the state, would be false to its trust should it permit shore owners to encroach on the public domain, and gradually appropriate such property to their own use. Here, in the erection of the structures complained of in the information, there has been a clear violation of the law, and no reason occurs to us why the structures should not be abated on the application of the people.

The decree in this case was in favor of the complainant, but, after a careful consideration of the whole record, we do not think it goes far enough. We think the cross errors of appellee are well assigned.

The decree will therefore be reversed, and the cause remanded, on the cross errors, with directions to the circuit court to enter a decree according to the prayer of the information, in conformity to the views here expressed.

Petition for rehearing denied February 9, 1899.

Abram F. DOREMUS *et al.*, *Appts.*,

v.

Mary G. HENNESSY.

(176 Ill. 608.)

1. **Members of a trade association who combine to induce or compel other persons not to deal or enter into contracts with one who will not join the association or conform his prices to those fixed by the association will be liable for the injuries caused to him by loss of business resulting from such combination.**
2. **Maliciously to persuade another to break his contract with a third person for the purpose of injuring the latter is an actionable wrong if the injury results as intended.**
3. **Whether or not inducement of a person to break his contract with another is the proximate cause of the resulting injury to the latter is a question for the jury.**

(October 24, 1898.)

APPEAL by defendants from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to recover damages for losses

NOTE.—For boycott or combination by dealers or persons engaged in business to injure rivals, see *Bohn Mfg. Co. v. Northwestern Lumbermen's Assn.* (Minn.) 21 L. R. A. 337; *Jackson v. Stanfield* (Ind.) 23 L. R. A. 588; *Macaulay v. Tierney* (R. I.) 37 L. R. A. 455; *Brewster v. C. Miller's Sons* (Ky.) 38 L. R. A. 505; *Hartnett v. Plumber's Supply Assn.* (Mass.) 38 L. R. A. 104; also *Boutwell v. Marr* (Vt.) *post*, —.

As to liability for damages for inducing breach of contract with third person, see *Boysen v. Thorn* (Cal.) 21 L. R. A. 233, and *note*; also *Raycroft v. Tayntor* (Vt.) 33 L. R. A. 225; and *Gore v. Condon* (Md.) 40 L. R. A. 382.

alleged to have resulted from an alleged conspiracy by defendants to break up plaintiff's business. *Affirmed.*

The facts are stated in the opinion.

Messrs. Howard Henderson and Francis W. Walker, for appellants:

Appellants cannot be held liable for the mere inducing of others to break their contracts, the parties themselves who broke their contracts being the only ones liable. They were free agents, and not coerced or influenced by force or fraud.

Chambers v. Baldwin, 91 Ky. 122, 11 L. R. A. 545; *Ashley v. Dixon*, 48 N. Y. 430, 8 Am. Rep. 559; *Payne v. Western & A. R. Co.* 13 Lea, 508, 49 Am. Rep. 666; *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373; *Cote v. Murphy*, 159 Pa. 420, 23 L. R. A. 135; *Bourlier Bros. v. Macauley*, 91 Ky. 136, 11 L. R. A. 550.

Appellants cannot be held liable for independent intervening causes of damage in themselves sufficient to cause the injury complained of. And so far as direct intervening causes of damage at laundries to which appellee went long after the commission of the acts charged in the declaration, and in which the evidence in no wise connects appellants, were sufficient of themselves to occasion injury, as to such injury at such laundries, previous acts of appellants must be considered too remote.

Cooley, Torts, 2d ed. pp. 76, 91; *Dale v. Grant*, 34 N. J. L. 142; *Rockingham Mut. F. Ins. Co. v. Bosher*, 39 Me. 253, 63 Am. Dec. 618; *Anthony v. Slaid*, 11 Met. 290; *Silver v. Frazier*, 3 Allen, 382, 81 Am. Dec. 662; *Watson v. People*, 27 Ill. App. 496; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. ed. 65; *Sharp v. Powell*, L. R. 7 C. P. 253; *Denny v. New York C. R. Co.* 13 Gray, 481, 74 Am. Dec. 645; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 17, 10 Am. Rep. 205; *Morrison v. Davis*, 20 Pa. 171, 67 Am. Dec. 695; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. ed. 909; *Rockford v. Tripp*, 83 Ill. 247, 25 Am. Rep. 381; *Murphy v. Michigan C. R. Co.* 107 Mich. 627; *Lambeck v. Grand Rapids & I. R. Co.* 106 Mich. 512; *Scott v. Allegheny Valley R. Co.* 172 Pa. 646; *Jammison v. Chesapeake & O. R. Co.* 92 Va. 327.

The acts of appellants in inducing parties to break their contracts with appellee were not merely malicious acts, done solely with the intent to injure her, but were in the line of legitimate trade competition, and for this they cannot be held liable.

Bourlier Bros. v. Macauley, 91 Ky. 136, 11 L. R. A. 550; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598; *Chambers v. Baldwin*, 91 Ky. 122, 11 L. R. A. 545; *Benjamin v. Wheeler*, 8 Gray, 409; *Stevenson v. Newnham*, 13 C. B. 285; *Jenkins v. Fowler*, 24 Pa. 308; *Phelps v. Noulton*, 72 N. Y. 43, 28 Am. Rep. 93; *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373; *Continental Ins. Co. v. Board of Fire Underwriters*, 67 Fed. Rep. 310.

That the acts which appellants are charged to have done were done in pursuance of a conspiracy does not create any liability. In the civil action of conspiracy 43 L. R. A.

the damage illegally done, and not the conspiracy, is the gist of the action.

Wellington v. Small, 3 Cush. 145, 50 Am. Dec. 719; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598; *Payne v. Western & A. R. Co.* 13 Lea, 508, 49 Am. Rep. 666.

Appellants cannot be held liable for inducing S. P. Miller, Hamlin Bros., Armstrong and Sargent, and Cook & Williamson to terminate their contractual relations with appellee, because appellant's acts could not produce the injuries complained of without the intervention of an independent force, which force was the act of the parties themselves who broke their contracts, and were the efficient cause of the damages suffered by her.

Cooley, Torts, 2d ed. pp. 76, 91; *Dale v. Grant*, 34 N. J. L. 142; *Rockingham Mut. F. Ins. Co. v. Bosher*, 39 Me. 253, 63 Am. Dec. 618; *Anthony v. Slaid*, 11 Met. 290; *Silver v. Frazier*, 3 Allen, 382, 81 Am. Dec. 662; *Watson v. People*, 27 Ill. App. 496; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. ed. 65; *Sharp v. Powell*, L. R. 7 C. P. 253; *Denny v. New York C. R. Co.* 13 Gray, 48, 74 Am. Dec. 645; *Cuff v. Newark & N. Y. Co.* 35 N. J. L. 17, 10 Am. Rep. 205; *Morrison v. Davis*, 20 Pa. 171, 67 Am. Dec. 695; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. ed. 909; *Rockford v. Tripp*, 83 Ill. 247, 25 Am. Rep. 381; *Murphy v. Michigan C. R. Co.* 107 Mich. 627; *Lambeck v. Grand Rapids & I. R. Co.* 106 Mich. 512.

On petition for rehearing.

A malicious motive cannot be a cause of action. Competition in trade does not become unlawful because actuated by motives of malice.

The English authorities cited by the court in support of the doctrine that a malicious motive may be a cause of action, so far as they apply to a state of facts like that in the case at bar, having been disapproved by the English House of Lords in the case of *Allen v. Flood* should be reconsidered. And the American cases cited by the court, depending as they do for their authority upon the same English cases so disapproved in part, should also be reconsidered in the light of that decision.

Allen v. Flood, 67 L. J. Q. B. N. S. 119, [1898] A. C. 1; *Huttly v. Simmons*, 67 L. J. Q. B. N. S. 213; *Perrault v. Gauthier*, 28 Can. S. C. 241; *Davis v. United Portable Hoisting Engineers*, 28 App. Div. 396; *Chambers v. Baldwin*, 91 Ky. 122, 11 L. R. A. 545.

Among the American cases opposed to those cited in the opinion are the following:

Chambers v. Baldwin, 91 Ky. 122, 11 L. R. A. 545; *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 666; *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373; *Bourlier Bros. v. Macauley*, 91 Ky. 136, 11 L. R. A. 550; *Boyson v. Thorn*, 98 Cal. 578, 21 L. R. A. 233; *Continental Ins. Co. v. Board of Fire Underwriters*, 67 Fed. Rep. 310; *Bowen v. Matheson*, 14 Allen, 499; *Macauley Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 455.

There are many other American authori-

ties to the general effect that a malicious motive will not make that unlawful which would otherwise be lawful.

Jenkins v. Fowler, 24 Pa. 308; *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 666; *Phelps v. Nowlen*, 72 N. Y. 43, 28 Am. Rep. 93; *Hunt v. Simonds*, 19 Mo. 583; *Glendon Iron Co. v. Uhler*, 75 Pa. 467; *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505; *O'Callaghan v. Cronan*, 121 Mass. 114; *Benjamin v. Wheeler*, 8 Gray, 409; *Rich v. New York C. & H. R. R. Co.* 87 N. Y. 382.

Messrs. Tuttle & Grier, for appellee:

An action will lie for inducing one to break a contract with the plaintiff to do certain work, if done without justifiable cause, with the intention of injuring the plaintiff, if damage results to the plaintiff.

Lumley v. Gye, 2 El. & Bl. 216; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Walden v. Conn*, 84 Ky. 312; *Haskins v. Loyster*, 70 N. C. 601, 16 Am. Rep. 780; *Jones v. Stunly*, 76 N. C. 355; *Cooley*, Torts, pp. 280, 281.

An action will lie for wilful acts calculated to cause damage to the plaintiff in his or her lawful business, done with the intention to cause such damage and loss without right or justifiable cause on the part of the defendant, if actual damage and loss result.

Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555; *Chipley v. Atkinson*, 23 Fla. 206; *Delz v. Winfree*, 80 Tex. 400; *Temperton v. Russell*, 4 Rep. 376; *Moore v. Bricklayers' Union No. 1*, 7 Ry. & Corp. L. J. 108; *Mogul S. S. Co. v. McGregor*, L. R. 15 Q. B. Div. 476, L. R. 21 Q. B. Div. 544, L. R. 23 Q. B. Div. 598; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569.

It is not necessary that a definite contract be broken to render defendants liable.

Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30; *Benton v. Pratt*, 2 Wend. 385, 20 Am. Dec. 623.

The following cases deal particularly with the element of right or justifiable cause, and in so doing define the limits of legitimate competition:

Olive v. Van Patten, 7 Tex. Civ. App. 630; *Curran v. Galen*, 52 N. Y. S. R. 479; *Lovejoy v. Michels*, 88 Mich. 15, 13 L. R. A. 770; *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588; *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 361; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598.

In order to render the defendants liable for wilfully inducing parties to break their contract or contracts with the plaintiff, done by the defendants with the intention of causing injury to the plaintiff, without right or justifiable cause, and from which acts damage results to the plaintiff, it is not necessary that such inducements should be with either force, fraud, threats, or intimidations.

Such inducement on the part of the defendants will give a cause of action if consisting merely of advising or arguing that it would be to the business interest of the one breaking the contract, if such acts were done by the defendants maliciously, without right or justifiable cause, and with the in-

tention of injuring the plaintiff, if damages actually result therefrom.

Lumley v. Gye, 2 El. & Bl. 216; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555; *Chipley v. Atkinson*, 23 Fla. 206; *Delz v. Winfree*, 80 Tex. 400.

Malice is the intent to injure another, without right or justifiable cause.

Moore v. Bricklayers' Union No. 1, 7 Ry. Corp. L. J. 108; *State v. Coelb*, 3 Wash. 99; *Lovett v. State*, 30 Fla. 142, 17 L. R. A. 705; *Territory v. Egan*, 3 Dak. 119; *Buckley v. Knapp*, 48 Mo. 152; *Mitchell v. Wall*, 111 Mass. 498; *Tuttle v. Bishop*, 30 Conn. 80.

Where an injury is maliciously inflicted, the jury may, in addition to the actual damages sustained, visit upon the wrongdoer vindictive or punitive damages for the double purpose of setting an example and of punishing the wrongdoer.

Grable v. Margrave, 4 Ill. 372, 38 Am. Dec. 88; *Sherman v. Dutch*, 16 Ill. 283; *Dean v. Blackwell*, 18 Ill. 336; *Wabash, St. L. & P. R. Co. v. Rector*, 104 Ill. 296; *Harrison v. Ely*, 120 Ill. 83.

In actions in tort the jury have necessarily a wide latitude, and the question of the extent of damages is almost exclusively for the jury. A verdict will not be disturbed on the ground of excessive damages unless it seems probable from the amount of the damages assessed that the jury acted under the influence of prejudice, passion, or misconception of the evidence.

Schlenker v. Risley, 4 Ill. 483, 38 Am. Dec. 100; *Chicago & R. I. R. Co. v. McKean*, 40 Ill. 218; *Baker v. Young*, 44 Ill. 42, 92 Am. Dec. 149; *Chicago v. Smith*, 48 Ill. 107; *Freeman v. Tinsley*, 50 Ill. 497; *Chicago & A. R. Co. v. Pondrom*, 51 Ill. 333, 2 Am. Rep. 306; *Chicago, R. I. & P. R. Co. v. Otto*, 52 Ill. 416; *Sulzer v. Yott*, 57 Ill. 164; *Galesburg v. Higley*, 61 Ill. 287; *Douglas v. Gausman*, 68 Ill. 170; *Conrad Seipp Brewing Co. v. Doody*, 25 Ill. App. 305.

The amount of exemplary damages is entirely within the discretion of the jury, and the verdict can be set aside by the court only when it is grossly excessive or evidently actuated by passion, prejudice, or undue influence.

1 Sedgw. Damages, p. 547, § 388; *Rogers v. Henry*, 32 Wis. 327; *Birchard v. Booth*, 4 Wis. 67; *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152; *Goetz v. Amba*, 27 Mo. 28; *Peshine v. Shepperson*, 17 Gratt. 488, 94 Am. Dec. 468.

The question whether or not the damages are excessive is conclusively settled by the decision of the Illinois appellate court, and cannot be assigned as error on appeal to the supreme court.

Aurora v. Pennington, 92 Ill. 564; *Laird v. Warren*, 92 Ill. 204; *Bangor Furnace Co. v. Magill*, 108 Ill. 656; *Louisville, E. & St. L. Consol. R. Co. v. Spencer*, 149 Ill. 97; *Lake Shore & M. S. R. Co. v. Hessons*, 150 Ill. 546.

Whether or not an act is the proximate cause of injury is a question for the jury.

upon the evidence, under appropriate instructions, and when passed on by the Illinois court is not subject to review in this court.

Wright v. Chicago & N. W. R. Co. 27 Ill. App. 200; *Fent v. Toledo, P. & W. R. Co.* 59 Ill. 349, 14 Am. Rep. 13; *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20, 50 Am. Rep. 601; *Mt. Carmel v. Howell*, 137 Ill. 91; *Meyer v. Butterbrodt*, 146 Ill. 131.

Whether or not the loss at Coleman & Newman's, Brigham & Finch's, Armstrong & Sargent's, or other places, where the evidence in this case tended to show a loss to the plaintiff, was or was not the result of the acts of the appellants in their attempt to break up the business of the appellee, as a proximate cause, or was the result of a new and independent factor for which appellants were not responsible, could not have been determined by the trial court as a question of law; it could only be properly tested by hearing the evidence and submitting the facts to the jury under appropriate instructions, and, having been passed upon by the appellate court, cannot be reviewed by this court.

Pullman Palace Car Co. v. Bluhm, 109 Ill. 20, 50 Am. Rep. 601; *Mt. Carmel v. Howell*, 137 Ill. 91; *Meyer v. Butterbrodt*, 146 Ill. 131.

Phillips, J., delivered the opinion of the court:

Appellee instituted an action on the case, alleging that in 1890, and several years prior thereto, she was conducting a laundry office in the city of Chicago, where she received clothing from various customers to be laundered; that she did not own a laundry plant herself, but employed other operating laundries, who, when the work was done returned the same to her for delivery to her customers; that she had built up a good and profitable business; that appellants conspired to injure her in her good name and credit, and to destroy her business, because she would not increase the price charged by her to customers in accordance with the scale of prices fixed by an organization known as the Chicago Laundrymen's Association, and to that end wilfully and unlawfully, by intimidation and unlawful inducements, caused parties who were doing her work (five of whom were mentioned in the declaration) to refuse to longer do the same, and by threats, intimidation, false representations, and unlawful inducements caused others who were operating laundries (who were specifically designated in a bill of particulars) to refuse to take or do her work; that this was done for no justifiable purpose, but to cause loss to the plaintiff and injure and destroy her business; that various persons with whom she had engagements to so do her work, in consequence of the acts of the appellants broke their contracts with her, and the business she had built up as a laundry agent was destroyed and entirely broken up, and she thereby sustained great loss and damage by reason of appellants so contriving, plotting, and conspiring, by the 43 L. R. A.

means aforesaid, to break up and destroy her said business.

The evidence shows that plaintiff had a contract with one Miller, who operated a laundry, and who agreed to do her work and give her two weeks' notice before he would quit doing it, and that through the interference of appellants he refused to do her work without giving the notice agreed on. Subsequently she applied to other laundrymen, who agreed to do her work as long as the laundry association did not interfere. She made arrangements with other laundries, by written agreement, by which her work was to be done. In one case the contract was for a year, and according to the testimony in this record that contract was broken by the party contracting with her almost as soon as made. One contract with Joseph Apple, by which her laundry work was to be done for one year, was violated. The officers of this association, as testified to by the witness who entered into the contract with appellee, interfered, and sought to injure the plaintiff by having him keep back her work, retaining it as long as possible, to her detriment, and also by having him retain parts of the work. He testifies: "They told me that they would give me \$300, a horse and wagon, and enough work to keep me going, provided I would keep back her work and retain it as long as I possibly could, to the detriment of her patronage. That was at the first meeting, and I agreed to that. I kept a bundle out. At the second meeting, they made threats to me if I didn't accept that they would ruin my business at any rate, as well as hers." Another witness who agreed to do her work as long as the laundry association would let him alone, was induced, by threats of destroying his business, to cease connection in business with appellee. The evidence shows that appellants were active in inducing these various breaches of contract, as well as other contracts entered into between her and various parties engaged in operating laundries.

Issues were joined, and upon a trial in the circuit court of Cook county defendants were found guilty and the plaintiff's damages were assessed by a jury at \$6,000. Motions for a new trial and in arrest of judgment were overruled and judgment was entered on the verdict, to which defendants excepted. On appeal to the appellate court for the first district the judgment was affirmed, and this appeal is prosecuted.

The contention of appellants is, that they cannot be held liable for merely inducing others to break their contracts; that the parties who broke their contracts were the only ones liable, they being free agents and not coerced or influenced by force or fraud; that their acts in inducing parties to break their contracts with appellee were not mere malicious acts, done solely with the intent to injure her, but were in the line of legitimate trade competition, for which they cannot be held liable; nor can they be held liable, they claim, for acts which are charged to have been done in pursuance of a conspir-

acy, as it is insisted that a conspiracy does not create a liability in a civil action, as the damage illegally done, and not the conspiracy, must be the gist of the action.

The common law seeks to protect every person against the wrongful acts of others, whether committed alone or by combination, and an action may be had for injuries done which cause another loss in the enjoyment of any right or privilege or property. No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. Losses wilfully caused by another, from motives of malice to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill, and credit, will sustain an action. It is clear that it is unlawful and actionable for one man, from unlawful motives, to interfere with another's trade by fraud or misrepresentation, or by molesting his customers or those who would be customers, or by preventing others from working for him or causing them to leave his employ by fraud or misrepresentation or physical or moral intimidation or persuasion, with an intent to inflict an injury which causes loss. A conspiracy may, when accompanied by an overt act, create a liability, by reason of the fact that one or more conspirators may do an unlawful act which causes damage to another, by which all those engaged in the conspiracy for the accomplishment of the purpose for which the injury was done, and which was done in pursuance of the conspiracy, would be alike liable, whether actively engaged in causing the loss or not. For acts illegally done in pursuance of such conspiracy, and consequent loss, a liability may exist against all of the conspirators. Appellants, and those persons who refuse to do appellee's work, had each a separate and independent right to unite with the organization known as the Chicago Laundrymen's Association, but they had no right separately or in the aggregate, with others, to insist that the appellee should do so, or to insist that appellee should make her scale of prices the same as that fixed by the association, and make her refusal to do this a pretext for destroying and breaking up her business. A combination by them to induce others not to deal with appellee or enter into contracts with her or do any further work for her was an actionable wrong.

Every man has a right, under the law, as between himself and others, to full freedom in disposing of his own labor or capital according to his own will, and anyone who invades that right without lawful cause or justification commits a legal wrong, and, if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong. Damage inflicted by fraud or misrepresentation, or by the use of intimidation, obstruction, or molestation, with

malicious motives, is without excuse, and actionable. Competition in trade, business, or occupation, though resulting in loss, will not be restricted or discouraged, whether concerning property or personal service. Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set and actually accomplishing that result, be actionable unless there was actual malice. Malice as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another it is malicious, and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition. In this case it is clear the evidence sustained the allegations of the plaintiff's declaration, and there is here no contention on the facts. The principles herein announced are sustained by the weight of authority in England and in this country. *Lumley v. Gye*, 2 El. & Bl. 216; *Blake v. Lanyon*, 6 T. R. 221; *Sykes v. Dixon*, 9 Ad. & El. 693; *Pilkington v. Scott*, 15 Mees. & W. 657; *Hartley v. Cummings*, 5 C. B. 247; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555; *Chiple v. Atkinson*, 23 Fla. 206; *Delz v. Winfree*, 80 Tex. 400; *Curran v. Galen*, 52 N. Y. S. R. 479; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184.

In *Mogul S. S. Co. v. McGregor*, L. R. 15 Q. B. Div. 476, Lord Coleridge said: "It seems that a large number of important and rich shipowners joined together, and they issued two circulars or documents . . . to the different traders and their agents with whom they had been in the habit of dealing in the tea trade and other trades in China, . . . to the effect that, if the persons whom that circular reached and was meant to affect should deal with the plaintiffs or plaintiffs' ships, they, the defendants, would deny them all the benefits, or at least a very large and substantial benefit, which had accrued to them in their dealing with the defendants; . . . that, if the persons to whom they addressed the circular would deal exclusively with them they should have certain advantages at their hands. . . . It is certainly conceivable that such a conspiracy,—because conspiracy undoubtedly it is,—as this might be proved in point of fact, . . . were made out to be, not the mere honest support . . . of the defendant's trade, but the destruction of the plaintiffs' trade, and their consequent ruin as merchants, it would be an offense for which an indictment for conspiracy, and if an indictment, then an action for conspiracy, would lie; . . . that a conspiracy to do the thing which has been called by the name of boycotting is unlawful and an indictable

offense, and, if so, then a thing for which an action will lie, an action may well lie for that which is complained of here."

It is urged by appellants that they cannot be held liable for inducing certain persons named in the declaration to terminate their contractual relations with appellee, because their acts could not produce the injuries complained of without an independent force which was the act of the parties themselves, and these appellants, it is urged, cannot be held liable for an intervening cause of damage sufficient to cause the injury; and that the refusal of different persons to work for the appellee was sufficient, of itself, to occasion injury, for which the appellants cannot be held responsible. The first branch of this proposition has been disposed of by what we have heretofore said, and the authorities above cited. In *Lumley v. Gye*, 2 El. & Bl. 216, it was said: "He who maliciously procures a damage to another by violation of his right ought to be made to indemnify." In *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, it was said: "Merely to persuade a person to break his contract may not be wrongful in law or fact. . . . But if the persuasion be used for the indirect purpose of injuring the plaintiff . . . it is . . . actionable, if injury ensues from it."

The second branch of the proposition, in which it is urged that appellants could not produce the injuries complained of without the intervention of an independent force, presents the question whether the proximate cause of the injury is a question of fact. It has been settled by the adjudication of this state, so far as this question is here concerned, that in this state what was the cause of the injury, or the combination of causes producing it, is a question of fact. Whether the injury and damage sustained by plaintiff resulted from the acts of the defendant, or were the result of a new, independent factor for which appellants were not responsible, cannot be determined by the court as a question of law, unless the fact be conceded or the proof be substantially all to that effect. *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20, 50 Am. Rep. 601; *Mt. Carmel v. Howell*, 137 Ill. 91; *Meyer v. Butterbrodt*, 146 Ill. 131. The finding of the trial and appellate courts on this question is not subject to review in this court.

It is next insisted that the damages are excessive. This has so repeatedly been held to be an error which cannot be assigned in this court that citation of authority will be unnecessary.

What has been said in the discussion of the questions heretofore presented effectually disposes of all questions raised on giving, refusing, and modifying instructions.

The judgment of the Appellate Court for the First District affirming the judgment of the Circuit Court of Cook County is affirmed.

A petition for a rehearing having been 43 L. R. A.

filed, **Phillips, J.**, subsequently delivered the following additional opinion:

Appellants present their petition for a rehearing of this case, and have brought to the attention of the court the case of *Allen v. Flood* [67 L. J. Q. B. N. S. 119, [1898] A. C. 1], decided by the House of Lords in Great Britain, which was not accessible at the time the opinion in this case was written. Since the petition for rehearing was presented counsel have procured a full report of that case and brought the same to the attention of the court. From that case it appears that boiler makers in common employment with the respondents, Flood and another, who were shipwrights working on wood, objected to working with the latter on the ground that in a previous employment they had been engaged on iron work. The appellant, an official of the boiler-makers' union, in response to a telegram from one of the boiler-makers, came to the yard and dissuaded the men from immediately leaving their work, as they threatened to do, intimating that if they did so he would do his best to have them deprived of the benefits of the union and also fined; that they must wait till the matter was settled. The appellant, Allen, then saw the managing director, to whom he said that if the respondents, who were engaged from day to day, were not dismissed, the boiler-makers would leave their work or be called out. Respondents were thereupon dismissed. The men so discharged instituted their action against the official of the boiler-makers' union, and obtained judgment, which was affirmed by the court of appeal, and on appeal to the House of Lords the assistance of the judges was requested, and the question submitted to the judges was: "Assuming the evidence to be given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" Six of the eight judges answered in the affirmative and two in the negative. It appears there was no contract, as the men were engaged by the day, and were liable to be discharged at the close of any day, without a breach of contract; that the only question presented by that case was, (1) "Did the defendant Allen 'maliciously induce' the company to discharge the plaintiffs? (2) Did he 'maliciously induce' the company not to engage them?" and it was held if the defendant's action was in itself lawful it was not made unlawful by the motive. It is a very different thing to do a lawful act with a proper motive, and to do an illegal act with a malicious motive. The facts in the case of *Allen v. Flood* are entirely different from the facts presented in this record. There was no contract in that case, the breach of which was induced by the defendant. Here, existing contracts, which were a property right in the plaintiff (the appellee), were broken; and this was brought about by the action of the defendants in inducing those

contracting with her to violate their contracts. This caused a right to be taken away, in consequence of which she was injured and damaged.

After a careful consideration of the case of *Allen v. Flood*, and with a full recogni-

tion of the importance of the principles involved in the questions presented by this record, we are constrained to adhere to what has been said in our opinion heretofore, and must deny the petition for rehearing.

Rehearing denied.

VERMONT SUPREME COURT.

James M. BOUTWELL *et al.*

v.

William MARR *et al.*

(.....Vt.....)

1. Withdrawal of patronage from a person by members of an association by concerted action becomes illegal when the concert of action is procured by the coercion of a by-law which imposes a fine or penalty upon any member who violates it.
2. The fact that members of an association voluntarily assumed its obligations in the first instance does not make legal a by-law which, by fine or penalty, compels them to act in concert in withdrawing their patronage from another person.
3. Exemplary damages cannot be recovered in an action against the several members of an association for acting in concert to withdraw their patronage from a dealer, when some of them have been coerced by a by-law which imposed a penalty for its violation.

(February 15, 1899.)

EXCEPTIONS by defendants to the action of the Washington County Court in entering judgment for plaintiffs upon a special verdict in an action brought to recover damages for conspiracy which resulted in the ruining of plaintiff's business. *Judgment reversed.*

The facts are stated in the opinion.

Messrs. George W. Wing, O. A. Proudy, and J. P. Lamson for defendants.

Messrs. W. A. Lord, John L. Senter, and Dillingham, Huse, & Howland for plaintiffs.

Munson, J., delivered the opinion of the court:

On the 6th day of June, 1893, the plaintiffs obtained a bond for the conveyance of a mill in Barre, equipped with machinery for polishing granite; and on the 16th day of the month they received a deed, and took possession of the property, and became copartners, under the name of the Boutwell Polishing Company. The mill had been operated for several years by the plaintiffs' grantor; and, in the interval between the taking of the bond and the receipt of the deed, the plaintiffs saw the patrons of the mill, and received assurances of a continuance of their custom, limited in the case of some patrons by the mention of an expectation or a possibility of their putting in polishing machines of their

own. From the time of their purchase until November the work of the mill averaged over \$1,000 a month, that of the last month being but little below that amount. In November the receipts were some less than \$200. In December and January the mill was without work, and substantially all that it did after that was upon stock purchased by the company from parties outside of Barre. On the 19th of April, 1894, the mill was sold to one of the defendants. No complaint was ever made of the plaintiffs' work or their methods of business. During this time there was an organization in Barre called the "Granite Manufacturers' Association," which embraced about 95 per cent of all the granite manufacturers in the place. There was also an organization located at Boston, called the "Granite Manufacturers' Association of New England," with which were connected the local organizations of the New England states, including that at Barre. All the defendants held by the verdict were members of the Barre association. Neither the plaintiffs' firm nor any of its members were connected with this or any similar organization. Prior to November, 1893, the Barre association adopted by-laws, which prohibited dealings with members not in good standing, and imposed fines for the violation of its rules. On the 10th of November the association indorsed a resolution previously adopted by the New England Association, which recommended that none of its members sell any rough stock, partly finished or finished granite, directly or indirectly, to any firm, individual, or corporation engaged in cutting, quarrying, or polishing granite in any of the New England states or in New York City, and not a member of the association. On the 24th of November the association adopted a resolution of the following terms: "Resolved for the purpose of strengthening the association, and [for] the mutual protection of its members, [that] no trade shall be conducted with any individual, firm, or corporation engaging in cutting, quarrying, or polishing granite in the state of Vermont, who are not members of this association."

George Lamson, a defendant, testified that he assisted in the formation of both associations, and had been connected with them ever since; that he was notified by a circular of the action taken November 10; that the effect of that resolution would be that, if a company declined to join the association, no member of the association would thereafter do any business with it. Alexander Gordon, another defendant, testified that he understood that the main reason for the collapse of

NOTE.—See also preceding case of *Doremus v. Hennessy* (Ill.) ante, 797, and footnote thereto. 43 L. R. A.

the plaintiff's business was the passage of the resolution; that he voted for it, and did so believing that it would have that effect on their business; that, after its passage, he stopped sending work to the plaintiffs; and that he did so because of that vote. It appears from the testimony of some of the defendants that during the summer and early fall of 1893 they had several conversations with John W. Dillon, the manager of the plaintiff's business, in regard to their becoming members of the association, in which they expressed a desire to have them join. Mr. Kemp, one of the plaintiffs, testified that some time in November, and after the loss of their business, defendant Kelliher asked him why they would not join the association, and said they would find out that they would have to join it before they could do any business. Mr. Senter, an attorney for the plaintiffs, testified that, in December, defendant Eagan, on coming out from an interview with the plaintiffs, said to him that "they would find out they couldn't do any polishing business until they joined the association." Mr. Kemp further testified that in January, 1894, he had two interviews with certain defendants, at their suggestion, in which the question of plaintiffs' joining the association was discussed at length. His testimony tended to show that the first of these meetings was with defendants Ady and Gordon, and that Ady remarked that the object of the interview was to see if they could induce the plaintiffs to join the association, but that they hardly expected to get them to, as they supposed plaintiffs were still stubborn about joining; that later in the conversation he used substantially these words, "I will admit that the effect of that resolution was to destroy the business of your company in one day, but it is my opinion that, if you will join the association, you can get your business all back in one day;" and that Gordon on being appealed to by Ady, affirmed his statement; that the second of these interviews was with the defendant J. D. Smith, who said it was true that the action of the association had had the effect to close plaintiffs' mill, but that he was perfectly confident that it could be started up, with all their old customers, at once, if they would join the association.

The defendants have not brought up their exceptions to the charge, but stand on their motion that a verdict be directed for want of sufficient evidence to make them liable. There was clearly evidence tending to show that the defendants undertook to compel the plaintiffs to join the association by depriving their mill of work, and that they made use of their organization as a means of concerted action to accomplish their purpose. But there was no evidence tending to show that the defendants made any attempt to compel persons, not members of the association, to withhold their patronage, and they insist that they cannot be made liable for simply withholding their own.

The crime of conspiracy consists in a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, or to effect a legal purpose by illegal

means. *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710. But the grounds of recovery in a civil suit are not identical with the elements of the crime. The law punishes the mere agreement to effect an illegal purpose or to use illegal means. But it is clear that a civil action cannot be sustained unless something causing damage to the plaintiff has been done in furtherance of the agreement; and it is claimed to be also requisite that the thing done be something unlawful in itself. This would preclude a reliance upon the existence of an illegal purpose, and require that the means used be illegal. The agreeing together to effect an illegal purpose being itself illegal, it might seem that any act done in furtherance of the agreement, and resulting in damage, even though not itself a violation of right, would sustain a recovery. But the view suggested is not sustained by the authorities, and we proceed with our inquiry upon the assumption that there can be no recovery unless illegal means were employed.

It is clear that everyone has a right to withdraw his own patronage when he pleases, but it is equally clear that he has no right to employ threats or intimidation to divert the patronage of another. If it be true as a general proposition that several may lawfully unite in doing to another's injury, even for the accomplishment of an unlawful purpose, whatever each has a right to do individually, it by no means follows that the combination may not be so brought about as to make its united action an unlawful means. The defendants insist that, as members of the association, they had a right to resolve to keep their work among themselves, and that, in the absence of anything tending to show an attempt on their part to influence the action of others, they cannot be held liable. It may be true that if the defendants, acting independently of any organization, and moved solely by similarity of interest and views, had united in withdrawing their patronage, the effect upon the plaintiffs' business would have been the same, and yet the defendants have incurred no liability. But, in the case supposed, the united action would result from the free exercise of individual choice. It will be seen upon further inquiry that this cannot be said of the action of an organization like that operated by the defendants.

It is true, as suggested in argument, that everyone engaged in business is liable to have it injured or destroyed by the action of those upon whom he depends for patronage. But, when those upon whom he depends for patronage are acting as individuals, he has a measure of security in the probability that different preferences will be shown by persons left to their own choice; and, if some who desire to injure his business secure the co-operation of others by unlawful means, the law gives him a remedy. If the defendants are right, he can be deprived of this security and this remedy by converting those who desire his injury into the majority of an association, and those who do not into a suppressed minority, held to the designated course by the pressure of a system of fines

and penalties. But giving a new face to an old wrong can never defeat the remedy, for the law will inquire as to the substance of the thing complained of. If the plaintiffs were in fact injured by a forced withdrawal of patronage secured through the action of defendants' organization, they are entitled to redress. Without undertaking to designate with precision the lawful limit of organized effort, it may safely be affirmed that when the will of the majority of an organized body, in matters involving the rights of outside parties, is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation. The withdrawal of patronage by concerted action, if legal in itself, becomes illegal when the concert of action is procured by coercion. In this case it could easily be found that a fine of \$50 for a violation of the rules was not intended to be applied to rules adopted to secure a performance of the ordinary duties of membership. If in fact designed to hold unwilling members to unity of action in an aggressive movement of unlawful character, the defendants cannot complain if the law so treats it. The jury could properly infer from the nature and management of the defendants' organization that their united action was due in part to the means adopted to secure it. The force of the measure resolved upon lay partly in the fact that the by-laws threatened penalties against any who should fail in carrying it into effect.

The fact that the members of the association voluntarily assumed its obligations in the first instance, so far as it is a fact, is not controlling. The law cannot be compelled by any initial agreement of an associate member to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken. The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible, and the standing threat of their imposition may properly be classed with the ordinary threat of suits upon groundless claims. The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body cannot change the result. The law sees in membership of an association of this character both the authors of its coercive system and the victims of its unlawful pressure. If this were not so, men could deprive their fellows of established rights, and evade the duty of compensation, simply by working through an association. But it can hardly be supposed that the defendants' organization reached its present proportions without some previous use of the methods disclosed by the evidence above cited; and, as far as its membership was due to coercion, there was a further element of unlawful pressure in the enforcement of the united action against the plaintiffs. It would be strange, indeed, if the members of an association organized upon such a basis, and advanced by such means, could meet a claim of this nature by saying that they had made

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no attempt to secure the co-operation of outside parties. It is clear that if the association had comprised but a small portion of the manufacturers, and had destroyed the plaintiffs' business by compelling the manufacturers to join them in withholding patronage, its members would have been liable. But it is claimed, in effect, that a business can be destroyed with impunity when the organization has become so extensive that there are no outside patrons to control, or so few that their course is a matter of no moment. Upon this theory, every successful instance of coercion would increase the safety with which another coercion could be attempted, and, when coercion had been pursued until but one contumacious person remained, immunity would be complete. It is clear that the law cannot concede to organizations of this character the powers and immunities claimed for their association by these defendants, and retain its own power to protect the individual citizen in the free enjoyment of his capital or labor.

The evidence excepted to was properly admitted. Evidence that the defendants individually expressed a purpose to continue to patronize the mill, in connection with evidence that they did so without complaint until the general withdrawal, was evidence tending to characterize the withdrawal when made. The items offered as showing the profit of the mill tended to establish the damages according to the rule adopted by the court, and no question is now made as to the correctness of that rule. Evidence of the existence and rules of the New England association was admissible because of the connection of that body with the local organization. The resolution and by-laws of the Barre association, the agreement of that association with the Boston Wholesalers' Association in restriction of the sales of its members, the appointment of a committee to inquire as to violations of its rules, the official correspondence had with one of its members upon that subject, the fact that a fine was imposed for an ascertained violation, and the action of the association in assuming the defense of its secretary when sued because of a letter written in respect to an alleged violation, were all admissible as showing the purpose and use of the organization, and its coercive character as against its own members. The statements of different defendants indicative of their purpose and of members of the association not defendants as to the force and effect of the vote, made contemporaneously with and in explanation of their action under it, were clearly admissible.

The case stands upon grounds which are inconsistent with the allowance of exemplary damages; for damages of this nature, if ever recoverable against several defendants, are recoverable only where all are shown to have been moved by a wanton desire to injure. The exemplary damages were separated by a special verdict, but were included in the judgment rendered.

Judgment reversed, and judgment for actual damages, with interest from date of judgment below.

VIRGINIA SUPREME COURT OF APPEALS.

Jed HOTCHKISS, Trustee, *Appt.*,
v.
Samuel MIDDLEKAUF *et al.*

(.....Va.....)

1. Power to convey land is not included in a power of attorney to demand and receive real and personal estate and prosecute suits, and to perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises.
2. A conveyance by a committee, of the land of a lunatic, is not valid, when authorized only by judgment of a court of another state, in which the lunatic and the committee reside.
3. A waiver, to be effective, must be made with full knowledge of the rights which one intends to waive.

(January 12, 1899.)

APPPEAL by defendant from a decree of the Circuit Court for Rockingham County in favor of complainants in a suit to enjoin the prosecution of an action in ejectment to recover possession of certain real estate and for partition thereof. *Reversed.*

The facts are stated in the opinion.

Messrs. James Bumgardner, Jr., J. Lewis Bumgardner, and Rudolph Bumgardner, for appellant:

The plaintiff had a right to try his title at law, and to have the facts upon which the validity of his title depended ascertained by the verdict of a jury, unless the defendants in ejectment were prevented by fraud, accident, or surprise from making defense at law, or unless the plaintiff occupied some relation to the defendants exclusively cognizable in equity, which precluded the plaintiff from asserting against the defendant a superior legal title.

Oxford's Case, 2 White & T. Lead. Cas. in Eq. pt. 2, p. 676.

A partition suit cannot be made a substitute for an action of ejectment.

Pillow v. Southwest Virginia Improv. Co. 92 Va. 145.

The original jurisdiction of courts of chancery in cases of partition was only where the complainants had a clear legal title, and where any doubt arose in regard to the complainant's title the court either dismissed the bill or retained the case until the question of title was tried at law.

2 Minor, Inst. ed. 1877, 417.

And so it is clear that where there is no relation of tenant in common, joint tenant, or coparcener between complainant and respondent, there can be maintained no suit for partition, and equity can have no possible jurisdiction to try the title to the land.

Va. Stat. Code, § 2562.

It is as essential to prove that the attorney in fact was duly authorized by a legal

power of attorney, as it is to prove the execution of the instrument executed by the attorney.

Stuart v. Com. 91 Va. 152; *Devlin, Deeds*, § 357; *Hager v. Spect.* 52 Cal. 579; *Preston v. Hull*, 23 Gratt. 600, 14 Am. Rep. 153.

There are cases where a court of chancery, having jurisdiction over parties owning lands outside of the territorial jurisdiction of the court, has entered a decree against such party subject to its jurisdiction, requiring such party to execute a deed conveying the land, or to do some other act affecting the land.

Penn v. Baltimore, 1 Ves. Sr. 444, 2 White & T. Lead. Cas. in Eq. pt. 2, pp. 1806-1832.

But no court outside of the limits of Virginia has jurisdiction to authorize any agent of the court to convey, or to do any act affecting lands situated within the limits of Virginia.

Wimer v. Wimer, 82 Va. 890; *Poindexter v. Burwell*, 82 Va. 507; *Freeman*, Judgm. § 564.

Every requirement of the statutes authorizing and providing for the sale and conveyance of land returned for nonpayment of taxes must be complied with, as the proceedings are *ex parte* and merely clerical and not judicial in any sense; and such statutes are in the nature of penal statutes, and must therefore be strictly pursued, and unless the statutory provisions and requirements are complied with the sale and conveyance are void.

Delaney v. Goddin, 12 Gratt. 286; *Randolph v. Stalnaker*, 13 Gratt. 525; *Nowlin v. Burwell*, 28 Gratt. 883; *Bond v. Pettit*, 89 Va. 474; *Boon v. Simmons*, 88 Va. 259.

These powers of attorney were not a ratification of the illegal conveyance of Butler, committee of Helen D. Hawkesworth, to Mount.

Wilson v. Carpenter, 91 Va. 183; *Montague v. Massey*, 76 Va. 307.

By attorneys in fact are meant persons who are acting under a special power created by deed.

18 Am. & Eng. Enc. Law, p. 871, note; *Stuart v. Com.* 91 Va. 152; *Preston v. Hull*, 23 Gratt. 600, 14 Am. Rep. 153.

A committee of an insane person is powerless, to sell the lands of such insane person situated in Virginia, although so directed by decree of a chancery court of the state of New York, the state of which the insane person is an inhabitant.

Penn v. Baltimore, 1 Ves. Sr. 444, 2 White & T. Lead. Cas. in Eq. pt. 2, pp. 1806-1832; *Wimer v. Wimer*, 82 Va. 890; *Poindexter v. Burwell*, 82 Va. 507; *Freeman*, Judgm. § 564; *Gibson v. Burgess*, 82 Va. 650; *Wharton*, Conf. of L. § 289.

Messrs. O. B. Roller and J. B. Stephenson, for appellees:

Inasmuch as the said Helen D. Hawkesworth was a resident of the city and county of New York, that court had personal jurisdiction of the lunatic and of her committee, and could direct a conveyance by such com-

NOTE.—As to the validity of a deed made by an insane person, see note to *Riley v. Carter* (Md.) 19 L. R. A. 489.
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mittee because of that fact, even if the land was not in that state.

Poindexter v. Burwell, 82 Va. 512; *Penn v. Baltimore*, 1 Ves. Sr. 444, 2 White & Tudor Lead. Cas. in Eq. 1806-1832; *Massie v. Watts*, 6 Cranch, 148, 3 L. ed. 181; *Farley v. Shippen*, Wythe, 135; *Guerrant v. Fowler*, 1 Hen. & M. 5; *Dickinson v. Hoomes*, 8 Gratt. 353; 4 Minor, Inst. 1201.

Any form of words indicating an intention is sufficient to create a power.

2 Bouvier, Law Dict. title *Power*, 356.

The power may be created by parol as well as by sealed instrument.

2 Minor, Inst. 901; *Yerby v. Grigsby*, 9 Leigh, 387; *Ewing v. Burnet*, 11 Pet. 52, 9 L. ed. 629; *Naddo v. Bardon*, 4 U. S. App. 642, 51 Fed. Rep. 493, 2 C. C. A. 335; *Underwood v. Dugan*, 139 U. S. 380, 35 L. ed. 197.

If the deeds gotten in 1872 and 1874 from States Wilkins and Helen H. Furman respectively, were not utterly worthless, for the reason that they had no title to convey, those deeds surely inured to the benefit of all of the joint owners of these "undivided acres" of the Gambill-Huston survey.

Forrer v. Forrer, 29 Gratt. 134; *Turner v. Sawyer*, 150 U. S. 580, 27 L. ed. 1189.

Neither the tax title of John N. Hill nor that acquired by John E. Roller to the tract of 5,000 acres in controversy can be assailed collaterally.

Black, Tax Titles, § 430; *Robinett v. Preston*, 4 Gratt. 141; *Smith v. Chapman*, 10 Gratt. 465; *Hawkinberry v. Snodgrass*, 39 W. Va. 332; *Machir v. Funk*, 90 Va. 289.

Possession of part is in no sense possession of the whole, in the case of an interlock, unless the possession is of a part of that interlock.

Taylor v. Burnside, 1 Gratt. 200; *Koiner v. Rankin*, 11 Gratt. 427; *Cline v. Catron*, 22 Gratt. 392; *Garrett v. Ramsey*, 26 W. Va. 345.

Messrs. Hulst Glenn, Henry V. Strayer, John E. Roller, and Charles Curry, also for appellees:

Appellant cannot claim under the Hawkesworth-Wilkins-Butler deed of 1837, for one purpose, and for another purpose deny the deed. If appellant claims under the deed at all, he is estopped to deny its validity. He cannot even set up an outstanding title at all against it.

Bolling v. Teel, 76 Va. 487; *Herman, Ectoppel*, 243; *Gaines v. New Orleans*, 6 Wall. 717, 18 L. ed. 965; *Kinsman v. Loomis*, 11 Ohio, 475; *Rangely v. Spring*, 26 Me. 142; *Farrar v. Cooper*, 34 Me. 401; *Douglass v. Scott*, 5 Ohio, 195; *Carver v. Jackson, Astor*, 4 Pet. 1, 7 L. ed. 761.

If appellant is estopped to deny the validity of the Hawkesworth-Wilkins-Butler deed of 1837, then the deed must be accepted as valid, and appellant having no title by adverse possession, and appellees tax title deed being unassailable, this case is settled in favor of appellees.

The New York court had jurisdiction to sell said lands.

Barger v. Buckland, 28 Gratt. 863; *Penn v. Baltimore*, 1 Ves. Sr. 444; *Massie v. Watts*, 6 Cranch, 148, 3 L. ed. 181; *Dickinson v. Hoomes*, 8 Gratt. 353.

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It is not absolutely necessary to the execution of a power that the deed should recite or refer to it.

Devlin, Deeds, § 223.

If the instrument should be wholly inoperative, unless taken as an execution of the power, the maker will be considered as having intended to have executed it, although no reference to the power is made; but then if there be any legal interest on which the deed can attach, it will not execute a power, but pass the interest of the one executing the deed.

Devlin, Deeds, § 223, note 1; *Pease v. Pilot Knob Iron Co.* 49 Mo. 124; Code 1887, §§ 2464, 2438.

Keith, P., delivered the opinion of the court:

Hotchkiss, trustee, brought an action of ejectment in the circuit court of Rockingham county against Samuel Middlekauf and others to recover 5,000 acres of land lying in said county. Before this cause was tried, the defendants filed a bill in chancery, in which they allege that the 5,000 acres which is the subject-matter of the ejectment suit was part of a larger tract of land originally granted by the commonwealth on the 8th of February, 1796, to one Gambill, and that by virtue of certain deeds they have become the owners of the land in controversy, and have thus become "joint owners" with the plaintiff in ejectment in the proportion which the 5,000 acres bears to the whole of the original patent, the title to the residue of which they concede is in Hotchkiss, trustee. In accordance with the prayer of the bill, proceedings in the action of ejectment were enjoined, and, the chancery cause coming on to be heard upon the bill, answer, exhibits, depositions, and the report of the commissioner in chancery, to whom it had been referred, the court decreed "that the complainants . . . be quieted in their possession and ownership of the 5,000 acres of land known as the 'Hill Survey' upon the terms indicated in the report of Commissioner Liggett." The cause is before us upon an appeal from that decree.

Appellant urged upon the court that there was error in the decree, for the reason, among others, that the bill was to be taken as claiming a tenancy in common upon the part of the plaintiffs with the defendants, while the decree was in favor of the plaintiffs for an ascertained tract of 5,000 acres; but, without entering upon any discussion of that and other technical objections taken to the proceedings in the circuit court, we shall content ourselves with an inquiry into the title presented for our consideration by the appellees, and endeavor to ascertain whether they have shown any right whatever to the real estate in controversy.

Their alleged title, like that of the appellant, begins with the grant from the commonwealth of Virginia to Matthew Gambill, dated February 8, 1796, and the chains of title of appellant and appellees are coincident until the deed from States Wilkins and George F. Butler, attorney in fact, and committee of Helen Hawkesworth, to James R. Mount, is reached.

Appellees claim under a deed to James R. Mount from George F. Butler claiming to act as the attorney in fact of States Wilkins and as committee of Helen D. Hawkesworth, a lunatic. Placing the title by this means in James R. Mount, they deduce it through him to Prosper Knowlton, and as to the land of Prosper Knowlton appellees claim that it was sold for taxes, and conveyed by Little W. Gambill, clerk of the county court of Rockingham, to one John N. Hill, of said county, by deed dated the 5th of December, 1857. By Hill it was conveyed to J. D. Price by deed of the 7th of April, 1866, and from him, by several deeds shown in the record, and not disputed, it is vested in the appellees. The deed to Mount was, as we have seen, executed by George F. Butler, as attorney in fact for States Wilkins, and committee of a lunatic; and his power and authority, both as attorney in fact and as committee, are denied by the appellant.

The authority to execute a deed must be by deed, for "the law requires that a power of attorney to execute a deed should be in writing and of the same solemnity as the deed itself; . . . [and the] . . . authority [of the agent] should be co-extensive with the act to be done, and the instrument clothing him with the authority as complete as the deed which he is to give." 1 Devlin, Deeds, 2d ed. § 356.

The following power of attorney is exhibited with the record:

Know all men by these presents that I, States Wilkins, of the city of New York, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, my friend, George F. Butler, of said city, my irrevocable, true, and lawful attorney for me and in my name, place, and stead to ask, demand, and receive of and from any person or persons all such real and personal estate as I may be entitled to by virtue of my being a son and heir at law of Jacob Wilkins and Ann, his wife, late of the city of New York, deceased; and I do hereby irrevocably authorize and empower the said George F. Butler to commence and prosecute in my name any suit or suits in that behalf, and to compromise or settle or compound the same, or either of them from time to time, as he may deem proper, with full power of substitution, irrevocably giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand and seal the 29th day of October in the year of our Lord one thousand eight hundred and thirty-four.

States Wilkins. [L. S.]

Powers of attorney are strictly construed. "While the general rule governing the inter-
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pretation of all contracts or written instruments that the intention of the parties is to be considered in construing their language, applies to the construction of powers of attorney, yet powers of attorney are construed strictly, and the authority is never considered to be greater than that warranted by the language of the instrument, or indispensable to the effective operation of such authority. 'Powers of attorney are, ordinarily, subject to a strict construction; or, rather, the authority given is not extended beyond the meaning of the terms in which it is expressed.'" 1 Devlin, Deeds, 2d ed. § 358.

The power of attorney under consideration nowhere authorizes the agent to sell and convey. He is empowered "to demand and receive of and from any person or persons all such real and personal estate" as States Wilkins may be entitled to as son and heir at law of Jacob Wilkins and Ann, his wife.

Just such an instrument came under consideration before the court of civil appeals of Texas. Said the court: It was "found as a conclusion of law that the power of attorney from Parsons and wife to Duncan, Morgan, and Adams did not authorize them to sell the land in controversy. The court did not err in this conclusion. The power conferred was 'to bring suit for, settle up, compromise, release, obtain, or recover the interest belonging to and owned by Louise C. Parsons,' etc. The power is not given to sell and convey. Powers of attorney are strictly construed, and the extent of authority must be ascertained from the terms of the instrument itself."

So far, therefore, as George F. Butler undertook to convey, as attorney in fact of States Wilkins, his deed is a nullity, because the authority under which he assumed to act conferred no power to execute such an instrument. George F. Butler and States Wilkins were appointed a committee of Helen D. Hawkesworth, a lunatic, by order of the chancery court of the state of New York, on the 23d of May, 1836, and on the 8th of August of the same year, upon the petition of George F. Butler, stating that Helen D. Hawkesworth was interested in two large tracts of land in the counties of Rockingham, Albemarle, and Orange in the state of Virginia, that the lands were entirely unproductive, that there was no prospect of their improving in value, that it was to the interest of the lunatic that her interest should be sold, and praying for authority to sell the same, it was referred to one of the masters of the court to ascertain whether it would be advantageous or beneficial to the said lunatic that all her right, title, and interest in the land should be sold. The master was required to report with all convenient speed. He obeyed the order by submitting a report of even date with the order itself, in which he states that the land consists of about 20,000 acres; that it is not worth 5 cents per acre, and he does not believe it could be sold for any price in cash; that one half of it belongs to the lunatic; and that, if it is not disposed of, it will probably be sold for taxes. Upon these facts he is of opinion that it

would be advantageous and beneficial to Helen D. Hawkesworth, the lunatic, that all her right, title, and interest in said land be sold.

The proceedings in the courts of the state of New York by which Helen D. Hawkesworth was adjudged a lunatic, and George F. Butler was appointed her committee, and authorized to sell her land in the state of Virginia, and the deed executed by him in conformity with and obedience to that order constitute the only authority with which Butler was clothed to divest the title of Helen Hawkesworth, and transmit it to his grantee. Nor is it pretended that there is any other deed from her upon which the title of appellees to the land of which she was seised can rest. It is settled law that real estate is exclusively subject to the laws and jurisdiction of the courts of the nation or state in which it is located. No other laws or courts can affect it. *Story, Conf. L. § 591*. And it was said by Chancellor Zabriskie in *Davis v. Headley*, 22 N. J. Eq. 115: "I find no case in which a statute, judgment, or proceeding in one country has been held to affect such property when situate in another country, or beyond the jurisdiction of the sovereign or court making the statute or decree." It is true "that in cases of fraud, trust, or contract, courts of equity will, whenever jurisdiction over the parties has been acquired, administer full relief without regard to the nature or situation of the property in which the controversy had its origin, and even where the relief sought consists in a decree for the conveyance of property which lies beyond the control of the court, provided it can be reached by the exercise of its powers over the person and the relief asked is of such a nature as the court is capable of administering." *Wimer v. Wimer*, 52 Va. 901, and authorities there cited.

Between these two propositions there is not the slightest conflict. The decree of the court does not operate *ex proprio vigore* in the foreign state or territory, but having jurisdiction over the person, it will, in cases of fraud, trust, or contract, compel the party within its jurisdiction to obey its decree. As was said by Chancellor Wythe in *Farley v. Shippen*, Wythe, 135: "If an act performed by a party in Virginia, who ought to perform it, will be effectual to convey land in North Carolina, why may not a court of equity in Virginia decree that party, regularly brought before that tribunal, to perform the act? Some of the defendant's counsel supposed that such a decree would be deemed by our brethren of North Carolina an invasion of their sovereignty. To this shall be allowed the force of a good objection if those who urge it will prove that the sovereignty of that state will be violated by the Virginia court of equity decreeing a party within its jurisdiction to perform an act there, which act, voluntarily performed anywhere, would not be such a violation." In the last clause above quoted is to be found the very kernel of the matter. A foreign court can compel a party within its jurisdiction to do an act in Virginia, which act, if voluntarily performed by such party, would not violate the sovereignty of this state. If Helen Hawkesworth had been of sound mind, and had voluntarily conveyed the property in question, it would have been a valid act,—valid everywhere. So, if she had as a result of contract, trust, or fraud been under obligation to convey this property, the court of New York, having jurisdiction over her, could have compelled obedience to its decree, and that act which she could voluntarily have performed would have been equally valid, though done under the compulsion of a decree of a foreign court. But here we have no such case. Helen Hawkesworth was a lunatic. She has made no deed, and she was under no obligation, by contract or otherwise, to make a deed. The authority with which Butler, her committee, was clothed, is derived, not from her, but from the laws of New York, and the act of her committee derives its whole validity from the judgment of the court which clothed him with power as her committee, and upon his petition decreed the sale of the property of the lunatic lying beyond its jurisdiction and within the limits of this state.

We are of opinion that the deed from George F. Butler to James R. Mount as attorney in fact for States Wilkins and as committee of Helen D. Hawkesworth was ineffectual to convey the land in controversy. Nor do we think that any efficacy is imparted to it by the subsequent conduct of States Wilkins and of Mrs. Furman, the daughter and heir at law of Helen Hawkesworth, even if the deed of Butler as committee is to be considered as a voidable, and not as a void, act. Ratification and acquiescence imply knowledge, and there is no proof in this record that the acts relied upon as a ratification of or acquiescence in the assumption upon the part of George F. Butler of authority to execute the deed to Prosper Knowlton were performed with knowledge on the part of Wilkins and Mrs. Furman of the existence of that deed, and the circumstances attending its execution.

As was said by Judge Harrison in *Wilson v. Carpenter*, 91 Va. 192: "Confirmation must be a solemn and deliberate act." . . . No man can be bound by a waiver of his rights, unless such waiver is distinctly made with full knowledge of the rights which he intends to waive; and the fact that he knows his rights, and intends to waive them, must plainly appear."

As we have seen, appellees' title flowing from the deed of Butler to James R. Mount passed from him to Prosper Knowlton, and, he being delinquent in the payment of taxes, it was sold by the state, and a deed made by L. W. Gambill, clerk of Rockingham county court, on the 5th of December, 1857.

What has been said with reference to the deed of George F. Butler in his double capacity of attorney in fact and committee renders it unnecessary to say anything with respect to the deed from L. W. Gambill further than to remark that it conveyed only such title as was vested in Prosper Knowlton, who had no title, and could, therefore, transmit none.

Nor need we consider whether this tax deed could be, under the circumstances, re-

garded as constituting color of title, for there is no evidence of adversary possession by force of which color or claim of title could ripen into a good title.

Nor do we deem it proper to inquire into the title of appellant, nor to express any opinion with respect thereto.

We are of opinion, for the reasons stated, that the decree of the Circuit Court should be reversed; the injunction awarded dissolved, the bill dismissed, and the appellants left to

prosecute their action of ejectment in the circuit court of Rockingham county without prejudice to the rights of the parties, plaintiff and defendant, to that suit, except in so far as we have found it necessary in this opinion to pass upon the validity of the deed to James R. Mount from George F. Butler as attorney in fact for States Wilkins, and as committee of Helen D. Hawkesworth.

Biely and Cardwell, JJ., absent.

WISCONSIN SUPREME COURT.

Mrs. A. W. FISHER, Resp't.,

v.

W. P. WALSH et al., Appts.

(.....Wis.....)

1. No recovery can be had for services under an entire contract where the employee voluntarily abandons work, without valid excuse, before the stipulated time.
2. Threats of strikers which excuse an employee for quitting service in breach of his contract, although they entitle him to recover the actual benefit conferred by his services, do not relieve him from liability for the damages sustained by the employer on account of his quitting the service, which must be deducted from his wages.
3. A requested instruction to find for defendants, if plaintiff quit their services pursuant to an agreement for a strike, should not be qualified or confused by adding a clause as to his reason for quitting, and the effect upon him of danger or apparent danger.
4. A stipulation that the damages for breach of contract in quitting the service of a contractor for loading and unloading vessels and cars upon docks shall be the loss of fifteen days' wages is justified by the uncertainty as to the injury that may be caused thereby to the employer's business.

(February 21, 1899.)

A PPEAL by defendants from a judgment of the Superior Court for Douglas County in favor of plaintiff in an action brought to recover wages alleged to be due and unpaid. *Reversed.*

Statement by Winslow, J.:

This was an action to recover \$25.50, for fifteen days' personal services rendered by one McKillop to the appellants in June and July, 1896, the claim having been assigned by McKillop to the plaintiff. The answer, after a general denial, contained a counterclaim, alleging that McKillop was employed under an entire contract for the season of

1896, and that he breached said contract without cause, and claimed damages for such breach. On the trial it appeared that the defendants, as copartners, had entered into a contract with various railroad and steamboat companies for the loading and unloading of vessels and cars upon some of the docks at West Superior for the season of 1896, and had given bond for the prompt performance of such contract in a considerable sum. In order to perform this work, two classes of men were employed. One class, to which McKillop, plaintiff's assignor, belonged, were known as "day men," who were regularly employed under a contract which stipulated that they should work throughout the season of 1896, and should receive pay at a stipulated rate per day for every working day, whether work was provided for them or not. Of this class there were about 80 men. The other class, known as "hourly men," were employed casually, as the occasion arose, and paid by the hour for the time they in fact worked. Of these the defendants had employed at times some 300. McKillop, in common with the other day men, had entered into a written agreement of employment, which, in addition to the terms above mentioned, provided several ways in which it might be terminated; among others, the following: First, by first party or his agents discharging second party for any violation of this agreement in any respect; third, by the neglect, refusal, or inability of the second party at any time to obey the orders of the first party or his foreman, or to perform a fair and reasonable day's work; fourth, by the failure of the second party to perform any agreement therein. It further provided that, in case of termination for either of the above-mentioned causes, the first party might retain any wages then earned by the second party, not exceeding fifteen days' wages in all, to his own use, as and for liquidated damages for the breach thereof, which said sum was agreed to be the ascertained damages for such termination and breach, and a fair and full compensation therefor. It was also provided that payment should be made on the fifteenth of each month for the work done during the preceding month. The plaintiff knew or had heard when he signed the contract that the defendants had contracted with railroad and steamship companies as aforesaid, and were

NOTE.—As to the effect in general of an intervening impossibility to perform as a relief from the obligation of a contract, see *note* to *Stewart v. Stone* (N. Y.) 14 L. R. A. 215. See also *Remy v. Olds* (Cal.) 21 L. R. A. 645. As to the effect of strikes to relieve a carrier for failure to perform its contract, see *note* to *Empire Transp. Co. v. Philadelphia & R. Coal & I. Co.* (C. C. A. 8th C.) 85 L. R. A. 623. 42 L. R. A.

under bonds; that a large force was required to carry out their contracts; that boats and cars were liable to come in at all times of the day or night, and would have to be loaded or unloaded; and that it required a few experienced men to work with the inexperienced ones to safely and speedily conduct the work. It appears by the evidence that on the evening of the 6th of July, 1896, the so-called "hourly men" quit in a body, or "struck," demanding an increase of wages; and that the "Longshoremens Union," on the following day, July 7th, discussed the question of that strike, and assumed control and jurisdiction of it for the hourly men, and served on the defendants a notice signed by their officers, demanding an increase of pay for the hourly men. It appears that McKillop had for something like a year been a member of the Longshoremens Union, but had dropped out of active connection with it, and did not know that the union was having anything to do with the strike of the hourly men. The day men, continuing to work during the 7th and 8th of July, were interfered with by squads of the striking hourly men, and threatened with serious violence unless they also quit work. This interference did not occur at the docks where they were at work, but upon the streets, as they were going to and from their work. These threats were of personal injury, and, as plaintiff's assignor and others of the day men testified, put them in serious fear; so that on the evening of July 8 a considerable number of the day men, including McKillop, attended a meeting of the Longshoremens Union, at which it was demanded that the day men also quit work, unless wages were raised both for the hourly and day men, and that such quitting take place at noon of the following day, unless the demands were acceded to; and a resolution was offered and passed that the day men must quit accordingly, unless such concessions were made. It does not appear that McKillop voted on this resolution, nor whether he entered into any agreement other than that which may be inferred from the fact that he was a member of the union, and hence impliedly bound to abide its decisions. McKillop testifies that he was again interfered with on the morning of the 9th on his way to work, by seven or eight of the strikers; and at noon he quit work, as did also all of the day men who belonged to the union, the defendants having declined to accede to their demands. McKillop testifies: "I was stopped on my way to work the morning of the day I quit. There were seven or eight of them. They asked me if I was going to quit. I said I didn't think I would. They said, if I didn't quit, they would club me to death; they would murder half of us down there. I said nothing more, but kept on going. I worked until noon that day. On our way home, we were met by another gang, and they told us to stay home that afternoon. I don't know who those men were. I didn't go back to work that afternoon. I was kind of scared of those men down there in the yard. I boarded at the corner of Third street and Banks avenue. I didn't consider it safe at any time after I 43 L. R. A.

quit, until the strike was over, for me to go back to work, and for that reason I remained away. I heard of men getting held up and attacked after I quit. I don't know what men they were. They were working for Mr. Walsh. I quit because I feared those men I met in going to and from my work would hurt me." On cross-examination he testified as follows: "It is a fact that the reason I quit was because the rest of the day men quit;" and, further: "I didn't know for sure at noon of July 9th that I was going to quit. I thought everything might be all right when we got home at noon; that is, the strike might be called off, or something. I was thinking that." After the day men quit, on the 9th of July, the strike continued for some days, the officers of the union exerting themselves to prevent men coming in from St. Paul and Minneapolis to supply the place of the strikers; and the defendants were undoubtedly put to great straits and large expense by reason thereof, though they were not allowed on the trial to go into that, it being held that their damages were liquidated by the written contract. The plaintiff claimed that there was due McKillop, when he quit, fifteen days' wages, which, at the contract price of \$1.70, amounted to \$25.50, and put in evidence a written assignment to her of all claim against the defendants for work, labor, and services done and performed during June, 1896, amounting to \$25.50, dated July 24, 1896. The jury found for the plaintiff, and from the judgment entered thereon, after first moving to set the verdict aside, as contrary to the evidence, the defendants appealed.

Mr. A. T. Reek for appellants.

Messrs. O'Brien & Vaughn, for respondents:

The plaintiff had a right to sue on a *quantum meruit* for the reasonable value of services performed under the contract after the termination thereof.

In the case of a partial performance of a contract, where full performance was prevented by reason of sickness, plaintiff was allowed to sue on a *quantum meruit*, and not on the contract.

Green v. Gilbert, 21 Wis. 401; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Jennings v. Lyons*, 39 Wis. 553, 20 Am. Rep. 57; *Harrington v. Fall River Iron Works Co.* 119 Mass. 82; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Stewart v. Loring*, 5 Allen, 306, 81 Am. Dec. 747; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Cornell v. Cornell*, 96 N. Y. 115; *Dewey v. Union School Dist.* 43 Mich. 480.

When a special contract is in existence and open the plaintiff cannot sue on a *quantum meruit*. Here, the work was finally abandoned, and the jury found that no new contract had been entered into; under these circumstances the plaintiff ought not to lose the fruits of his labor.

Anson, Contr. 2d Am. ed. p. 376; *Hawley v. Keeler*, 53 N. Y. 114; *Woolner v. Hill*, 93 N. Y. 581; *Smith v. Roe*, 7 Colo. 95; *Ran-kin v. Darnell*, 11 B. Mon. 30, 52 Am. Dec.

557; *Lovell v. St. Louis Mut. L. Ins. Co.* 111 U. S. 264, 28 L. ed. 423.

If there has been a special contract, and the plaintiff has performed a part of it according to its terms, and has been prevented by the act of the defendant from completing it, he may recover upon the *quantum meruit* the reasonable price of the services already performed.

1 Beach, *Modern Law of Contr.* § 693, p. 840; *Hemminger v. Western Assur. Co.* 95 Mich. 355; *McGregor v. Ross*, 96 Mich. 103.

If a person renders personal service under an entire contract, which either his own or his employer's sickness or death prevents him from fully performing, he can recover upon an implied assumpsit what those services are reasonably worth.

1 Beach, *Modern Law of Contr.* § 228, p. 284; *Parker v. Macomber*, 17 R. I. 674, 16 L. R. A. 858; *Cutter v. Powell*, 6 T. R. 320; *Bream v. Marsh*, 4 Leigh, 21; *Haynes v. Second Baptist Church*, 12 Mo. App. 536; *Carpenter v. Gay*, 12 R. I. 306; *Farrow v. Wilson*, L. R. 4 C. P. 744; *Seaver v. Morse*, 20 Vt. 620.

The defendant is under a contract duty to furnish reasonable protection to his employees, not only when they are actually engaged in their service, but also in going to and from the place where the work is being done.

1 Shearm. & Redf. Neg. 4th ed. § 190, p. 325.

A strike of workmen is no excuse for the failure to perform a contract, but where the workmen abandon their work, and by violence and intimidation prevent other employees who are ready and willing to work from so doing, then this ceases to be a strike.

Geisner v. Lake Shore & M. S. R. Co. 102 N. Y. 563, 55 Am. Rep. 837; 1 Beach, *Modern Law of Contr.* § 238, p. 296; *Pittsburgh, Ft. W. & C. R. Co. v. Hazen*, 84 Ill. 36, 25 Am. Rep. 422; *Pittsburgh, O. & St. L. R. Co. v. Hollowell*, 65 Ind. 188, 32 Am. Rep. 63; *Lake Shore & M. S. R. Co. v. Bennett*, 89 Ind. 457; *Indianapolis & St. L. R. Co. v. Juntgen*, 10 Ill. App. 295.

A common carrier is not liable for delay in the shipment of goods caused solely by the lawlessness and irresistible violence of strikers and their confederates.

International & G. N. R. Co. v. Tisdale, 74 Tex. 8, 4 L. R. A. 545; *Missouri P. R. Co. v. Levi* (Tex. App.) 14 S. W. 1062; *Southern P. R. Co. v. Johnson* (Tex. App.) 15 S. W. 121; *Haas v. Kansas City, Ft. S. & G. R. Co.* 81 Ga. 792; 1 Beach, *Modern Law of Contr.* § 238, p. 296; 24 Am. & Eng. Enc. Law, p. 133; *Pittsburgh, Ft. W. & C. R. Co. v. Hazen*, 84 Ill. 36, 25 Am. Rep. 422.

A servant may abandon his service for a breach of any of the expressed or implied provisions of the contract, as when the master fails to provide him with sufficient and wholesome food.

Wood, *Mast. & S.* 2d ed. § 148, p. 288.

It is only in cases where the contract is entire, and performance is a condition precedent to payment, that no recovery can be had for partial performance.

43 L. R. A.

Davis v. Maxwell, 12 Met. 286; *Marsh v. Russellson*, 1 Wend. 514; *Larkin v. Buck*, 11 Ohio St. 561; *Davis v. Preston*, 6 Ala. 83; *Jones v. Dunton*, 7 Ill. App. 580.

Winslow, J., delivered the opinion of the court:

The question which was sharply litigated in this case was whether McKillop quit because of genuine and justifiable fear of serious bodily violence at the hands of the hourly men who had struck, or because of the agreement or resolution of the day men to strike at noon of the 9th of July, unless the demands of the hourly men were acceded to. There was evidence which would justify a finding either way on these propositions. Certainly there were ample facts which would justify the conclusion that McKillop quit because he chose to abide by the resolution, or, in other words, that he was in fact one of the second set of strikers. If such were the case no recovery could be had, because his contract was entire, and he voluntarily abandoned his work, without valid excuse, before the end of the stipulated time. *Kopitz v. Powell*, 56 Wis. 671. This proposition of law was substantially correctly stated in the following instruction, which was offered by the defendant: "You are instructed that if Mr. McKillop left his work under and pursuant to the agreement of the day men and the hourly men, on the night of July 8, 1896,—that is, to quit at noon, July 9th, if defendants did not concede to the proposition submitted to them on July 5th, then plaintiff cannot recover, and your verdict shall be for the defendants." The court read this instruction to the jury, and added the following words: "That is, if that was the reason he quit, and the danger was not such—that the danger or apparent danger was not such—that the man of ordinary nerve would have refused or declined to go on with the work, your verdict will be for the defendants." We think that the addition of this limitation to the instruction was error. Irrespective of the statute which requires an instruction to be given as asked or refused in full (Rev. Stat. 1878, § 2853), we think the defendants were certainly entitled to have the instruction which they asked given without dilution or qualification. The proposition was that, if McKillop quit in pursuance of the agreement to strike, he could not recover, and the jury should have been so informed plainly and directly, without being required to determine, in addition, what would have been the condition of mind of a hypothetical man, who perhaps had entered into no agreement to strike. The last clause added a confusing element to a simple proposition, and it was error to attach it to the instruction as asked.

A more important and vital question, however, is yet to be considered. There was a motion to direct a verdict for the defendant, which was overruled, and exception taken; and this raises the question whether, in any view of the case, the plaintiff is entitled to recover. It seems to have been assumed upon the trial below, and upon the argument in this court, that, if McKillop was excused

in leaving the defendant's service on account of the threats of strikers to do him bodily harm, he can recover for the time of his actual service, without deduction for damages suffered by the master by reason of his breach of contract. Such is certainly not the law. If a servant is prevented from performing his contract by the act or fault of the master, the master cannot, of course, recover or recoup any damages, because the breach is his own. Wood, Mast. & S. 2d ed. § 148. But, in case the servant is prevented from fulfilling his contract for personal services by his own sickness, this is not the fault or act of the master, and while the servant will generally be excused from fulfilling his contract, and be entitled to recover for the labor performed up to the time of his sickness, the master will be entitled to counterclaim his damages for the breach of contract, for which he (the master) was not responsible. The justice of the rule is apparent on a moment's reflection. Id. § 122.

Now, it may well be that McKillop would be justified in quitting if the danger of bodily injury was real and imminent, and the threats of the strikers were so serious that a reasonable man in McKillop's situation would have been justified in believing that he was in imminent danger if he continued to work; for it can hardly be claimed that a man must daily carry his life in his hand in such a manner. Still, this condition of things was a condition for which the master was in no way responsible. If it operated to relieve McKillop from his obligation to work the entire season, still it manifestly could not operate to give him any greater right against his employer than as though he had been relieved of his contract by sickness or *vis major*, for which his employer was not responsible. It is still the employee, and not the employer, who breaks the contract; and the rule that the party who breaks an entire contract shall have no recovery by reason of his part performance of it is relaxed only to the extent of permitting recovery of compensation for the actual benefit conferred upon the employer, or, as more usually expressed, by allowing the employee the value of his services after deducting the damages, if any, suffered by the employer by reason of the breach of the entire contract. Wood, Mast. & S. § 122; *Fenton v. Clark*, 11 Vt. 567; *Hubbard v. Belden*, 27 Vt. 645; *Patrick v. Putnam*, 27 Vt. 759; *Ryan v. Dayton*, 25 Conn. 183, 65 Am. Dec. 560; *Wolfe* 43 L. R. A.

v. Howes, 20 N. Y. 197-203, 75 Am. Dec. 388; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Allen v. McKibbin*, 5 Mich. 449-455. In the last-cited case (*Allen v. McKibbin*) the court tersely states the rule as to the measure of recovery thus: "Without reviewing the cases in detail, we think that the only rule which harmonizes them may be laid down substantially as follows: The defaulting plaintiff can in no case recover more than the contract price, and cannot recover that if his work is not reasonably worth it, or if, by paying it, the rest of the work will cost the defendant more than if the whole had been completed under the contract. The party in default can never gain by his default, and the other party can never be permitted to lose by it; and the price thus determined is the true amount recoverable on a *quantum meruit*." The plaintiff's recovery, then, in the most favorable aspect of the case, is limited to the amount of McKillop's wages at the agreed rate, less any damages resulting to the employer from the termination of the contract. These damages are stipulated and fixed. The language used in the written agreement is apt, and clearly expresses the understanding that the damages recoverable for a termination thereof shall be fifteen days' wages. The consequences of a termination of this contract of employment were eminently of the character to justify stipulation of the damages in advance: Uncertainty as to the possibility and expense of finding another employee, and as to the wages to be paid if one be found; uncertainty as to the extent of interruption or embarrassment of the numerous other employees, joined with the uncertain, but possibly very large, liability to vessel owners or shippers which might be imposed upon defendants by interruption of their work, the apportionment of which damages to each, should several of the contracting employees quit at once, would be extremely difficult and intricate. All these elements bring the situation within the rule adopted in *Berrinkott v. Traphagen*, 39 Wis. 219, 226. The damages stipulated by the contract equal the amount of plaintiff's demand, and therefore, upon the most favorable view of the evidence, preclude any recovery. A verdict for the defendant should have been directed, and the verdict for the plaintiff should have been set aside.

Judgment reversed, and action remanded for a new trial.

LOUISIANA SUPREME COURT.

W. B. COLLINS, *Appt.*,

v.

Margaret RYAN.

(49 La. Ann. 1710.)

*The proof disclosing that the relations of the defendant insisted upon the plaintiff marrying her, believing that he had seduced and ruined her, and that to marry her was his duty under the circumstances; and, further, that the plaintiff, upon due consideration of the pressure which was brought to bear upon him, and of his duty to repair a wrong he had done the girl, yielded a reluctant and passive consent to the performance of a marriage ceremony.—*Held*, that a case is not presented which justifies a court of justice in annulling the marriage which was thus brought about. *Lacoste v. Guidroz*, 47 La. Ann. 295, affirmed.

(December 28, 1897.)

*Headnote by WATKINS, J.

NOTE.—*Duress to avoid marriage.*

- I. Effect of, generally.
- II. What duress is sufficient.
 - a. Generally.
 - b. Threats.
 - c. Arrest or imprisonment.
- III. Ratification.
- IV. Matters of procedure.

I. Effect of, generally.

Although public policy requires that marriages shall not lightly be set aside, yet if one of the parties thereto has been coerced and induced to enter into it by means of duress or fraud, the marriage will be declared null and void. *Scott v. Sebright*, L. R. 12 Prob. Div. 21, 57 L. T. N. S. 421.

A marriage procured by abduction, terror, or fright will be annulled by the court of equity. *Ferlat v. Gojon*, *Hopk. Ch.* 478, 14 Am. Dec. 554.

And a consent to a marriage given under actual duress or obtained by force is no consent, and where marriage is obtained under such circumstances it will be declared void, although duress is not a statutory cause for divorce. *Willard v. Willard*, 6 Baxt. 297, 32 Am. Rep. 529.

So, in *Clark v. Field*, 13 Vt. 480, which was an action to set aside a marriage upon the ground of fraud, it was stated that the court of chancery, under its common equity jurisdiction, may rescind or relieve against a marriage contract, or annul the contract solemnized before a magistrate or a minister of the gospel if obtained by force, fraud, or imposition, where such marriage had not been followed by consummation or cohabitation.

And it has been held that a marriage effected by fraud or duress, which was never ratified afterward voluntarily by a mind having proper capacity and being free at the time of ratification to act without fear or force, is void *ab initio*. *Hampstead v. Plaistow*, 49 N. H. 84.

The general rule, however, seems to be that where the marriage was celebrated according to forms of law, it is *prima facie* valid, and the burden rests with the person attacking its validity to establish the invalidity, and the husband, in an action against the wife to annul the marriage on the ground of force and duress, cannot therefore be allowed to testify against her, 43 L. R. A.

APPEAL by plaintiff from a judgment of the Judicial District Court for the Parish of Calcasieu in favor of defendant in an action brought to obtain the annulment of a marriage. *Affirmed*.

The facts are stated in the opinion.

Messrs. Schwab & Moore, for appellant:

Marriage is a civil contract.

Rev. Civ. Code, art. 86.

Want of free consent is cause for annulling a marriage.

Rev. Civ. Code, art. 91, No. 2, 1772, No. 2.

Consent obtained by means of violence, threats, or intimidation is not valid, and contracts based upon such consent, not legal.

Rev. Civ. Code, arts. 1819, 1850, 1332, 1853, 1857, 1859, 1881, 1882; *Lacoste v. Guidroz*, 47 La. Ann. 296.

Mr. R. L. Belden for appellee.

In the absence of a statute authorizing it. *Bassett v. Bassett*, 9 Bush, 696.

A husband on whose behalf an action is brought to set aside his marriage on the ground that it was forced upon him by violence and under fear on his part of a threatened prosecution for a felony which he had not committed cannot stand before the court as *prima facie* unmarried, and be permitted to testify as to the fact of the marriage and the circumstances leading up to his apparent consent, until the validity of the marriage shall have been judicially declared. *Lacoste v. Guidroz*, 47 La. Ann. 295.

And a wife will be allowed alimony *pendente lite* in an action brought by her husband to annul their marriage on the ground that the husband was compelled by duress to enter into the contract, where she denies any participation in or knowledge of the alleged duress. *Vroom v. Marsh*, 29 N. J. Eq. 15.

The fact that the consent of the mother of a minor to his marriage was obtained by force and violence would not have the effect of invalidating it. *Lacoste v. Guidroz*, 47 La. Ann. 295.

II. What duress is sufficient.

a. Generally.

The question whether a party to a marriage was coerced or acted willingly is one of fact in an action to annul the marriage. *Schwartz v. Schwartz*, 29 Ill. App. 516.

And the force or coercion for which a marriage may be annulled must be such as to compel the party to act against his will. There must be actual force by imprisonment, or putting in fear, or such threatening of life or of great bodily harm, as amounts to duress *per minas*. *Stevenson v. Stevenson*, 7 Phila. 386.

And to make out a defense of duress in an action to annul a marriage, it must appear that the party's actions had been influenced by the restraint. *Schwartz v. Schwartz*, 29 Ill. App. 516.

But it is not necessary that coercion or force to induce a marriage should be such as a person of ordinary physical and mental stability would be capable of resisting; if either party is mentally incapable of resisting improper pressure, there is no consent such as the law requires for the contracting of a valid marriage. *Scott v. Sebright*, L. R. 12 Prob. Div. 21, 57 L. T. N. S. 421.

Watkins, J., delivered the opinion of the court:

The object of this suit is to obtain a judgment decreeing the ceremony of marriage between the plaintiff and defendant *ab initio* null and void, and that they were never married to each other, and further decreeing that no community or other marital rights ever resulted from the ceremony of marriage which was performed between them, their legal status of unmarried persons never having been thereby changed or affected.

The allegation of the petitioner is "that on the 10th of June, 1897, he was compelled by force and threats to procure a [marriage] license and go before John L. Wasely, justice of the peace at Lake Charles, La., and there, under threats, to go through the ceremony of marriage with [the defendant]." He avers that he had never promised said Margaret Ryan to marry her, and that she had no legal or just ground to demand of him

that he should marry her, and that one George W. Ryan, an uncle of the defendant, commanded him to marry her under penalty of death; said Ryan being aided, abetted, and assisted by several other male relatives of the said defendant, while petitioner was at the same time protesting against this exercise of force and duress. And he further avers that, notwithstanding his unwillingness to marry her, and repugnance to said marriage, and his protestations to them that Margaret Ryan had no claims upon him whatever, said George W. Ryan and his associates forced him, under fear of death, to go to the clerk's office and take out a marriage license to marry her, and forced him to go before said justice of the peace, and there, in the presence of said persons, to go through the marriage ceremony; said justice of the peace and the said Margaret Ryan being at the time fully aware that he was acting under duress and violence and alto-

b. Threats.

Threats of any measure authorized by law and the circumstances of the case pursuant to which a marriage is obtained will not constitute such duress as will avoid it. *Lacoste v. Guildros*, 47 La. Ann. 295.

A marriage induced by threats of arrest and imprisonment, not based upon a false and invalid charge, but as a proper legal remedy to redress or punish a wrong, will not be set aside and annulled as having been procured by duress. *Brant v. Brant*, 17 Phila. 655.

And in order to justify a divorce under Pa. Code of May 8, 1854, providing that a divorce may be granted where the alleged marriage was procured by threats, force, and coercion and has not been subsequently confirmed, it must appear that the threats were such threats against life or to do bodily harm as would overrule the judgment and coerce the will. *Todd v. Todd*, 149 Pa. 60, 17 L. E. A. 820.

Thus, a petition in an action to annul a marriage, alleging that it was brought about by force and duress, and that the man at the time of its celebration was held in unlawful custody and compelled to act alone by fear of death, or great bodily harm, which fear was superinduced by the threats and conduct of the brother of the woman, and that he repudiated the supposed marriage and parted from her as soon as he was restored to liberty, is sufficient on demurrer to present a cause of action within the jurisdiction of the court, though it calls for relief in the way of a divorce instead of a judgment declaring the marriage void. *Bassett v. Bassett*, 9 Bush, 696.

So, a marriage between a man and a girl of sixteen, consummated after her rejection of his attentions, upon which he threatened to blow out her brains if she would not marry him and produced a pistol which he held to her head, upon which she promised to marry him upon condition that he put away the pistol, and a few days afterwards he intercepted her while on a railway journey and took her to the office of the registrar of marriages and married her, she having fainted during the ceremony and left him as soon as it was over, will be pronounced null and void, the marriage never having been ratified, and the man never insisting on his marital rights. *Bartlett v. Rice*, 72 L. T. N. S. 122.

And a marriage between a man and woman of less than usual mental stability, brought about by a conspiracy on his part, pursuant to which he induced her to sign bills, and caused her to be harassed and persecuted to the verge

of despair on account thereof, leading her to believe that she would become bankrupt if she did not marry him and perhaps be imprisoned, whereby she became so reduced by mental and bodily suffering as to be incapable of offering resistance to the threats, which in her normal condition she would have turned from with contempt, he having taken her to the registrar's office and told her that he was going to marry her and would shoot her if she showed any signs before the registrar that she was not acting of her own free will, which marriage was never consummated, will be set aside as wholly void. *Scott v. Sebright*, L. R. 12 Prob. Div. 21, 57 L. T. N. S. 421.

So, a marriage between a young man and a girl to which she did not actually consent but went through the ceremony believing it to be only a betrothal, while so much under the influence of her mother, who was a strong-minded woman, favorable to the marriage, that she was not a free agent, will be decreed null and void on application of the girl, where the marriage was never consummated. *Ford v. Stier* [1896] P. 1, 73 L. T. N. S. 632, 65 L. J. Prob. N. S. 13.

A marriage between two cousins upon the threat of the man that if the woman would not marry him he would blow out his brains, and that she would be responsible, however, will not be set aside on the ground of duress where the magistrate, who performed the ceremony, stated that the woman went through it without any signs of unwillingness, and signed the register in a clear, firm hand, though the marriage was never consummated, and the man admitted that he had only married her for her money, and there was evidence that the woman was of a weak, impressionable character. *Cooper v. Crane* [1891] P. 369.

In the above case, *Scott v. Sebright*, L. R. 12 Prob. Div. 21, 57 L. T. N. S. 421, *supra*, was distinguished upon the ground that in this case there was no threat of violence to the lady herself or any such infamy as was alleged in that case, and no evidence of prostration, mental or physical, in the lady, or of actual violence at the time of the ceremony.

And in *Field's Marriage Annuling Bill*, 2 H. L. Cas. 48, which was an application to the legislature to annul a marriage in which it appeared that the man persecuted the girl, who was about eighteen years of age, with his attentions, and upon her refusal to marry him and her confession that her affections were centered upon another, told her that she would never marry the other, that he would not harm

gether against his will, in submitting to said marriage ceremony. He further alleges that immediately after the completion of said marriage ceremony he withdrew as soon as he was released from said coercion and duress, without saying one word to Margaret Ryan, protesting that said ceremony and proceedings were against his will, without his consent, and under duress and fear of instant death and has ever since continually remained away from her, and refused to consummate the marriage by cohabiting with her. Therefore petitioner avers that said marriage ceremony and other proceedings were violations of law, against his consent,

her, but threatened mischief to the object of her attachment and also threatened to kill himself, upon which she promised to marry him, but afterward withdrew the promise, but subsequently was prevailed upon to renew it, which was followed by their marriage, but there was no cohabitation or consummation of the marriage, the legislature refused to annul it on the ground that it did not appear that it was not solemnized with her free consent.

So, where a man marries a woman under threats of prosecution for bastardy, and through fear of loss of reputation and character or imprisonment, the marriage is invalid, and will be set aside on his application, if the charges made against him were in fact false, and he never confirmed or recognized the marriage after it was entered into. *Brant v. Brant*, 17 Phila. 655.

And a complaint in an action to annul a marriage alleging that the woman represented herself as with child by the complainant, and that her father and mother threatened to have him arrested for fornication and bastardy unless he would marry her at once, and that in consequence of such threats of violence and fraudulent charges, and through fear of loss of reputation and character and fear of imprisonment, he did, against his will and choice, marry her, and that he was never guilty of sexual intercourse with her either before or after the marriage, is good on demurrer. *Ibid*. And see *COLLINS v. RYAN*.

But threatening to inflict bodily harm upon a person unless he marries another will not entitle him to a divorce where he marries her, but does so for other reasons, and not because he was coerced by force. *Todd v. Todd*, 149 Pa. 60, 17 L. R. A. 320.

And proof in an action for divorce that a woman stated to some of her friends that she was pregnant by the man, which statement was false, and that he did not know her at the time, but that he was induced to marry her thereby, is not sufficient to establish coercion or duress forcing him into the marriage contract, which will authorize its dissolution, in the absence of force or fear of bodily harm. *Hoffman v. Hoffman*, 30 Pa. 417.

So, to justify the annulment of a marriage upon the ground that the alleged husband consented through fear of imprisonment and bodily harm threatened to be inflicted upon him, it should appear that the duress was occasioned by the woman, and that she uttered or instigated the threats of imprisonment or bodily harm, or was cognizant of them, or at least that at the time of the marriage she knew or had reason to believe that the plaintiff was impelled to marry her through fear that the threats of imprisonment and bodily harm would be carried into execution if he did not do so. *Sherman v. Sherman*, 47 N. Y. S. R. 404.

In *Marks v. Crume*, 16 Ky. L. Rep. 707, 43 L. R. A.

under force, duress, and compulsion, and cannot, in law, produce any legal results.

The answer of the defendant is a general denial.

After due proceedings and trial there was a judgment pronounced against the plaintiff, rejecting his demands, and he prosecutes this appeal therefrom.

One of the plaintiff's witnesses testified that about three hours previous to the marriage he told the plaintiff that he had seduced the defendant, his niece, and had to marry her, and that his reply was "to give him a little time, and he would do what was honorable by her"; that two or three hours

however, it was held that a husband is entitled to a decree to annul and set aside his marriage on the ground of force and duress, though it does not appear that the wife was guilty of any force or duress, where the proof goes to show that her friends and relatives did by threats and duress compel him to enter into the marriage contract.

Where it appears in an action to annul a marriage on the ground of coercion that at the time of its celebration no violence or threats were brought to bear upon the husband, but that he willingly gave his consent and signed the wedding certificate, the court will hold him to proof that in order to obtain his consent forms of law were used to cover coercion. *Lacoste v. Guidroz*, 47 La. Ann. 295.

So, in *Leavitt v. Leavitt*, 18 Mich. 452, which was an action to annul a marriage on the ground of fraud, it was said that the common cases of fraud which will invalidate a marriage are duress, surprise, or stratagem in procuring the marriage, and the fraud must usually be nearly, if not absolutely, coincident in time with the marriage, and operate to destroy the intelligent consent which is required for the marriage itself, rather than the preliminary engagement.

For cases of threats in connection with arrest and imprisonment, see next subdivision.

c. Arrest or imprisonment.

A lawful arrest or imprisonment properly caused for the purpose of redressing a wrong cannot amount to duress which will avoid a marriage.

Thus, if a man lawfully arrested on the process for seduction marries the woman to procure his discharge, he cannot have the marriage avoided upon the ground of duress. *Marvin v. Marvin*, 52 Ark. 425; *Honnett v. Honnett*, 33 Ark. 156, 34 Am. Rep. 39; *Lacoste v. Guidroz*, 47 La. Ann. 295; *State v. Davis*, 79 N. C. 603; *Johns v. Johns*, 44 Tex. 40; *Copeland v. Copeland* (Va.) 21 S. E. 241.

In the absence of any force or direct fear of bodily harm at the time of the marriage. *Honnett v. Honnett*, 33 Ark. 156, 34 Am. Rep. 39; *Copeland v. Copeland* (Va.) 21 S. E. 241.

And a marriage consummated while the man is under arrest for seducing the woman, and on the advice of the officer who arrested him, and the justice before whom he was brought, that by marrying her he would be relieved from further prosecution, is valid, and cannot be annulled on the ground that it was consummated under duress. *Johns v. Johns*, 44 Tex. 40.

Nor will a marriage by a man under twenty-one years of age, while under arrest upon the charge of seducing a minor under promise of marriage, be annulled on the ground of duress because the magistrate read a portion of the law to him and told him if he did not marry the

afterwards he happened to meet the plaintiff at the railroad depot, just as he was about to board the train, and "stopped him, and told him to come back to town, and fulfil the promise he had made me." The witness said he did not threaten plaintiff with violence, but that "he insisted upon his going back with him." He said he stayed with him until he married the defendant; that he stayed with him for the purpose of seeing that he married her. He said that he used no force, but told him he had to marry the defendant; that it was his priv-

ilege to marry her or not, but that he "intended to do everything [he could] to make him marry her." He states that he accompanied him to the clerk's office to procure a marriage license; that plaintiff asked him "to go and get John Wasey [the justice of the peace], and he went to Wasey's boarding house after him. He states that "after he told me he would do what was honorable by [the defendant], he did not stay with him; but it was several hours afterwards before he saw him again." There were only five present at the ceremony, in addition to

woman he would be obliged to confine him, unless he gave bail in an amount which was excessive, though she was a prostitute of the lowest order and they never afterward cohabited. *Seyer v. Seyer*, 37 N. J. Eq. 210.

And a fraudulent contract for which a divorce is authorized in Connecticut implies a cause of divorce which existed previous to the marriage, and such a one as rendered the marriage unlawful *ab initio*, as consanguinity, corporal imbecility, and the like, but does not include the claim of invalidity of the marriage through duress, it having been entered into on the claim of the woman that the man had seduced her under promise of marriage and while he was under arrest therefor. *Benton v. Benton*, 1 Day, 111.

So, the fact that a man was under arrest as the putative father of a bastard child at the time he was married to the mother of the child, is not enough to avoid the contract of marriage on the ground of duress. *Jackson, Dies, v. Winne*, 7 Wend. 47; *Lacoste v. Guldros*, 47 La. Ann. 295.

If a single man who is under lawful arrest under a bona fide regular proceeding in bastardy on examination of a single woman, wishes, as a means of avoiding the legitimate consequences of the proceeding, to marry her, he cannot be permitted to relieve himself of the obligations which he assumes merely on the ground that at the time of the marriage he was under duress. *Sickles v. Carson*, 28 N. J. Eq. 440.

Where a man has been guilty of illicit intercourse with a woman, and supposed her to be pregnant as a result thereof, furnishes her with the means to commit abortion for the purpose of preventing the birth of the offspring, and criminal proceedings are regularly and lawfully instituted against him for the latter offense, and being under arrest therefor he chooses, as a means of release, to marry the woman, the circumstances under which he enters into the marriage constitute no ground for annulling it. *Frost v. Frost*, 42 N. J. Eq. 55.

A man having a wife living, who marries another woman while under arrest for her seduction upon being informed that the prosecution would be discontinued if he married her, cannot claim that the second marriage was procured by compulsion or duress in a prosecution for bigamy, where the statutes expressly provide that he may under such circumstances marry the girl alleged to have been seduced. *Medrano v. State*, 32 Tex. Crim. Rep. 214.

And a marriage contract through fear of imprisonment is not void so as to relieve a party to the marriage from the prosecution for bigamy on account of a subsequent marriage when the force was not imposed as an inducement to the marriage, but arose from the arrest and prosecution of the party for bastardy, and the marriage was entered into to escape the consequences. *Williams v. State*, 44 Ala. 24.

But evidence of a marriage ceremony while 43 L. R. A.

the man in question was under arrest upon a charge of bastardy, and that he was told by the constable who arrested him that he would have to marry the woman or go to the penitentiary, and that when the ceremony was over he left her and refused to have anything to do with her, and that the license upon which the marriage was based was issued by a deputy clerk unauthorized to issue such licenses, is not sufficient to establish a prior marriage so as to support a charge of bigamy based upon a second marriage by the same man. *Kopke v. People*, 43 Mich. 41.

A marriage procured while a man was under arrest on process for bastardy or seduction, for the purpose of securing his discharge therefrom, however, will be set aside on his application, where the process of arrest was void and the imprisonment unlawful, and he married for the purpose of regaining his liberty. *Lacoste v. Guldros*, 47 La. Ann. 295.

And if an officer arrests a man for bastardy, not having a warrant which the law requires, and, to avoid imprisonment, he goes through with the form of marriage with the woman and then leaves her, the marriage will be declared void. *James v. Smith*, Supreme Judicial Court Mass. 1861, Reported in *Blisshop, Marr. Div. & Sep.* § 544.

And an arrest and imprisonment under a void process or under a warrant issued upon a charge by a woman against a man that she was pregnant by him, which was false and which caused the man to marry her, the proceedings having been set on foot by her, will authorize a divorce on his behalf under the Pennsylvania statute upon the ground that the marriage was obtained by duress. *Collins v. Collins*, 2 Brewst. (Pa.) 515.

So, a marriage between a lad sixteen years old and a woman much older of bad repute for chastity will be held void on the ground that it was procured by duress, where he never had sexual intercourse with her before or after the performance of the ceremony, and never cohabited or lived with her, and it was performed while he was under arrest at her instance in bastardy proceedings, and was actually confined, and was told by the officer that he must get bail or go to jail, and his father advised him to marry her. *Shoro v. Shoro*, 60 Vt. 268.

And a boy eighteen years old, who had seen little of the world and who was arrested on a charge of bastardy made by a woman and brought before a justice, who told him he had better marry her and that she had every advantage of him, and that he would be sent to prison, and who continued to press his advice upon him, though he protested his innocence, until he was induced to stand up with the woman and go through the marriage ceremony without an opportunity to consult his friends, is entitled to have the marriage annulled. *Smith v. Smith*, 51 Mich. 607.

The conclusion of coercion is not a necessary and unavoidable one, however, from the fact of

the parties and the justice of the peace. On cross-examination the following occurred, viz.:

Q. Did Collins at any time refuse to marry this girl?

A. No, sir. . . .

Q. When you went to the house of Mr. Stoddard,—the place where the ceremony took place,—were there any threats [made] against him?

A. No, sir.

Q. Did he not go through the marriage ceremony willingly?

A. I was not in the house when it went on.

Q. You did not see any violence toward him, did you?

A. No, sir.

Q. If he had persisted in not marrying her, could he not have done as he wanted to?

A. I think he could.

Q. Did he appear to be frightened?

A. He did not seem so. . . .

Q. Did Collins call for a marriage license?

A. Yes, sir. He asked Mr. Gosset to issue it.

Q. At the time Mr. Gosset was issuing the license, was there any trouble between Collins and you?

A. No, sir. I did not go into the court house until afterwards.

Another witness of the plaintiff states that after the parties had assembled at the place where the wedding was to take place, "the lady walked in, and sat down, and nobody said a word for perhaps half a minute. Then Mr. Wasey motioned to Ben [the plaintiff] to know if that was the lady, and he said or motioned that it was. Then Wasey told them to get up, and join hands, and go through the ceremony." That he "does not think anything at all was said after the

unlawful restraint. *Schwartz v. Schwartz*, 29 Ill. App. 516.

And the fact that a warrant under which a man charged with seduction was arrested in another state at the instance of the father of the girl alleged to have been seduced was unauthorized by the statutes of that state will not establish duress of imprisonment which will invalidate a marriage had while under arrest where it appears that the prosecutor was acting in good faith and pursuing legal remedies which he was advised to pursue by one whom he supposed to be a competent lawyer. *Schwartz v. Schwartz*, 29 Ill. App. 516.

And the validity of a marriage between a man under arrest upon a charge of seduction and the woman alleged to have been seduced is not affected by the fact that he was under arrest though the arrest was unlawful, and though coercion was used by the father of the girl, where the girl herself had no purpose to coerce or force him into the marriage nor knew of any such purpose on the part of her father. *Ibid.*

So, where the court, in an action to annul a marriage, is satisfied that actual intercourse had taken place between the parties the charge of threat, or unlawful menace, or fraud, or duress must be most fully and satisfactorily established before the court will annul a marriage. *Seyer v. Seyer*, 37 N. J. Eq. 210.

And the subsequent discovery by a man who marries to secure his discharge while under lawful arrest on process for seduction, that he could not have been convicted, will not enable him to procure the annulment of the marriage where the prosecution was upon probable cause, and not merely from malice. *Marvin v. Marvin*, 52 Ark. 425.

And one who, knowing that he cannot be the father of a bastard child, is induced to marry the mother to avoid prosecution for bastardy, is not in a position to annul the marriage contract on the ground of threat and coercion, though he should afterward be able to establish the fact that the child was not his. *Scott v. Shufeldt*, 5 Paige, 43.

But a white man under arrest as the putative father of a bastard child of a white woman, who, believing the child to be his, marries her to obtain his discharge, after which he ascertains that the child was a mulatto, and that she knew that fact at the time she swore it to be his, having then been delivered and seen the child, is entitled to a decree declaring the mar-

riage contract void on the ground of fraud. *Ibid.*

So, a marriage by a man under arrest for seducing a minor under promise of marriage will not be set aside on the ground of duress on the allegation that the woman was over twenty-one years of age, where, if such was the fact, he knew it at the time of the marriage. *Seyer v. Seyer*, 37 N. J. Eq. 210.

III. Ratification.

A marriage effected by force or duress may be made good at the election of the injured party, who, after being set free from the influence of the fear or duress, may ratify and confirm the contract, though the other party cannot avoid it by taking advantage of his own wrong. *Hampstead v. Plaistow*, 49 N. H. 84.

Thus, the voluntary cohabitation by parties to a marriage obtained by duress after the force or cause of fear is removed is a sufficient ratification thereof to render it valid. *Ibid.*

And a marriage between a man and woman while the man was under arrest upon a charge of fornication and bastardy while he was unable to get bail, if voidable on the ground of duress, will be deemed to have been ratified by him where he lived with her in marital cohabitation for three weeks after he was released from prison and after the marriage took place, while he was no longer in danger of prosecution for bastardy. *Richards v. Richards*, 14 Lane. L. Rev. 286.

And one who was arrested in a distant state on the charge of seduction under promise of marriage, and thereafter married the woman alleged to have been seduced, and returned with her to her home, occupying the same berth in the sleeper, and occupying the same room with her upon their arrival, and who introduced her to a relative as his wife and never challenged the validity of the marriage or denied his consent until the wife filed a bill for separate maintenance, will be deemed to have ratified the marriage, though the warrant under which he was arrested may have been unauthorized, and though it is claimed that he came home under compulsion from the father of the girl. *Schwartz v. Schwartz*, 29 Ill. App. 516.

And a marriage between a guardian and his ward of tender years, while they were traveling abroad, after she had wished she was home again, upon which he had threatened that he would kill himself if she went home, after which

ceremony." That immediately after the ceremony the plaintiff accompanied witness and others down town, and, if any conversation took place after the ceremony he did not hear it. On cross-examination the following occurred, viz.:

Q. You say you were present at that marriage. Did plaintiff answer any of the questions put to him during the ceremony by Mr. Wasey?

A. Yes, sir.

Q. Answer them without any objection?

A. He simply said, "I do," when asked if he would take the lady for his wife. He did not state any objections during the ceremony.

Another witness made a statement similar to that of the first one interrogated, and confirmed his testimony to the effect that

they traveled together from place to place and finally she signed a declaration falsely stating her age, parentage, and guardianship, and married him, and afterward continued traveling from place to place with him until they were pursued by other guardians who had been informed of the marriage, will not be decreed null, where she was of the age of consent. *Harford v. Morris*, 2 Hagg. Eccl. Rep. 423.

So, it has been held that the subsequent cohabitation of the parties to a marriage alleged to have been obtained by duress may be looked to by the jury as a circumstance of the case, in determining in their own minds whether the marriage was valid or not, but that cohabitation of itself would not render a void marriage valid, though it is evidence of marriage. *Williams v. State*, 44 Ala. 24.

The subsequent consent of a woman forcibly carried away and married will not excuse the offense of carrying her away. *Queen v. Swanson*, 7 Mod. 101.

IV. *Matters of procedure.*

Matters of procedure in actions to annul a marriage for duress or other cause in the absence of special statutory provision therefor seem to be governed by the rules of practice in divorce cases.

Under N. Y. Rev. Stat. 248, § 30, providing that the marriage may be annulled on the ground that the consent of one of the parties was obtained by force or threat, during the lifetime of the parties or one of them, a suit can only be brought by the party whose consent was obtained by force or threat, or by some person who had an interest in contesting the validity of the marriage during the lifetime of the parties to the marriage, or during the lifetime of one of these parties, and not afterward, and a suit may not be brought at any distance of time after the right to institute it occurred, provided either party is still alive. *Montgomery v. Montgomery*, 3 Barb. Ch. 132.

Minors who have contracted marriage are authorized to stand in judgment in an action to annul it upon the ground of coercion without the intervention of their tutors. *Lacoste v. Guldroz*, 47 La. Ann. 295.

And a complainant in an action to set aside a marriage upon the ground that it was procured by threats and duress and by fraud and coercion, is insufficient where there is nothing to

plaintiff professed a willingness to do what was right by the girl. Aside from the testimony we have quoted, there are a great many details of similar character and import; and all of them, taken together, have given us the impression that originally it was neither the purpose nor expectation of the plaintiff to marry the defendant, but the relations of the defendant insisted upon the plaintiff marrying the girl, believing that he had seduced and ruined her, and that to marry her was his duty under the circumstances; that, upon due consideration of the pressure which was brought to bear upon him, and of his duty to repair a wrong he had confessedly done the girl, he yielded a reluctant and passive consent to the performance of a marriage ceremony. We are of opinion that he has not presented a case which entitles him to relief.

Judgment affirmed.

show what threats were made or what duress or force were used, so that the court can see whether or not they constitute a cause for annulment of the marriage. *Shriver v. Shriver*, 14 Phila. 170; *Hoffman v. Hoffman*, 30 Pa. 417.

So, all the rules for requiring evidence of bona fides in an application for divorce to secure the court against imposition in such cases apply equally to actions to annul a contract of marriage, and it should be made to appear to the satisfaction of the court in such an action based upon an allegation of duress that the proceeding is not the result of collusion between the parties. *Sickles v. Carson*, 26 N. J. Eq. 440.

And a divorce will not be granted upon the ground that the marriage was obtained by duress upon the unsupported testimony of the complainant that the marriage was performed while he was under arrest upon the charge of seducing the woman he married under promise of marriage, upon being told if he did not marry her he would be imprisoned, where at the time of his arrest he made no denial of the complaint. *Pyle v. Pyle*, 10 Phila. 58.

And there must be a preponderance of evidence against the decision of a trial court which personally heard the testimony in an action for the annulment of a marriage upon the ground that it was obtained by force and duress in favor of such annulment to authorize an appellate court to reverse it upon appeal. *Anderson v. Anderson*, 74 Hun. 56.

And a verdict in an action for the annulment of a marriage will be set aside as against the weight of evidence where it is based upon the unsupported testimony of the complainant to the effect that he was compelled to marry under threats to take his life, where the marriage took place in the presence of the wife's family and two ladies who were in the house temporarily and a well-known and highly respected magistrate, all of whom contradicted the complainant on the question of force and coercion. *Stevenson v. Stevenson*, 7 Phila. 386.

A copy of a marriage record in one state, made under a statute applying only to residents of that state is not conclusive upon the courts of another state so as to preclude proof in the latter state, in an action for alimony, that the marriage was performed while the husband was under duress, and that he had not ratified it since in any of the methods recognized by law as sufficient for that purpose. *Miller v. Miller*, 43 S. C. 306.

F. H. B.

INDIANA SUPREME COURT.

Solomon NATHAN, Exr., etc., of Samuel Strasburger, Deceased, et al., Appts.,

v.

Edwin M. LEE, Receiver of G. Y. Roots Company.

(.....Ind.....)

1. A real-estate mortgage made by a foreign corporation to nonresident creditors to secure a bona fide antecedent debt may be held valid in the state where the land is, when it is not prohibited by the statutes of the state in which the corporation and the creditors reside, although the judicial decisions in that state hold such a mortgage to be an unlawful preference.
2. The fact that creditors are nonresidents will not affect the question of the validity of a mortgage made to them as against other creditors.

(February 24, 1899.)

APPEAL by defendants from a judgment of the Circuit Court for Dearborn County in favor of plaintiff in an action brought to set aside certain mortgages and assignment deeds which have been executed by G. Y. Roots Company as giving an unlawful preference in an assignment for creditors and to have the property covered thereby subjected to the claims of creditors. *Reversed.*

The facts are stated in the opinion.

Messrs. Charles H. Stephens, G. H. Wald, and Ledyard Lincoln, for appellants:

The law of Ohio does not prevent an insolvent corporation from preferring one creditor to the exclusion of another.

Damarin v. Huron Iron Co. 47 Ohio St. 581; *Cross v. Carstens*, 49 Ohio St. 548.

A manufacturing corporation (such as this was) has the power to borrow money and secure its repayment by mortgage.

Burt v. Rattle, 31 Ohio St. 116.

To repay or secure the repayment of money borrowed by the corporation, especially if borrowed under promise to give security, is certainly one of "the legitimate objects of its creation" spoken of in § 5286, Ohio Rev. Stat. even though the corporation be at the time insolvent.

Damarin v. Huron Iron Co. 47 Ohio St. 581; *First Nat. Bank v. Dovetail Body & Gear Co.* 143 Ind. 550.

The agreement for security makes the mortgages executed pursuant thereto valid.

Campbell Printing Press & Mfg. Co. v. Bellman Bros. 11 Ohio C. C. 360.

An execution creditor cannot question a sale of property made by his debtor, merely because that contract of sale is within the statute of frauds.

Dixon v. Duke, 85 Ind. 434; *Brown v. Rawlings*, 72 Ind. 505; *Lefferson v. Dallas*,

NOTE.—As to preferences among creditors of insolvent corporations, see note to *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* (Tex.) 22 L. R. A. 802.

As to transfer of property out of the state by assignment for creditors, see note to *Long v. Forrest* (Pa.) 23 L. R. A. 33.

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20 Ohio St. 68; *Wald's Pollock*, Contr. p. 609.

The decision of the supreme court of Ohio in the *Rouse Case*, 46 Ohio St. 493, 5 L. R. A. 378, cannot, in any view, be of greater force in this case than would be an act of the legislature of Ohio declaring that all preferences made by incorporated companies under the circumstances existing in this case should be null and void. Yet it is held that such statutes have no extra-territorial force.

Warren v. First Nat. Bank, 149 Ill. 9, 25 L. R. A. 746; *Boehme v. Hall*, 51 N. J. Eq. 541; *East Side Bank v. Columbus Tanning Co.* 170 Pa. 1; *Commercial Nat. Bank v. Motherwell Iron & S. Co.* 95 Tenn. 172, 29 L. R. A. 164; *Hoyt v. Sheldon*, 3 Bosw. 268; *Pairpoint Mfg. Co. v. Philadelphia Optical & Watch Co.* 161 Pa. 17; *Borton v. Brines-Chase Co.* 175 Pa. 209.

"A state rule of corporate power" and even an express statute forbidding preferences by corporations, have no extra-territorial force.

Hoyt v. Sheldon, 3 Bosw. 267; *Hoyt v. Thompson*, 19 N. Y. 207; *Warren v. First Nat. Bank*, 149 Ill. 9, 25 L. R. A. 746; *Rhaen v. Pearce*, 110 Ill. 350, 51 Am. Rep. 691; *Boehme v. Hall*, 51 N. J. Eq. 541; *Borton v. Brines-Chase Co.* 175 Pa. 209; *East Side Bank v. Columbus Tanning Co.* 170 Pa. 1; *Commercial Nat. Bank v. Motherwell Iron & S. Co.* 95 Tenn. 172, 29 L. R. A. 164; *Lisenbee v. Holt*, 1 Sneed, 42; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518; *Catlin v. Wilcox Silver-Plate Co.* 123 Ind. 477, 8 L. R. A. 62.

A creditor coming from the domicile of the debtor and pursuing his remedy by attachment stands upon the same footing as to rights of priority as a creditor resident in the state of the forum.

Barth v. Backus, 140 N. Y. 230, 23 L. R. A. 47; *Chipman v. Peabody*, 159 Mass. 420; *Moore v. Church*, 70 Iowa, 208, 59 Am. Rep. 439; *Sheldon v. Blauvelt*, 29 D. C. 453, 1 L. R. A. 685.

A failing creditor on the very eve of insolvency may by mortgage prefer any creditor, and a mortgage so executed is not part of the assignment.

Cross v. Carstens, 49 Ohio St. 548; *Akers v. Rowan*, 33 S. C. 476, 10 L. R. A. 705.

The effect of the Indiana law is not to impair, but rather to confirm and enlarge, the powers of foreign corporations.

The legislature of the state has the power to domesticate foreign corporations and enlarge their powers with respect to lands situated within its jurisdiction.

Canada Southern R. Co. v. Gebhard, 109 U. S. 537, 27 L. ed. 1024; *Pierce v. Crompton*, 13 R. I. 313; 6 Thomp. Corp. §§ 7890, 7894; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 56 Am. Rep. 776; *Stephens v. Pratt*, 101 Ill. 206.

Messrs. Givan & Givan, also for appellants:

Under our statutes the G. Y. Roots Company could not make a valid assignment of its real estate situated in this country.

Rev. Stat. 1881, § 2663; *Hoyt v. Thompson*, 5 N. Y. 320; *Wright v. Lee*, 2 S. D. 596; *Perry*, Tr. 4th ed. § 589.

A corporation as well as an individual has the right to dispose of its property to pay its debts.

Henderson v. Indiana Trust Co. 143 Ind. 561; *Beach*, Priv. Corp. § 164 d; *Swank v. Hufnagle*, 111 Ind. 453; *Cochran v. Benton*, 126 Ind. 58; *Wert v. Naylor*, 93 Ind. 431; *Levering v. Bimel*, 146 Ind. 545.

The appellee cannot ask the court to adjudge said deeds of assignment invalid, and after the court has so adjudged then ask the court to find that appellant's mortgages were invalid because they were made and executed at the time said invalid assignments were made and executed.

John Shillito Co. v. McConnell, 130 Ind. 41.

An insolvent debtor may in good faith prefer one or more of his creditors to the exclusion of others.

Carnahan v. Schucab, 127 Ind. 507; *First Nat. Bank v. Dovetail Body & Gear Co.* 143 Ind. 550; *Henderson v. Indiana Trust Co.* 143 Ind. 561; *Levering v. Bimel*, 146 Ind. 545; *Gilbert v. McCorkle*, 110 Ind. 215; *Winslow v. Wallace*, 116 Ind. 317, 1 L. R. A. 179; *Cook, Stock & Stockholders*, § 691.

If the appellants were promised security for their said loans, it was proper that they should have the same, and it was not fraudulent or in derogation of the rights of others that said corporation should have executed said mortgages to secure said debts evidenced by its notes.

First Nat. Bank v. Dovetail Body & Gear Co. 143 Ind. 550; *Paulding v. Chrome Steel Co.* 94 N. Y. 334; *Castle v. Lewis*, 78 N. Y. 131.

Messrs. Roberts & Stapp, Thornton M. Hinkle, and Frederick W. Hinkle, for appellee:

The case now before the court is one in which the law of the corporation state in the corporation's insolvency is in question. For the true principle we should look to that line of authority wherein is decided the effect of the laws of the corporation state in cases of insolvency, bankruptcy, assignment for creditors, etc.

Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 337; *Rust v. United Waterworks Co.* 36 U. S. App. 167, 70 Fed. Rep. 129, 17 C. C. A. 16; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020; *Parsons v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 305; *Pierce v. Crompton*, 13 R. I. 312; *Diamond Match Co. v. Powers*, 51 Mich. 145; *Bockover v. Life Asso. of America*, 77 Va. 85; *Gilman v. Ketcham*, 84 Wis. 60, 23 L. R. A. 52; *Saltmarsh v. Spaulding*, 147 Mass. 224; *Atty. Gen. v. Bay State Min. Co.* 99 Mass. 148, 96 Am. Dec. 717; *Rue v. Missouri P. R. Co.* 74 Tex. 474; *American Waterworks Co. v. Farmers' Loan & T. Co.* 29 Colo. 203, 25 L. R. A. 338.

The power of a corporation to act in a foreign country or in another state depends upon the law of the country of its creation, and on the law of the place where it assumes to act.

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American Waterworks Co. v. Farmers' Loan & T. Co. 46 Am. St. Rep. 288, note, 20 Colo. 203, 25 L. R. A. 338.

There is a line of cases where the question has been as to what effect some general statute or state rule of corporate power, not expressly a part of the charter, yet of a limiting nature, should have when sought to be invoked.

As to this line there is always present a very important element which distinguishes some from others, and that is the particular citizenship of the party to be affected by the application of such limit of corporate power. That is, the persons against whom the general statute or rule of corporate power of the foreign state is sought to be invoked is in one case a citizen of the corporation state while in another case he is not.

Warren v. First Nat. Bank, 149 Ill. 9, 27 L. R. A. 746; *Hoyt v. Thompson*, 19 N. Y. 207; *First Nat. Bank v. Dovetail Body & Gear Co.* 143 Ind. 550.

The charter of a corporation, with such modifications as may be made by the legislative power of the state, or as may result from the decisions of its highest court, construing the same, forms a contract between the corporation on the one part and the state on the other.

Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; 4 Am. & Eng. Enc. Law, p. 209.

Every other state recognizes this right of the parent state to control, and also recognizes the contractual relation mentioned.

The power of a foreign corporation must depend, first, on the laws of the state creating it, and second, on the laws of the state where the power is sought to be exercised. Such power cannot extend beyond the privileges given by the first, nor can it override the prohibitions adopted by the latter.

Citizenship is controlling in the various decisions.

Re Waite, 99 N. Y. 433; *Barnett v. Kinney*, 147 U. S. 476, 37 L. ed. 247.

The law of Ohio which created the G. Y. Roots Company by positive rule of its highest court, and which rule became a part of its incorporation law, said and decreed that upon the insolvency, failure, and ceasing of business of said company, its property *ipso facto* became a trust fund, and its officers mere trustees for creditors without power to prefer.

A positive and express trust was thus effected, and the trust was certainly binding on the appellants, who were citizens of Ohio and bound to know its law, and who knew of that condition of the company which under such laws was requisite to such trust relation.

Massie v. Watts, 6 Cranch, 148, 3 L. ed. 181; 6 Am. & Eng. Enc. Law, pp. 712, 713; 27 Am. & Eng. Enc. Law, p. 25; *Perry*, Tr. 3d ed. §§ 70-73; 2 Story, Eq. Jur. §§ 743, 744; *Chew v. Brumagen*, 13 Wall. 497, 20 L. ed. 663.

The law of Ohio, acting upon the persons of the officers of one of its own corporations, converted them *eo instanti* into trustees of all the corporate property, and so acting de-

prived them of power to act otherwise than as such trustees.

The rule of the *lex rei sitæ* would not be applicable here.

The scope of the agency of corporate officers must be fixed by the law of the state creating the corporation, and whether or not there is sufficient authority within the scope of such agency for such officers to make a mortgage depends upon the law of the creating state.

Tippecanoe County Comrs. v. Lafayette, M. & B. R. Co. 50 Ind. 85; *Wilson v. Joseph*, 107 Ind. 490; *Allen v. Buchanan*, 97 Ala. 399.

It was the peculiar province of the highest court in Ohio to construe the corporation laws and rights of corporations and the powers of corporate officers of that state, and principles of state comity require other states to give to that construction binding weight, when to do so will not conflict with the rights of citizens of such other states.

Jessup v. Carnegie, 80 N. Y. 441, 36 Am. Rep. 643; *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. ed. 289; *Shelby v. Guy*, 11 Wheat. 367, 6 L. ed. 496.

There is a vast difference between the corporation as a legal entity and the officers or directors. The latter are not the corporation and have no common-law powers. They are simply agents and no more.

3 *Thomp. Corp.* §§ 3968, 3970-3972.

Whether a contract affecting lands is within the statute of frauds or is void for ambiguity or uncertainty is not a question going to inherent or permissive power to contract, but is one relating to the necessary and legal evidence of the contract, and the formality by which the contract to be enforceable must be surrounded.

Saltmarsh v. Spaulding, 147 Mass. 224.

Under Indiana law the agreement to give security was within the statute of frauds.

Johnson v. Hoover, 72 Ind. 395; *Browne*, Stat. Fr. § 267; *Irwin v. Hubbard*, 49 Ind. 350, 19 Am. Rep. 679; *Miller v. Campbell*, 52 Ind. 125.

Where the proceeding is one which goes to the very existence of the trust, that is, where the question is as to whether in fact any valid trust was created, then the adjudication in order to be binding on the beneficiaries of the trust must be an adjudication in which the beneficiaries or some of them, in behalf of themselves and others, are parties and before the court, or one which is actively litigated by the assignee.

Smith v. Gaines, 39 N. J. Eq. 545.

Even though the deed of assignment itself should have declared a preference, such preference would not be upheld when rights of Indiana creditors to Indiana property are concerned, unless such preference was given a sufficient time before the assignment so as not to be in reality a part of one and the same transaction.

John Shillito Co. v. McConnell, 130 Ind. 41; *Peed v. Elliott*, 134 Ind. 536.

The preference given at the same time the deed is made will be construed as a part of it, and the preference, being against the policy of Indiana laws and in contravention to the rights of Indiana creditors, will be adjudged L. R. A.

judged invalid, but the assignment held operative.

Henderson v. Pierce, 108 Ind. 462; *Redpath v. Tuteciler*, 109 Ind. 248; *Seibert v. Milligan*, 110 Ind. 106; *Schwab v. Lemon*, 111 Ind. 54; *Carnahan v. Schwab*, 127 Ind. 507.

Where there has been a bona fide effort by a debtor to create a trust for creditors, a court of equity will carry it out even though it covers only a portion of the debtor's property or is defectively executed or names an incompetent trustee.

Krug v. McGilliard, 76 Ind. 28; *Seibert v. Milligan*, 110 Ind. 106; *Peed v. Elliott*, 134 Ind. 536.

Jordan, J., delivered the opinion of the court:

Appellee is the receiver of the G. Y. Roots Company, a foreign corporation incorporated under the laws of the state of Ohio; and prior to the suspension of its business, as hereinafter stated, its principal office was located in the city of Cincinnati, Ohio. The purpose for which this corporation was created was to manufacture, purchase, and deal in flour, grain, salt, and other merchandise, for profit. To further the object of its incorporation, it became the owner of and operated a large flouring mill and cooper shops, situated on certain described real estate in the city of Lawrenceburg, Dearborn county, Indiana. In 1893 Samuel Strasburger, a resident of Cincinnati, Ohio, loaned to this company at different times money amounting in the aggregate to \$14,000 and over. This money was used by the company in carrying on its business. These several loans were evidenced by certain promissory notes executed by said company to Strasburger in 1893, payable to him at the city of Cincinnati, Ohio. In 1894 the company also borrowed of Rosa E. Levi, a resident of Cincinnati, Ohio, and one of the appellants in this appeal, money to the amount of \$5,000, which was also used by the company in its business; and for the several sums so loaned by her the company executed its promissory notes, payable to her at Cincinnati, Ohio. On August 6, 1895, these notes of Strasburger and Levi were unpaid; and on that day the G. Y. Roots Company was insolvent, having contracted debts and liabilities amounting to \$400,000, while its assets at the same time amounted in value to \$140,000. On said day it had virtually ceased to be a going concern, but was still in the possession and control of all of its property, but contemplated making a voluntary assignment for the benefit of its creditors. On the said 6th day of August, at its office at Cincinnati, Ohio, in order to secure the payment of the notes held by Strasburger and Levi for the money loaned, the company, by order of its board of directors, executed to each of these two creditors a mortgage upon its real estate on which its mills and shops were situated in Lawrenceburg, Dearborn county, Indiana. These mortgages were in accordance with the form prescribed by the laws of Indiana, and were duly recorded, after their execution and acknowledgment, in the recorder's office of said Dear-

born county, on said 6th day of August, 1895. On the same day, after the execution of these mortgages, this company, under the insolvent laws of the state of Ohio, made what purported to be a voluntary assignment to Edwin M. Lee, as its assignee, of all of its property. It also on the same day executed a special deed of conveyance, wherein it was recited that the said company conveyed and warranted to Edwin M. Lee its real estate (describing it), situated in Lawrenceburg, Dearborn county, Indiana, to be held by him in trust for the benefit of its creditors; the real estate described in this latter deed being the same which the company had previously mortgaged to Strasburger and Levi. On February 22, 1896, in an action instituted by certain creditors of this company in the circuit court of Dearborn county, Indiana, appellee, Lee, was by said court appointed receiver of the said insolvent company, and duly qualified as such; and thereupon, by permission of that court, he instituted this action therein, making Strasburger (then in life) and Levi, together with the said G. Y. Roots Company and its said assignee under its general and special assignments, parties defendant to the action. The receiver by his action invoked the judgment of the court in his favor as follows: First, to set aside the mortgages executed by the said company on August 6, 1895, to Strasburger and Levi; second, to set aside and have declared null and void the two assignment deeds heretofore mentioned, made by the company on the said 6th day of August, so far as the same, or either of them, sought to assign or transfer the property of the company situated in Dearborn county, Indiana; third, that the court order the said Dearborn county real estate sold, freed from the said mortgage liens, and, in the event the said liens should be held valid, that the same attach to the proceeds arising out of the sale of the said mortgaged premises, etc. All the parties appeared to this action and filed their answers thereto, and the matters and things involved under the issues so joined were submitted to the court for its judgment. The only question, however, which the court adjudicated upon this complaint of the receiver, was that which related to the validity of the deed of assignment, so far as the same affected the property situated in Dearborn county, Indiana, and embraced in the mortgages of Strasburger and Levi. Upon this question the court found and adjudged that the said deeds of assignment were invalid, and did not convey any right, title, or interest to the assignee in or to the property of the company situated in Dearborn county, Indiana, and further decreed that the said deeds of assignment be set aside and held for naught, and that the title to the said property be held to be as fully and effectually in said company at the time of the appointment of the receiver by the Dearborn circuit court as if such deeds of assignment had not been made. After the rendition of this judgment, Strasburger and Levi each filed a cross-complaint in the said action against the receiver, wherein they set up the notes which each held against the said Roots Company, and

also the mortgage executed by it to each of the cross complainants on the 6th day of August, 1895, to secure the payment of said indebtedness. The relief which each sought by their respective cross-complaints was to enforce the mortgage lien against the proceeds arising out of the sale by the receiver of the mortgaged premises, and each cross complainant prayed that the respective lien of each under his mortgage be protected by the court in the distribution of the proceeds arising out of the sale of the said mortgaged premises. After the filing of his cross-complaint Samuel Strasburger died, and appellant Nathan, as his executor, was substituted as a party in his place and stead. The receiver then filed his answer to each of these cross-complaints, whereby he sought to defeat the mortgages, and have them adjudged invalid by the court, upon the grounds that they were each executed by the said company as a preference to said complainants at a time when the company had become insolvent and had decided to make an assignment of its property for the benefit of its creditors, and that, therefore, by the laws of Ohio, under which the company had been incorporated, as construed by the supreme court of that state, it was forbidden, under the circumstances, to execute the mortgages in controversy; and the prayer was that each of these instruments be declared invalid, and that the cross complainants take nothing thereunder. The answer of the receiver to each of the cross-complaints was held sufficient upon demurrer, and the said complainants replied by the general denial; and, the cause being at issue between the said parties, it was submitted to the court for trial, and upon the evidence the court found for the receiver upon the issues joined upon the cross-complaints of Strasburger and Levi, to the effect that the mortgages in controversy were invalid, and did not constitute a lien upon the real estate therein described, nor a valid charge against the proceeds arising out of the sale of the mortgaged premises; and, over the separate motions of appellants for a new trial, wherein they each assigned, among others, as reasons therefor, that the finding of the court was contrary to law, and also contrary to the evidence, the court adjudged and decreed the mortgages to be invalid, and that they be set aside and held for naught.

From this judgment appellants have appealed to this court, and their separate assignments of error call in question the ruling of the court upon the demurrers to the answer of appellee to the cross-complaints, and also the overruling of their respective motions for a new trial. The evidence is in the record, and it discloses, among others, the facts heretofore stated. What might be denominated the charter of the corporation in question, or, rather, the governing laws of the state of Ohio relative to the creation of corporations, under which this company seems to have been incorporated and controlled, were introduced in evidence by the appellee. In addition to these statutes, the opinion of the supreme court of that state in the case of *Rouse v. Merchants' Nat. Bank*,

decided June 18, 1889, and reported in 46 Ohio St. at page 493, 5 L. R. A. 378, was given in evidence upon the trial by the appellee. The holding of the supreme court of Ohio in that appeal was to the effect that a corporation organized for profit under the laws of Ohio, after it had become insolvent and had ceased to prosecute the object for which it was created, could not, by giving some of its creditors mortgages upon its corporate property to secure the payment of antecedent debts, create a valid preference in their favor over other creditors of the insolvent corporation, or over a general assignment thereafter made by such corporation for the benefit of its creditors. The contention of counsel for appellee, in the main, is that, as the G. Y. Roots Company was an Ohio corporation, it was governed by the laws of that state; that the laws of Ohio prohibited it from executing the mortgages to appellants, under the circumstances, as it did; and that these laws must be given force and effect by the courts of Indiana. Hence it is insisted that the right of appellants to enforce the mortgages in dispute was properly denied by the lower court. The question, as counsel for appellee propounded it, is, Can this foreign corporation prefer appellants, in the execution of these mortgages, over its other creditors, when its right to do so is denied by the laws of its domicile, and where, as in this case, the persons seeking to enforce their rights under the preference given are citizens of the same state under whose laws the corporation was created? Reduced to a single or simple proposition, the contention of counsel for appellee is that these mortgages were executed in violation of the charter of the company or governing laws of Ohio relative to corporations like the one in controversy, as such charter or laws have been construed or interpreted by the supreme court of that state in its decision in the case of *Rouse v. Merchants' Nat. Bank*, *supra*, and that the decision of the court in that case is as operative and controlling, under the circumstances, in Indiana as it is in Ohio, and that the rules of comity required the Dearborn circuit court to accept the principle or rule therein asserted as controlling upon it, and by reason thereof adjudge, under the facts, the mortgages in controversy to be invalid, and deny appellants' right to enforce them.

Counsel for the respective parties in this appeal have favored us with able and elaborate briefs, in which they have cited numerous authorities which, as it is insisted, support the proposition which each advances. It would, however, unnecessarily extend this opinion, were we to review or comment upon all of the cases referred to. Hence we content ourselves with such authorities as support the principles which in our opinion are controlling upon the questions involved in this cause.

It is a well-affirmed general rule that the laws of a sister state, which either give or deny the power to contract, have no extra-territorial force or effect where the particular contract involved relates to the conveyance or encumbrance of lands situated in an-

other state or jurisdiction. *Cochran v. Benton*, 126 Ind. 58, and authorities there cited. Such conveyances or encumbrances are considered as being governed by the law of the situs of the realty, and all questions relating to the validity thereof are to be determined according to that law, and not according to the law of the place of the contract, or of the domicile of the contracting parties. 6 Thomp. Corp. § 7721; *Jones, Mortg.* § 823; *Whart. Confl. L.* §§ 273, 274; *Boehme v. Rall*, 51 N. J. Eq. 541, and authorities there cited. Another rule is that it is the restrictions or prohibitions contained in the charter of a foreign corporation, or those of the governing laws of the state where it is organized, in relation thereto, which follow it into another state. It is such restrictions or prohibitions, as a general principle, and, these alone, which, under the rules of comity, are recognized and enforced in other jurisdictions, and not the general legislation or judicial decisions of the state in which such corporation is organized. The general laws, regulations, or decisions of the courts of a sister state are controlling only within its own limits, and such state has no power to give them force or effect in other jurisdictions. 2 Morawetz, Priv. Corp. § 967; *Warren v. First Nat. Bank*, 149 Ill. 9, 25 L. R. A. 746, and cases there cited; *Boehme v. Rall*, 51 N. J. Eq. 541; *Borton v. Brines-Chase Co.* 175 Pa. 209. We have examined the statutes of Ohio, introduced in evidence, which relate to corporations organized thereunder, and we discover nothing therein which can be said to forbid or prohibit an insolvent corporation of that state from mortgaging its corporate property or assets to secure a bona fide antecedent indebtedness of its own, and thereby prefer one or more of its creditors over others. If it appeared in this case that the mortgages in question were executed in violation of the express provisions of any of these statutes, or that the power or right of the company to execute the mortgages depended upon a construction placed upon a statute of that state by its highest court, quite a different question would be presented for our decision.

That an insolvent corporation, in like manner as an insolvent natural person, may, at common law, execute a mortgage upon its property to some of its creditors, and thereby create a preference, is a well-settled proposition. See 2 Cook, Stock & Stockholders, § 779; *Ang. & A. Corp.* § 187, p. 168; 2 Morawetz, Priv. Corp. § 802; 1 Beach, Priv. Corp. § 358; *Levering v. Bimel*, 146 Ind. 545. Blackstone, in his Commentaries, asserts that it is necessarily and inseparably incident to every corporation aggregate that it has the power to sue or be sued, implead or be impleaded, grant or receive by its corporate name, and do all other acts as may a natural person. 1 Bl. Com. Cooley's ed. *475. In 2 Cook, Stock & Stockholders, § 691, it is said: "Corporations, unless restricted by their charters or by general statutes, may make assignments for the benefit of creditors to the same extent that individuals may. In making the assignment, the corporation may make preferences for one or more

creditors over others, or of one class of creditors over other classes. . . . A preference by the directors to themselves is generally held to be fraudulent." By § 5099, Burns's Rev. Stat. 1894 (Rev. Stat. 1881), § 3879, the legislature of this state has removed all doubt as to the right or power of a foreign corporation, organized for a like purpose as the one in this case, to acquire lands in this state and mortgage the same. This statute is an affirmative permission by the state to foreign corporations, organized for manufacturing and mining purposes, to purchase and hold real property in this state for the purpose of its business, and to convey or mortgage the same, as corporations of this state, organized for similar purposes, may do. It is true that this statute is not intended to confer any power or right upon a foreign corporation which is denied to it by its charter, or the governing laws of the place of its organization and domicile. As to the rights mentioned in the statute cited, it is simply permissive, and may be said to be but a recognition of the rules of comity existing between sister states. There is no question but what the indebtedness secured by these mortgages is a legitimate and bona fide one in all respects, and is such as the company was fully authorized, under the laws of Ohio, to contract or incur. Neither can it be said that a preference created thereby in favor of Strasburger and Levi was a part of the assignment made by the company on August 6, 1895. That assignment, as we have seen, was adjudged by the lower court to be invalid and of no effect so far as it attempted to assign or transfer property owned by the company situated in Dearborn county, Indiana; and the mortgaged premises apparently remained under the dominion of the company, after the execution of the mortgages, for a period of over six months, until the appointment of the receiver by the Dearborn circuit court on February 22, 1896.

The power of this corporation, under the circumstances, to make the mortgages, and thereby prefer these creditors over others, is not prohibited, as we have seen, by the statutes of its own state; neither is it denied by the rules of the common law or the laws of this state. The situs of the mortgaged premises being in Indiana, it is evident, under the circumstances, that the parties to the mortgages at the time of their execution must have contemplated their enforcement, if necessary, in the courts of this state. If these mortgages are to be adjudged invalid, and the right of appellants to enforce them denied, by the courts of this state, these results must follow by virtue of the rule announced and adopted by the supreme court of Ohio in *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493, 5 L. R. A. 378. In that decision the court did not construe or interpret any statute of that state in relation to the execution of a mortgage by an insolvent corporation. The court therein expressly recognizes the fact that decisions of the higher courts of other jurisdictions are conflicting in respect to the question in dispute in that appeal; and the court expressly admits that it is one of first impression, so far as that

court is concerned, and therefore, it is said, that it is at liberty to adopt the rule which in its judgment best coincides with justice and right. The rule adopted by the court in the case in question, and the one which controlled the question therein involved, is but an application of the equitable principle which arises out of what is denominated the "trust-fund doctrine." The foundation upon which this rule or doctrine, as recognized in the *Rouse Case*, and which now prevails in Ohio and other states, is said to rest, is that the assets or property of a corporation, when it becomes insolvent and has ceased to be a going concern, *eo instanti* become a trust fund for the benefit of its creditors, and, under the circumstances, its officers, being trustees for all of its creditors, cannot lawfully dispose of or encumber the property otherwise than for the equal benefit of all its creditors. This doctrine or rule does not prevail in this jurisdiction, and this court has declined to accept or enforce it. See *Henderson v. Indiana Trust Co.* 143 Ind. 561; *First Nat. Bank v. Dovetail Body & Gear Co.* 143 Ind. 534; *Levering v. Bimel*, 146 Ind. 545; *First Nat. Bank v. Dovetail Body & Gear Co.* 143 Ind. 550. In the case last cited, on page 553 of the opinion, 143 Ind. this court said: "The expression that the 'property of a corporation constitutes a 'trust fund' for its creditors,' only means that when the corporation is insolvent, and a court of equity has taken possession of its assets for administration, such assets must be appropriated to the payment of its debts before distribution to its stockholders, but, as between the corporation itself and its creditors, the corporation does not hold its property in trust or subject to a lien in favor of the creditors, in any other sense than does an individual debtor." In the appeal of *Levering v. Bimel*, on page 553 of the opinion, 146 Ind., we said: "As between the corporation and its creditors, it cannot, in reason, be said that the relation is anything more than that of debtor and creditor. The relation of trustee and *cestui que trust* does not exist so as to create a lien upon its assets in favor of the creditor, in any other sense than applies to an individual debtor."

While the decision of the Ohio court in the case in controversy is controlling in that jurisdiction upon like questions, when presented, it, as we have seen, can have no extrajudicial effect. It has merely a local application, and the courts of this state are not required to follow it, and by reason thereof declare invalid the mortgages in dispute, and deny appellant's right to enforce them. In addition to the authorities heretofore cited on this point, see *Rhawn v. Pearce*, 110 Ill. 350, 51 Am. Rep. 691. While we may and do yield great respect to the decisions of the supreme court of Ohio, still we are not bound to accept them as governing us in the administration and application of legal or equitable principles. It is true that the construction placed upon a statutory law by the courts of its own state will, by virtue of the rules of comity, be followed by the courts of a sister state in cases in which such statute may be involved; but as heretofore stated, the con-

struction of a statute was not involved in the *Rouse Case*, but the question presented to the court in that appeal depended for its solution upon the view which the court might take in regard to the equitable rule or trust-fund doctrine. It is certainly manifest and well supported by authority that neither the principles of equity nor the common law, as they may be expounded by the supreme court of Ohio, are binding upon this court; but, in the administration of justice, we must adhere to and follow our own decisions or precedents in which such principles are exposed or expounded,—so far, at least, as we consider such decisions sound and correct. This rule is well affirmed by the courts of other states. *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26, 13 L. R. A. 241, and cases there cited.

The fact that the creditors in this cause are nonresidents of this state, and citizens of the state of Ohio, can exert no influence over the question as here presented. By the rule approved by this court in *Catlin v. Wilcox Silver-Plate Co.* 123 Ind. 477, 8 L. R. A. 62, it is asserted that when a citizen of another state is once properly in court, and accepted as a suitor, neither the law, nor the court ad-

ministering the law, will admit any distinction between such a suitor and one who is a resident or a citizen of its own state. "Before the law and its tribunals there can be no preference of one over the other."

Tested by the rules prevailing in this state, as expounded and settled by our own decisions, relative to the validity of mortgages given in good faith by an insolvent corporation upon its corporate property to secure a bona fide antecedent indebtedness, we are constrained, under the facts, to uphold the validity of the mortgages in controversy. Under the evidence, the judgment of the lower court ought to have been in favor of appellants upon the issues tendered by the cross-complaints.

The judgment rendered by the Trial Court in favor of appellee upon the issues joined upon appellants' cross-complaints is therefore reversed, and the cause is remanded to the lower court, with instructions to grant appellants a new trial, and for further proceedings not inconsistent with this opinion.

Baker, J., did not participate in this decision.

MASSACHUSETTS SUPREME JUDICIAL COURT.

AMERICAN WALTHAM WATCH COMPANY
v.
UNITED STATES WATCH COMPANY.
(.....Mass.....)

1. The manufacturer who first uses a geographical name for his goods may put later comers to the trouble of taking such reasonable precautions as are commercially practicable to prevent their lawful names and advertisements from deceitfully diverting his custom.
2. The original manufacturer of Waltham watches may have an injunction against the use of the word "Waltham" or the words "Waltham, Mass." by another manufacturer of watches at that place, without any distinguishing statements, in such a way as to deceive the public, to the damage of the former.

(March 3, 1899.)

REPORT by the Supreme Judicial Court for Suffolk County for the opinion of the full bench of a bill to enjoin defendant from making use of the word "Waltham" in connection with watches manufactured by it. *Decree for plaintiff.*

The trial justice, Knowlton, found that the plaintiff corporation for many years had been a manufacturer of watches at Waltham, and before defendant had begun to do business its watches of all grades had acquired

a general reputation for excellence which made them much sought by purchasers in the market. It was then the only manufacturer of watches in that town, and it was accustomed to put upon the dial of each watch an abbreviation of its corporate name, with the word "Waltham" underneath. Its watches had come to be commonly known as Waltham watches.

Since 1885 defendant had been engaged in manufacturing watches in Waltham, and had been accustomed to put upon the dials of its watches the words and letters "U. S. Watch Co." with the word "Waltham" underneath. Dealers in watches are generally sufficiently familiar with the names and places of business of manufacturers to know that watches made by defendant are not manufactured by plaintiff. But persons about to purchase watches merely for personal use are generally ignorant in regard to such matters. The word "Waltham" was originally used by the plaintiff merely in a geographical sense, but by long use in connection with plaintiff's watches it came to have a secondary meaning as a designation of watches of a particular class. It was shown that defendant's watches had often been sold by dealers as Waltham watches. Sometimes dealers have expressly told purchasers that they were the watches commonly known as Waltham watches, whose excellence was well known. One of the purposes

NOTE.—On the subject of the use of geographical names for trademarks, see also *Laughman v. Piper* (Pa.) 5 L. R. A. 599, and *note*; *Gato v. El Modelo Cigar Mfg. Co.* (Fla.) 8 L. R. A. 823; *New York & B. Cement Co. v. Coplay* 43 L. R. A.

Cement Co. (C. C. E. D. Pa.) 10 L. R. A. 833, and *note*; *Levy v. Walcott* (C. C. A. 1st C.) 25 L. R. A. 190; *Hoyt v. J. P. Lovett Co.* (C. C. A. 3d C.) 31 L. R. A. 44. Also some cases in *note* to *Alff v. Radam* (Tex.) 9 L. R. A. 145.

of defendant in using the word "Waltham" was to avail itself of the reputation of plaintiff's watches to increase the sale of its own. One or more of its managing officers sometimes advised the use of the word "Waltham" by its agents as an aid in making sales.

It did not appear that defendant's watches were of poor quality, and there is nothing to show that it was not trying to make them as good as the plaintiff's, but they had not acquired such a good reputation in the market as plaintiff's had. Defendant's sales had been materially increased, and plaintiff's sales had been materially diminished, by reason of the deception of ultimate purchasers, caused in part, and made easy and possible, by the use of the word "Waltham" on the plates and dials.

The trial justice was of opinion that the word had acquired a secondary meaning in connection with the plaintiff's watches of which defendant had no right to avail itself to the damage of plaintiff, and that there should be an injunction against the use by the defendant of the word "Waltham," or the words "Waltham, Mass.," upon plates of its watches without some accompanying statement which shall plainly distinguish its watches from those manufactured by plaintiff. The use of the word Waltham, in its geographical sense, on the dial, is not important to defendant, and its use should be enjoined. Watch movements were put in evidence to show that it would not be difficult to use in connection with the words "U. S. Watch Co., Waltham, Mass.," the words "No connection with the Am. Waltham Watch Co.," or "Not the original Waltham Watch Co.," or some similar explanatory statement.

Messrs. William A. Munroe, Frederick P. Fish, and Frank L. Crawford, for plaintiff:

The propriety of the issue of an injunction in cases of this nature is essentially not a question of law, but is one which must necessarily be determined by a comprehensive view of all the evidence.

Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L. R. A. 42; *Genesee Salt Co. v. Burnap*, 43 U. S. App. 243, 73 Fed. Rep. 818, 20 C. C. A. 27; *Harvard Law Review*, Dec. 1898, p. 261.

A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end.

Perry v. Truefitt, 6 Beav. 66; *Croft v. Day*, 7 Beav. 84; *Reddaway v. Banham* [1896] A. C. 199; *Hildreth v. D. S. McDonald Co.* 164 Mass. 16; *New England Aul & Needle Co. v. Marlborough Aul & Needle Co.* 168 Mass. 154; *Vitascope Co. v. United States Phonograph Co.* 83 Fed. Rep. 30; *Pouillet, Brevets d'Invention*, ed. 1879, 279, § 329. Cited in *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 198, 41 L. ed. 129.

If, in fact, the defendant is selling his goods as those of the plaintiff, he is doing what the law will not allow.
43 L. R. A.

Saxlehner v. Apollinaris Co. [1897] 1 Ch. 893.

The courts in many cases have given relief against the use of defendant's own name, even the personal family name of an individual.

Russia Cement Co. v. Le Page, 147 Mass. 206; *Walter Baker & Co. v. Baker*, 77 Fed. Rep. 181; *Walter Baker & Co. v. Sanders*, 51 U. S. App. 421, 80 Fed. Rep. 889, 26 C. C. A. 220; *Walter Baker & Co. v. Baker*, 87 Fed. Rep. 209; *Allegretti Chocolate Cream Co. v. Keller*, 85 Fed. Rep. 613; *Wilson v. T. H. Garrett & Co.* 47 U. S. App. 250, 78 Fed. Rep. 472, 24 C. C. A. 173; *Stuart v. F. G. Stewart Co.* 91 Fed. Rep. 243, 85 Fed. Rep. 778; *Brinsmead v. Brinsmead*, 13 The Times L. R. 3; *Croft v. Day*, 7 Beav. 84; *Massam v. Thorley's Cattle Food Co.* L. R. 14 Ch. Div. 748.

Also against the use of generic and descriptive words applicable to the defendants' product.

Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118; *Reddaway v. Banham* [1896] A. C. 199.

Also against the use of the name of the town or place where the defendant did business.

Seizo v. Provezende, L. R. 1 Ch. 192; *Siebert v. Findlater*, L. R. 7 Ch. Div. 801; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Montgomery v. Thompson* [1891] A. C. 217; *Huntley v. Reading Biscuit Co.* 10 R. P. C. 277; *Gebbie v. Stitt*, 82 Hun. 93; *William C. Atwater & Co. v. Castner*, 50 U. S. App. 394, 88 Fed. Rep. 642; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 89 Fed. Rep. 487; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 58 U. S. App. 490, 86 Fed. Rep. 608, 30 C. C. A. 386, 41 L. R. A. 162.

The ground on which the leading cases go is that the word or words in question, which the second comer might otherwise have been free to use, have by long use acquired a secondary meaning whereby they have become the designation of the goods of a particular dealer, so that the public are confused and deceived if the words are allowed to be used by another.

Wotherspoon v. Currie, L. R. 5 H. L. 508; *Reddaway v. Banham* [1896] A. C. 199; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 89 Fed. Rep. 487; *Gage-Downs Co. v. Featherbone Corset Co.* 83 Fed. Rep. 213; *Metcalf v. Brand*, 86 Ky. 331; *Montgomery v. Thompson* [1891] A. C. 217; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118; *Gebbie v. Stitt*, 82 Hun. 93; *Rose v. McLean Pub. Co.* 24 Ont App. Rep. 240.

The jurisdiction in regard to trademarks and names is based, not only upon the importance of preventing fraud, actual or constructive, and unfair competition, but also upon the ground that "it is the policy of the law, for the advantage of the public, to encourage and protect invention and commercial enterprise.

Peabody v. Norfolk, 98 Mass. 453, 96 Am. Dec. 664; *William C. Atwater & Co. v. Castner*, 50 U. S. App. 394, 88 Fed. Rep. 642.

Where confusion arises, the second comer

will be required clearly to distinguish his goods from those of the merchant who first occupied the field.

Reddaway v. Banham [1896] A. C. 199; *Birmingham Vinegar Brewery Co. v. Powell* [1897] A. C. 710; *Huntley v. Reading Biscuit Co.* [1893] 10 R. P. C. 277; *Seizo v. Provezende*, L. R. 1 Ch. 192.

And such distinction must be so effective as to render confusion impossible.

Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118; *Walter Baker & Co. v. Baker*, 87 Fed. Rep. 209; *Powell v. Birmingham Vinegar Brewery Co.* [1896] 2 Ch. 54; *Walter Baker & Co. v. Sanders*, 51 U. S. App. 421, 80 Fed. Rep. 889, 26 C. C. A. 220; *California Fig-Syrup Co. v. Clinton E. Worden & Co.* 86 Fed. Rep. 212.

Even if the precautions necessary to render such distinction effective should make it impossible to carry on business successfully.

Powell v. Birmingham Vinegar Brewery Co. [1896] 2 Ch. 54; *Huntley v. Reading Biscuit Co.* 10 R. P. C. 277.

It is no objection that these precautions may result in giving plaintiff a practical monopoly of the name of the town, Waltham, in connection with watches.

Montgomery v. Thompson [1891] A. C. 217.

Whether the means used to distinguish the goods of the second comer are really effective, is a question of fact.

Powell v. Birmingham Vinegar Brewery Co. [1896] 2 Ch. 54.

The courts will go so far, in a proper case, as to enjoin the use of the defendant's name altogether.

William Rogers Mfg. Co. v. R. W. Rogers Co. 66 Fed. Rep. 56; *Wilson v. T. H. Garrett & Co.* 47 U. S. App. 250, 78 Fed. Rep. 472, 24 C. C. A. 173; *Pinet v. Maison Louis Pinet*, 77 L. T. N. S. 613; *Wotherspoon v. Currie*, L. R. 5 H. L. 508.

Those who use marks or words calculated to deceive are liable, not only because of the deception involved in their own acts, but also because they put it in the power of reckless and dishonest dealers to deceive.

New England Awl & Needle Co. v. Marlborough Awl & Needle Co. 168 Mass. 154; *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.* 45 U. S. App. 190, 77 Fed. Rep. 869, 23 C. C. A. 554; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.* 24 U. S. App. 395, 64 Fed. Rep. 841, 12 C. C. A. 432; *Hostetter Co. v. Becker*, 73 Fed. Rep. 297; *Hennessy v. Hermann*, 89 Fed. Rep. 669; *Collinsplatt v. Finlayson*, 88 Fed. Rep. 693; *Johnston v. Orr Ewing*, L. R. 7 App. Cas. 219; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Singer Mfg. Co. v. Loog*, L. R. 18 Ch. Div. 395; *Lever v. Goodwin*, L. R. 36 Ch. Div. 1; *Saxlehner v. Apollinaris Co.* [1897] 1 Ch. 893; *Hostetter Co. v. Bruggeman-Reinert Distilling Co.* 46 Fed. Rep. 188.

It is not necessary to show direct fraud, nor even a fraudulent intent, on the part of the offending manufacturer.

Singer Mfg. Co. v. Loog, L. R. 18 Ch. Div. 395; *Saxlehner v. Apollinaris Co.* L. R. 1 Ch. Div. 893; *Powell v. Birmingham* 43 L. R. A.

Vinegar Brewery Co. [1896] 2 Ch. 54; *Singer Mfg. Co. v. Wilson*, L. R. 3 App. Cas. 376; *Cochrane v. Macnish* [1896] A. C. 225; *LePage Co. v. Russia Cement Co.* 5 U. S. App. 112, 51 Fed. Rep. 941, 2 C. C. A. 555, 17 L. R. A. 354; *Tarrant & Co. v. Johanna Hoff*, 45 U. S. App. 143, 76 Fed. Rep. 959, 22 C. C. A. 644; *Millington v. Fox*, 3 Myl. & C. 338; *Orreuw v. Johnston*, L. R. 13 Ch. Div. 434; *Mitchell v. Henry*, L. R. 15 Ch. Div. 181; *Hendricks v. Montagu*, L. R. 17 Ch. Div. 638; *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.* 168 Mass. 154.

The relief to which the report finds the plaintiff entitled is the smallest measure of relief which will protect the plaintiff, and is in all points amply warranted by the authorities.

Brinsmead v. Brinsmead [1896] 13 The Times, L. R. 3; *Re Thomas Edward Brinsmead & Sons* [1897] 1 Ch. 406; *Allegretti Chocolate Cream Co. v. Keller*, 85 Fed. Rep. 643; *Allegretti v. Allegretti Chocolate Cream Co.* 177 Ill. 129.

Messrs. Causton Browne and Oliver R. Mitchell, for defendant:

There is nothing in the facts of the present case which renders it proper that the defendant should do more than refrain from employing any imitative devices and from any exercise of its legal rights tending unnecessarily to increase confusion, and abstain from any advice or suggestion to dealers, that they may make an unfair use of the word "Waltham."

Russia Cement Co. v. LePage, 147 Mass. 208.

Geographical words are for geographical purposes.

Connell v. Reed, 128 Mass. 477, 35 Am. Rep. 397; *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 20 L. ed. 581; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144; *Coffman v. Castner*, 59 U. S. App. 35, 87 Fed. Rep. 457, 31 C. C. A. 55; *Evans v. Von-Laer*, 32 Fed. Rep. 153; *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125; *Elgin Butter Co. v. Elgin Creamery Co.* 155 Ill. 127; *Clinton Metallic Paint Co. v. New York Metallic Paint Co.* 23 Misc. 66; *Glendon Iron Co. v. Uhler*, 75 Pa. 467, 15 Am. Rep. 599; *Lea v. Wolf*, 13 Abb. Pr. N. S. 389; *Wolfe v. Goulard*, 18 How. Pr. 64; *Binninger v. Wattles*, 28 How. Pr. 206; *Koehler v. Saunders*, 48 Hun, 48; *Laughman's Appeal*, 128 Pa. 1, 5 L. R. A. 599; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416; *Hoyt v. J. T. Lovett Co.* 39 U. S. App. 1, 71 Fed. Rep. 173, 17 C. C. A. 652, 31 L. R. A. 44; *Cahn v. Hoffman House*, 7 Misc. 461; *Bolander v. Peterson*, 136 Ill. 215, 11 L. R. A. 350.

Where the defendant is using the geographical word untruthfully, and therefore not in the exercise of any right, in such a case the plaintiff will receive protection.

Neuman v. Alvord, 49 Barb. 588; *Pillsbury-Washburn Flour Mills Co. v. Eagle Co.* 58 U. S. App. 490, 80 Fed. Rep. 608, 30 C. C. A. 380, 41 L. R. A. 162; *La Republique Francaise v. Schultz*, 57 Fed. Rep. 37; *Southern White Lead Co. v. Cary*, 25 Fed.

Rep. 125; *Collinsplatt v. Finlayson*, 98 Fed. Rep. 693; *Siebert v. Findlater*, L. R. 7 Ch. Div. 801; *Powell v. Birmingham Vinegar Brewery Co.* [1896] 2 Ch. 54; *Gage-Downs Co. v. Featherbone Corset Co.* 83 Fed. Rep. 213.

Where the defendant's use, though truthful, is not a necessary use, inasmuch as he can exercise his legal right to use the geographical or descriptive word in some other form or collocation than that adopted by the plaintiff, with equal advantage to himself so far as legitimate objects are concerned, in such a case the courts have sometimes interfered to regulate the exercise of the legal right, by requiring the defendant to refrain from using the collocation of words employed by the plaintiff.

Montgomery v. Thompson [1891] A. C. 217; *Clark Thread Co. v. Armitage*, 45 U. S. App. 62, 74 Fed. Rep. 936, 21 C. C. A. 178; *Johann Hoff v. Tarrant & Co.* 71 Fed. Rep. 163; *Wotherspoon v. Currie*, L. R. 5 H. L. 508.

There are also two apparent exceptions to the generality of the rule that descriptive words (including words geographically descriptive) are for descriptive purposes; namely, that an exclusive right may be sustained when, as used, the word is purely arbitrary.

Siebert v. Findlater, L. R. 7 Ch. Div. 801; *Powell v. Birmingham Vinegar Brewery Co.* [1896] 2 Ch. 54; *Hine v. Lart*, 10 Jur. 106; *Hirst v. Denham*, L. R. 14 Eq. 542; *Fleischmann v. Schuckmann*, 62 How. Pr. 92; *Taylor v. Carpenter*, 3 Story, 458; *Amos H. Van Horn v. Coogan*, 52 N. J. Eq. 380.

The other apparent exception is that where the defendant's use is merely colorable—where he has for the purposes of fraud put himself in a position to be able to claim the legal right—the color of right will be disregarded by the court and the use treated as if unnecessary and in effect untruthful.

Wilson v. T. H. Garrett & Co. 47 U. S. App. 250, 78 Fed. Rep. 472, 24 C. C. A. 173; *Pinet v. Maison Louis Pinet*, 77 L. T. N. S. 613; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 89 Fed. Rep. 487; *Gebbie v. Stitt*, 82 Hun, 93; *Wotherspoon v. Currie*, L. R. 5 H. L. 508.

The proposition that if the defendant has deliberately, and with fraudulent intent, put himself in position to exercise the legal right, his color of right will be disregarded, is not universally accepted.

Glendon Iron Co. v. Uhler, 75 Pa. 467, 15 Am. Rep. 599.

While a word geographically or otherwise descriptive, or a personal name, cannot be appropriated as against others who can use it with equal truth, the second comer in the field will not be allowed to use the word with any additions, or devices, or suppression of facts, calculated to cause defendant's article to be mistaken for the plaintiff's article, nor to use it in one way to the damage of the plaintiff when legitimate purposes of the defendant can equally well be served by using it in some other way. In the absence of additions or suppressions, 43 L. R. A.

and when the defendant's use is a use necessary to give him legitimate benefit of his legal right, damage resulting from defendant's use is *damnum absque injuria*, without regard to the purpose of the defendant in exercising his right.

Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118; *Genesee Salt Co. v. Burnap*, 67 Fed. Rep. 534; *Lea v. Wolf*, 13 Abb. Pr. N. S. 389; *Oppermann v. Waterman*, 94 Wis. 583; *Centaur Co. v. Killenberger*, 87 Fed. Rep. 725; *Walter Baker & Co. v. Sanders*, 51 U. S. App. 421, 80 Fed. Rep. 889, 26 C. C. A. 220; *Gebbie v. Stitt*, 82 Hun, 93; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 89 Fed. Rep. 487; *Rogers v. Wm. Rogers Mfg. Co.* 35 U. S. App. 848, 70 Fed. Rep. 1019, 17 C. C. A. 575; *Duryea v. National Starch Mfg. Co.* 45 U. S. App. 649, 79 Fed. Rep. 651; *Wm. Rogers Mfg. Co. v. Rogers*, 84 Fed. Rep. 639; *De Long v. De-Long Hook & Eye Co.* 7 App. Div. 33; *Gage-Downs Co. v. Featherbone Corset Co.* 83 Fed. Rep. 213; *Walter Baker & Co. v. Baker*, 87 Fed. Rep. 209; *Turton v. Turton*, L. R. 42 Ch. Div. 136; *Stuart v. F. G. Stewart Co.* 85 Fed. Rep. 778; *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125; *Elgin Butter Co. v. Elgin Creamery Co.* 155 Ill. 127; *New York Cement & R. Co. v. Copley Cement Co.* 44 Fed. Rep. 277, 45 Fed. Rep. 212, 10 L. R. A. 833; *Glendon Iron Co. v. Uhler*, 75 Pa. 467, 15 Am. Rep. 599; *Clinton Metallic Paint Co. v. New York Metallic Paint Co.* 23 Misc. 66; *Coffman v. Castner*, 59 U. S. App. 35, 87 Fed. Rep. 457, 31 C. C. A. 55; *Reddaway v. Banham* [1896] A. C. 199; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Thompson v. Montgomery*, L. R. 41 Ch. Div. 42; *Powell v. Birmingham Vinegar Brewery Co.* [1896] 2 Ch. 54 [1897] A. C. 710; *Linoleum Mfg. Co. v. Nairn*, L. R. 7 Ch. Div. 834; *Evans v. Von Laer*, 32 Fed. Rep. 153; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416; *Bolander v. Peterson*, 136 Ill. 215, 11 L. R. A. 350; *Wilson v. T. H. Garrett & Co.* 47 U. S. App. 250, 78 Fed. Rep. 472, 24 C. C. A. 173; *Duryea v. National Starch Mfg. Co.* 45 U. S. App. 649, 79 Fed. Rep. 651.

Holmes, J., delivered the opinion of the court:

This is a bill brought to enjoin the defendant from advertising its watches as the "Waltham Watch" or "Waltham Watches," and from marking its watches in such a way that the word "Waltham" is conspicuous. The plaintiff was the first manufacturer of watches in Waltham, and had acquired a great reputation before the defendant began to do business. It was found at the hearing that the word "Waltham," which originally was used by the plaintiff in a merely geographical sense, now, by long use in connection with the plaintiff's watches, has come to have a secondary meaning as a designation of the watches which the public has become accustomed to associate with the name. This is recognized by the defendant so far

that it agrees that the preliminary injunction, granted in 1890, against using the combined words "Waltham Watch" or "Waltham Watches" in advertising its watches, shall stand, and shall be embodied in the final decree.

The question raised at the hearing, and now before us, is whether the defendant shall be enjoined further against using the words "Waltham," or "Waltham, Mass.," upon plates of its watches, without some accompanying statement which shall distinguish clearly its watches from those made by the plaintiff. The judge who heard the case found that it is of considerable commercial importance to indicate where the defendant's business of manufacturing is carried on, as it is the custom of watch manufacturers so to mark their watches, but, nevertheless, found that such an injunction ought to issue. He also found that the use of the word "Waltham," in its geographical sense, upon the dial, is not important, and should be enjoined.

The defendant's position is that, whatever its intent and whatever the effect in diverting a part of the plaintiff's business, it has a right to put its name and address upon its watches; that to require it to add words which will distinguish its watches from the plaintiff's in the mind of the general public is to require it to discredit them in advance; and that if the plaintiff, by its method of advertisement, has associated the fame of its merits with the city where it makes its wares, instead of with its own name, that is the plaintiff's folly, and cannot give it a monopoly of a geographical name, or entitle it to increase the defendant's burden in advertising the place of its works.

In cases of this sort, as in so many others, what ultimately is to be worked out is a point or line between conflicting claims, each of which has meritorious grounds, and would be extended further were it not for the other. *Boston Ferrule Co. v. Hills*, 159 Mass. 147, 149, 150, 20 L. R. A. 844. It is desirable that the plaintiff should not lose custom by reason of the public mistaking another manufacturer for it. It is desirable that the defendant should be free to manufacture watches at Waltham, and to tell the world that it does so. The two *desiderata* cannot both be had to their full extent, and we have to fix the boundaries as best we can. On the one hand, the defendant must be allowed to accomplish its *desideratum* in some way, whatever the loss to the plaintiff. On the other, we think, the cases show that the defendant fairly may be required to avoid deceiving the public to the plaintiff's harm, so far as is practicable in a commercial sense. It is true that a man cannot appropriate a geographical name; but neither can he a color, or any part of the English language, or even a proper name, to the exclusion of others whose names are like his. Yet a color in connection with a sufficiently complex combination of other things may be recognized as saying so circumstantially that the defendant's goods are the plaintiff's as to pass the injunction line. *New England Aul & Needle Co. v. Marlborough Aul & Needle* 43 L. R. A.

Co. 168 Mass. 154, 156. So, although the plaintiff has no copyright on the dictionary, or any part of it, he can exclude a defendant from a part of the free field of the English language, even from the mere use of generic words, unqualified and unexplained, when they would mislead the plaintiff's customers to another shop. *Reddaway v. Banham* [1896] A. C. 199. So, the name of a person may become so associated with his goods that one of the same name coming into the business later will not be allowed to use even his own name without distinguishing his wares. *Brinsmead v. Brinsmead*, 13 The Times L. R. 3; *Reddaway v. Banham* [1896] A. C. 199, 210. See *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 204, 41 L. ed. 118, 131; *Allegritti Chocolate Cream Co. v. Keller*, 85 Fed. Rep. 643. And so, we doubt not, may a geographical name acquire a similar association with a similar effect. *Montgomery v. Thompson* [1891] A. C. 217.

Whatever might have been the doubts some years ago, we think that now it is pretty well settled that the plaintiff, merely on the strength of having been first in the field, may put later comers to the trouble of taking such reasonable precautions as are commercially practicable to prevent their lawful names and advertisements from deceitfully diverting the plaintiff's custom.

We cannot go behind the finding that such a deceitful diversion is the effect, and intended effect, of the marks in question. We cannot go behind the finding that it is practicable to distinguish the defendant's watches from those of the plaintiff, and that it ought to be done. The elements of the precise issue before us are the importance of indicating the place of manufacture and the discrediting effect of distinguishing words on the one side, and the importance of preventing the inferences which the public will draw from the defendant's plates as they now are, on the other. It is not possible to weigh them against each other by abstractions or general propositions. The question is specific and concrete. The judge who heard the evidence has answered it, and we cannot say that he was wrong.

Decree for plaintiff.

The decree enjoined defendant generally from using the words "Waltham watch" or "Waltham watches" or using the word "Waltham" otherwise than geographically and "from using the word Waltham with or without other words on the dials of its watches; from making, selling, or disposing of watches or parts of watches having plates inscribed with the word Waltham unless accompanied by the word "Mass." and unless there is also prominently collocated with the word "Waltham" the words "A new watch company at Waltham Est'd 1885," and unless its corporate name, whether in full or abbreviated, is printed on such plates in letters easily legible; from using the word "Waltham" in any such way as to induce the belief that its watches are made by plaintiff; and from doing anything to avail itself of the reputation of the plaintiff's watches to increase the sale of its own.

GRAFTON NATIONAL BANK

v.

Oliver M. WING, Admr., etc., of Henry F. Wing, Deceased.

GRAFTON SAVINGS BANK

v.

SAME.

(.....Mass.....)

An executor will not be personally bound by his indorsement of commercial paper by the words "Estate of" his testator followed by his own name "Executor."

(February 28, 1899.)

EXCEPTIONS by defendant to a ruling of the Superior Court for Worcester County in favor of plaintiff in an action brought to hold defendant liable upon an indorsement on certain promissory notes. *Sustained.*

These actions were brought to hold the Wing estate liable for indorsements which had been made by Wing as executor of the estate of Jonathan D. Wheeler, deceased. The notes had originally been indorsed by Wheeler and were renewed by the indorsement of H. F. Wing, and during the life of the notes the president of the banks told Wing that the indorsements bound him personally and not the Wheeler estate. The president of the banks testified that when the Wing indorsement was first made the banks questioned his right to indorse the notes in that way and from that time constantly took the position toward him of absence of authority on his part to make the indorsement so as to bind the estate.

Mr. Wing at the same time claimed that the indorsements were proper. Defendant requested the court to instruct that there was no indorsement on the note which bound the defendant's testator personally, but the court refused so to rule and found for plaintiff in each case, to which ruling the defendant excepted.

The facts are stated in the opinion.

Messrs. Frank P. Goulding and William C. Mellis for plaintiff.

Messrs. John B. Scott and T. H. Gage, Jr., for defendant:

The indorsement in question does not purport to bind Henry F. Wing personally.

The renewal notes were not payment, but an extension of the old liability of Jona. D. Wheeler.

Tucker v. Drake, 11 Allen, 145; 2 Dan. Neg. Inst. §§ 1266 *et seq.*

Consequently the indorsements were not a new promise to pay, and do not impose any new liability upon the estate, but were promises to pay a debt created by Wheeler, and the defendant's intestate was liable *de bonis testatoris*.

NOTE.—As to the effect of the qualifying word "executor" in a contract, see also *note* to *Rich v. Sowles* (Vt.) 15 L. R. A. 850.

As to indorsement of note by trustee, see *Tradesmen's Nat. Bank v. Looney* (Tenn.) 38 L. R. A. 837.
43 L. R. A.

Luscomb v. Ballard, 5 Gray, 403, 46 Am. Dec. 374; *Douce v. Coxe*, 3 Bing. 26; *Powell v. Graham*, 7 Taunt. 581; *Ashby v. Ashby*, 7 Barn. & C. 444; *Rose v. Bowler*, 1 H. Bl. 108; *Segar v. Atkinson*, 1 H. Bl. 102; *Piper v. Goodwin*, 23 Me. 251.

If the estate of Jonathan D. Wheeler was not bound by the form of indorsement, it was not in form to bind Henry F. Wing personally, and no one was bound by it.

Jefts v. York, 4 Cush. 371, 50 Am. Dec. 791, 10 Cush. 392; *Abbey v. Chase*, 6 Cush. 54; *Sunborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502; *Taylor v. Shelton*, 30 Conn. 122.

The indorsement is not in form to reject the word "executor" as surplusage or *descriptio personæ*.

Dan. Neg. Inst. § 202; *Rittenhouse v. Ammerman*, 64 Mo. 197, 27 Am. Rep. 215; *Taylor v. Shelton*, 30 Conn. 122.

If the executor was bound by the indorsement, it was only on a promise to pay out of the estate of Wheeler, and his liability is *de bonis testatoris*, as the form and manifest intention of the indorsement was to limit the payment to that estate.

1 Dan. Neg. Inst. § 203; *Childs v. Monins*, 2 Brod. & R. 460.

Holmes, J., delivered the opinion of the court:

These are two actions of contract against the administrator of the estate of Henry F. Wing, seeking to hold him upon two indorsements made by Henry F. Wing, as executor of the will of Jonathan D. Wheeler. The indorsements were in the following form:

Estate of Jona. D. Wheeler,
Henry F. Wing, Executor.

A majority of the court are of opinion that these words mean, "Estate of Wheeler, by Wing," and therefore that, at least, they failed to bind Wing by contract. It is quite true that the law does not know the estate of a dead man as a contractor, and that, unless the fact that these indorsements were the renewal of indorsements by Wheeler in his lifetime makes a difference, they did not bind the estate. But that merely shows that the indorsements were made by Wing under a mistake of law, as the testimony also proves to have been a fact. But the presence of Wing's name upon the paper, and his failure to bind his supposed principal, are not enough to make the contract his own. *Jefts v. York*, 4 Cush. 371, 50 Am. Dec. 791, 10 Cush. 392, 395, 396; *Abbey v. Chase*, 6 Cush. 54, 56, 57; *Taylor v. Shelton*, 30 Conn. 122. If a man does not purport to be a party to negotiable paper, he is not a party to it. See, further, 1 Dan. Neg. Inst. 4th ed. §§ 306-308; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240. It is true that it is suggested by Mr. Daniel that, in such cases, an ambiguous expression may be interpreted to bind the agent; but neither that suggestion, nor a presumption that the agent knew the law, can pervert words from their meaning, if the meaning is plain. The so-called "presumption" is a requirement, not a presumption of fact, and has no bearing

or weight upon the construction of instruments.

We are of opinion that the court should have ruled that the defendant was not liable.

Exceptions sustained:

Margaret C. SPADE

v.

LYNN & BOSTON RAILROAD.

(.....Mass.....)

1. A passenger on whom a drunken man is thrown by being jostled while the conductor is removing another drunken man from the car rightfully and without negligence has no right of action therefor against the carrier.
2. The enhancement, because of fright, of the damages sustained by a passenger on whom a drunken man is thrown in a car while another drunken man is being removed from the car must be limited to the fright caused by the personal contact with the former, and cannot extend to the fright resulting from the general disturbance.
3. A street-car conductor's knowledge of the peculiar sensitiveness of a lady passenger does not increase the carrier's obligation toward her, although in case of a wrong toward her the carrier will be liable for the actual consequences, even if the effect would have been less upon a normal person.

(January 16, 1899.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence which resulted in a verdict in plaintiff's favor. *Sustained.*

The facts are stated in the opinion.

Mr. C. K. Cobb for defendant.

Messrs. S. L. Whipple and W. R. Sears for plaintiff.

Holmes, J., delivered the opinion of the court:

This is an action for personal injuries, which already has been before the court. 168 Mass. 285, 38 L. R. A. 512. At the second trial the evidence was that the defendant's conductor, in removing a drunken man from a car, jostled another drunken man, who was standing in front of the plaintiff, and threw him upon her. The fall upon her seems to have been a trifling matter, taken by itself, but the fright caused by that and the rest of the occurrences in the car resulted in physical injury. The case comes up again upon exceptions.

The judge was asked to direct a verdict for the defendant. We find some difficulty in seeing upon what ground the jury were warranted in finding for the plaintiff. So far as appears, the conductor was acting rightly in putting the drunken man off the car. As against the plaintiff, he was doing

one of the things which she had to contemplate as liable to happen, when she got into the car. We all know that, if people are standing in the passageway of a street car, you cannot remove a man forcibly through the passageway without more or less contact. If the fall upon the plaintiff was the necessary consequence of a lawful and reasonable act, then it was one of the risks which she assumed when she took her passage.

It is a question which deserves more discussion than it has received, whether a man is answerable for an injury inflicted upon an innocent stranger knowingly, or with sufficient notice of the danger, if the injury is an unavoidable incident of lawful self-protection. It might be said, and it has been held, when it is a question of paying damages, that a man cannot shift his misfortunes to his neighbor's shoulders. *Gilbert v. Stone*, Allyn, 35, Style, 72; *Scott v. Shepherd*, 2 W. Bl. 892, 896; *Cooley*, Torts, p. 115. See *McLeod v. Jones*, 105 Mass. 403, 405, 7 Am. Rep. 539; *Miller v. Horton*, 152 Mass. 540, 547, 10 L. R. A. 116; *Pierce v. Cunard S. S. Co.*, 153 Mass. 87, 90; *Whalley v. Lancashire & Y. R. Co.* L. R. 13 Q. B. Div. 131. And compare the rule as to duress in contracts and conveyances. *Fairbanks v. Snow*, 145 Mass. 153, 155. On the other hand, the contrary has been intimated in a case of shooting in self-defense, the injury to the third person being treated on the footing of accident. *Morris v. Platt*, 32 Conn. 75, 84. See *Bacon Max. Reg.* 5, 6; *Addison*, Torts, 6th ed. 380, 383. And the right to pull down a house when the destruction is necessary to stop a fire, as it usually is stated, looks the same way. See *Taylor v. Plymouth*, 8 Met. 462, 465; *American Print Works v. Lawrence*, 23 N. J. L. 590, 613, 57 Am. Dec. 420. The alleged immunity for the necessary destruction of a building suggests that perhaps the question cannot be answered in general terms, and that one possible distinction may be found where the parties have a common interest, even though the act done in furtherance of it may cause more harm than good to the plaintiff. Perhaps it would be unsafe to find any countenance to such a distinction in decisions as to the rights of landowners or officials in diking against water when it appears as a common enemy. *King v. Pagham Sewer Comrs.* 8 Barn. & C. 355; *Nield v. London & N. W. R. Co.* L. R. 10 Exch. 4. Compare *Whalley v. Lancashire & Y. R. Co.* L. R. 13 Q. B. Div. 131. But when we go a step further, and take a case like the present, where all parties concerned are in a conveyance, and to maintain order and keep the car clear of obnoxious persons is the defendant's right, and its duty to the plaintiff and the other passengers, no passenger can complain of any consequence which the performance of that duty necessarily entails. We assume for present purposes that carriers of passengers owe the same degree of care in respect of such matters as they owe in respect of the construction and management of their vehicles, but, if that care is shown, probably the injury must be regarded as an inevitable accident. As to whether there was any negligence in the manner of expelling the drunk-

NOTE.—For former report of this case, denying recovery for fright alone, see *Spade v. Lynn & B. R. Co.* (Mass.) 88 L. R. A. 512. 43 L. R. A.

en man, or otherwise, we will go no further than to say that it has not been pointed out to us. We need not decide the question, as there must be a new trial for another reason.

A ruling was asked to the effect that the plaintiff could recover only for the pain and fright caused by the contact with her person, and not for such mental disturbance and injury as was caused by other acts of the conductor, and the general disturbance in the car. This was refused, and the jury were instructed that if there was a physical injury, and accompanied by it there was fright which operated to her injury in body or mind, she could recover for the damage caused by the fright, and the jury were told that they might take all that happened as one whole. The effect of the refusal and the instructions appears to us to have been that, when once a battery of the plaintiff was proved, the defendant became, or might be found, liable for all the consequences of the disturbance in the car, and of the plaintiff's fright, however caused. We do not so understand the law. By something of an anomaly, consequences of the defendant's conduct which would not of themselves constitute a cause of action may at times enhance the damages, if the conduct has some other consequence for which an action lies. But this further liability is not for all consequences of the defendant's conduct, but for consequences of the defendant's wrong to the plaintiff. The wrong to the plaintiff, if any, began with the battery; and it is for the consequences of the battery only that the defendant is liable, not for all the consequences of the drunken man's presence in the car, or of the defendant's attempt to remove him. We are perfectly aware of the difficulty of discriminating. But it seems quite possible in this case that the plaintiff's trouble was due, in substance, to the disturbance as a whole, although it may be that the jury would be warranted in finding that the impact upon her person gave the detonating spark, without which she would not have collapsed. It is unnecessary to express an opinion whether the evidence in this case warranted the latter finding.

We may add a word with reference to a suggestion made on behalf of the plaintiff and having some bearing upon the eighth instruction asked, and the instructions given. It is argued that, because the conductor had known the plaintiff for several years, the defendant's obligations to her were increased, if the jury believed that she was a particularly sensitive person, and that the conductor must have known it. We regard such an argument, even to the jury, as wholly inadmissible. Ordinary street cars must be run with reference to ordinary susceptibilities, and the liability of their proprietors cannot be increased simply by a passenger's notifying the conductor that he has unstable nerves. In this case it was left to the jury to say whether there was anything that called for special attention to the plaintiff, beyond what was due to other women. Nothing is pointed out to us as a basis for such increased obligation, except the conductor's acquaintance with the plaintiff, and that laid

no foundation for it. We should add, however, to avoid being misunderstood, and with reference to the plaintiff's tenth request, that, if the defendant's servant did commit an unjustifiable battery on the plaintiff's person, the defendant must answer for the actual consequences of that wrong to her as she was, and cannot cut down her damages by showing that the effect would have been less upon a normal person. *Braithwaite v. Hall*, 168 Mass. 38, 40. The measure of the defendant's duty in determining whether a wrong has been committed is one thing; the measure of liability when a wrong has been committed is another.

Exceptions sustained.

Ellen B. GANNON

v.

NEW YORK, NEW HAVEN, & HARTFORD
RAILROAD COMPANY.

(.....Mass.....)

1. The reasonableness of the conduct of a lady passenger who hurts her arm while attempting to escape in haste and fright from a car in which an oil lamp has blazed up, and oily waste with which a brakeman tries to smother the flame has caught fire, is a question for the jury.
2. The impulsive and unguarded act of a lady passenger, by which she is hurt, while trying to escape from a car because of a reasonable fear due to mismanagement of the carrier, is to be deemed a consequence of such mismanagement, for which the carrier is responsible.

(March 8, 1899.)

EXCEPTIONS by defendant to the action of the Superior Court for Barnstable County allowing a suit to recover damages for personal injuries alleged to have been caused by defendant's negligence to go to a jury which returned a verdict in plaintiff's favor. *Overruled.*

The facts sufficiently appear in the opinion.

Mr. H. P. Harriman for defendant.

Messrs. George A. King and Henry H. Baker, Jr., for plaintiff:

The lamp in use by the defendant corporation was defective and unsafe, and there were incompetence and negligence in dealing with it on the part of the defendant's employees.

White v. Boston & A. R. Co. 144 Mass. 404.

If the conditions created by the defendant are dangerous, it is immaterial that the plaintiff might, without moving, have escaped injury.

NOTE.—As to the effect of peril, real or apparent, on contributory negligence, see *Louisville, N. A. & C. R. Co. v. Lucas* (Ind.) 6 L. R. A. 198 and note; *Cody v. New York & N. E. R. Co.* (Mass.) 7 L. R. A. 843, and note; *Mitchell v. Southern P. R. Co.* (Cal.) 11 L. R. A. 130 and note; *Kleiber v. People's R. Co.* (Mo.) 14 L. R. A. 613.

As to negligence of passenger in passing from one car to another, see *McAfee v. Huldekoper* (App. D. C.) 34 L. R. A. 720.

Cody v. New York & N. E. R. Co. 151 Mass. 462, 7 L. R. A. 843; *Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346; *Sears v. Dennis*, 105 Mass. 310; *Worthen v. Grand Trunk R. Co.* 125 Mass. 99; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692.

If there is any evidence upon which it is competent for the jury to find that due care was in fact exercised the case resolves itself into a question of fact for them.

Mayo v. Boston & M. R. Co. 104 Mass. 137; *Marsland v. Murray*, 148 Mass. 91; *Kerrigan v. West End Street R. Co.* 158 Mass. 305; *Warren v. Boston & M. R. Co.* 163 Mass. 484; *Tilton v. Boston & A. R. Co.* 169 Mass. 253.

Even if the court were disposed to regard the plaintiff as exhibiting on the whole a want of due care, the action of the jury would not be reversed.

Mayo v. Boston & M. R. Co. 104 Mass. 137. Inference of due care may be drawn from the absence of negligence.

Ibid.; *Peverly v. Boston*, 136 Mass. 366, 49 Am. Rep. 37.

The danger being imminent and apparent, the plaintiff, in endeavoring to escape therefrom, was not obliged, in order to be in the exercise of due care, to use the same caution and prudence in her movements that she would be held to under ordinary circumstances.

Cody v. New York & N. E. R. Co. 151 Mass. 462, 7 L. R. A. 843; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692.

Holmes, J., delivered the opinion of the court:

This is an action for personal injuries suffered by the plaintiff while a passenger upon a train of the defendant. The case, as stated by the plaintiff's witnesses, was as follows: A lamp opposite where the plaintiff was sitting blazed up. A bystander, and then the conductor, tried to fan out the flame with their hats, but did not succeed, and the plaintiff changed her seat to the other end of the car, next to the baggage car. Then a brakeman tried to smother the flame with oily waste, which caught fire, and blazed, part of it dropping on the floor. The flames came out underneath the lamp. The brakeman got down, and rushed for the rear end of the car, and it looked as if the car was on fire. Thereupon the plaintiff rose to go into the baggage car, presumably in some haste and fright, and struck her arm, hurting her ulnar nerve so badly that she fainted and fell.

An expert on lamps, who was a passenger, testified that the lamp needed more care than ordinary lamps; that the means used to put out the fire were dangerous; and that, with proper skill, the trouble could have been avoided. The judge refused to take the case from the jury, and the defendant excepted.

The judge who tried the case was right. We cannot say, as matter of law, how frightened the plaintiff was or ought to have been, or how great the peril of fire may have seemed. There is no question before us of the degree of firmness which the plaintiff was bound to exhibit, or, more accurately, of the

defendant's immunity from consequences due to unstable nerves. *Spade v. Lynn & B. R.* (Mass.) (Suffolk, Jan. 16, 1899) ante, 832. If the peril seemed imminent, more hasty and violent action was to be expected than would be natural at quieter moments; and such conduct is to be judged with reference to the stress of appearances at the time, and not by the cool estimate of the actual danger formed by outsiders after the event. See *Linnehan v. Sampson*, 126 Mass. 506, 511, 512, 30 Am. Rep. 692; *Haucks v. Locke*, 139 Mass. 205, 209; *Pomeroy v. Westfield*, 154 Mass. 462, 465. We cannot say that an impulsive, and somewhat unguarded, rise from her seat was not a natural and reasonable consequence of the situation as it appeared to the plaintiff. If it was, and if her fear was reasonable,—which, as we have said, we cannot pronounce it not to have been, whatever we may conjecture that we should have thought had we been the jury,—then the plaintiff's conduct is recognized by the law as a consequence of the defendant's mismanagement, for which it is responsible. *Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346; *Sears v. Dennis*, 105 Mass. 310, 313; *Cody v. New York & N. E. R. Co.* 151 Mass. 462, 468, 469, 7 L. R. A. 843.

The case of *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L. R. A. 512, does not establish a principle contrary to that of the foregoing decisions. It admits that principle, and merely sets a limit to its logical extent, upon practical considerations.

Exceptions overruled.

Joshua M. SEARS

v.

BOARD OF ALDERMEN of Boston et al.

(.....Mass.....)

1. The benefit to abutting property from the watering of a street in front of it may be such an improvement to the property that it can be made the subject of an assessment upon it.
2. Assessments for the sprinkling of streets within a certain territory may be lawfully made upon abutting property, although the sprinkling of other parts of the city is done at the public expense.
3. The frontage rule of assessments for watering streets may be upheld when it does not appear that as applied to the property assessed it is not an approximately accurate method of determining benefits.
4. Street-sprinkling assessments made by a superintendent of streets by direction of the board of aldermen, and reported to them, may be regarded as made by the aldermen themselves, when they have made an appropriation based on the report.

(March 3, 1899.)

NOTE.—For street sprinkling as a local improvement, see *Chicago v. Blair* (Ill.) 24 L. R. A. 412, and note.

For an ordinance requiring street-railway companies to sprinkle streets, see *State v. New Orleans City & Lake R. Co.* (La.) 39 L. R. A. 618.

PETITION for a writ of certiorari to quash certain alleged erroneous assessments for street sprinkling. *Dismissed.*

In 1897 the legislature passed an act relative to the watering of streets in cities. This statute gave authority to assess the expense of watering in whole or in part upon abutting owners. The city council of Boston by order approved April 18, 1898, determined that all streets or portions of streets lying within the central portion of the city should be watered in whole at the expense of the abutters, and that all other streets and portions of streets should be watered in whole at the expense of the city. The board of aldermen authorized the superintendent of streets to determine the amount of the assessment for street watering to be laid upon the estates abutting upon the streets within the part of the city designated to be watered by assessment. Seventy-five thousand dollars was appropriated for watering those streets to be raised by assessments upon abutting property. The superintendent of streets made a list of the streets or portions of streets which the city had determined should be watered, specifying the number of linear feet of each estate upon the street. The amount of assessment was fixed for 5 cents per front foot. The computation showed that the amount necessary to be raised was \$138,511, and the aldermen appropriated the difference between the amount already appropriated and that sum for the purpose required, and the list of estates subject to assessment was sent to the assessors.

Further facts appear in the opinion.

Mr. Charles F. Choate, Jr., for petitioner:

This assessment is not a valid exercise of the taxing power.

Street watering is not a matter which can legally be made the subject of a local assessment.

The justification for a local assessment is an added value conferred upon the land benefited by any public improvement. By this benefit is meant a peculiar special benefit which accrues to those whose land is directly affected, and peculiarly enhanced in value by the improvement.

Wright v. Boston, 9 Cush. 233; *Boston v. Boston & A. R. Co.* 170 Mass. 95; *Thomas v. Guin*, 35 Mich. 162, 24 Am. Rep. 535; *Tide-water Co. v. Coster*, 18 N. J. Eq. 519, 90 Am. Dec. 634; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. —; *Stuart v. Palmer*, 74 N. Y. 189, 30 Am. Rep. 289; *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Taylor v. Palmer*, 31 Cal. 254; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Oliver v. Washington Mills*, 11 Allen, 268.

To justify an assessment, a taking of a man's property to pay for an improvement, it is to be implied that the property is taken, not without compensation, but because a corresponding benefit of equal value has been conferred.

Washington Avenue, 69 Pa. 364, 8 Am. Rep. 255.

The division of the city into two districts, one of which is to be a taxing district and the other a nontaxing district, is entirely arbitrary and unreasonable, and is contrary to constitutional provisions and unwarranted by the statute.

bitrary and unreasonable, and is contrary to constitutional provisions and unwarranted by the statute.

Dill. Mun. Corp. § 761; *Stuart v. Palmer*, 74 N. Y. 189, 30 Am. Rep. 289; *Dorgan v. Boston*, 12 Allen, 223.

The board of aldermen never estimated and determined the expense of watering the streets within the red line, nor the rate to be assessed upon each linear foot of frontage upon the estates within the district upon which the cost of watering was to be assessed upon the abutters.

The statute delegating power to charge property of individuals with local assessments must be strictly construed; any departure from the formula of the statute vitiates all proceedings.

Merritt v. Portchester, 71 N. Y. 309, 27 Am. Rep. 47; *Bowditch v. Superintendent of Streets*, 168 Mass. 239.

If it was the duty of the board of aldermen to determine the rate per linear foot in the first instance, this duty could not be delegated to any other officer.

St. Louis, Murphy, v. Clemens, 43 Mo. 395; *Ruggles v. Collier*, 43 Mo. 353.

Mr. Thomas M. Babson, for defendants:

Local assessments or taxes of this kind have been uniformly sustained by the court where there has been a special benefit or advantage to the property taxed.

Dorgan v. Boston, 12 Allen, 234; *Howe v. Cambridge*, 114 Mass. 388; *Chapin v. Worcester*, 124 Mass. 464; *Jones v. Boston*, 104 Mass. 461; *Grace v. Newton Bd. of Health*, 135 Mass. 493.

Such assessments have been uniformly sustained and the laws imposing them held constitutional, even if no jury trial is provided for by the act, provided that the estates assessed are specially benefited, and that the assessments are made in a way which is equal and proportional between the estates.

Burnett v. Sacramento, 12 Cal. 83, 73 Am. Dec. 518; *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *Hayden v. Atlanta*, 70 Ga. 817; *Adams County v. Quincy*, 130 Ill. 566, 6 L. R. A. 155; *Palmer v. Stumph*, 29 Ind. 329; *Bradley v. McAtee*, 7 Bush, 667, 3 Am. Rep. 309; *Brewster v. Syracuse*, 19 N. Y. 118; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615.

Taxes or special assessments can be levied on territory carved out of a town or city for purposes which specially benefit the owners of real estate in such territory, even if such benefit is not permanent but transient.

Thaxter v. Jones, 4 Mass. 570; *Adams v. Howe*, 14 Mass. 340, 7 Am. Dec. 216; *Iglee v. Bosworth*, 5 Pick. 498, 16 Am. Dec. 419; *Amesbury Nail Factory Co. v. Weed*, 17 Mass. 53; *Pond v. Negus*, 3 Mass. 230, 3 Am. Dec. 131; *Blackstone v. Taft*, 4 Gray, 250; *Waldron v. Lee*, 5 Pick. 323; *Bacon v. Thirteenth School-Dist.* 97 Mass. 421; Section 4. of chap. 81 of 1786; *Wood v. Waterville*, 5 Mass. 296; *Dwight v. Springfield Centre Fire Dist.* 11 Met. 374; *Weymouth & B. Fire Dist. v. Norfolk County Comrs.* 108 Mass. 142.

A town can act by confirming and accepting the doings of a committee or other official.

cers or agents of the town, as effectually as though a previous vote had been passed.

Crawshaw v. Roxbury, 7 Gray, 374; *Niles v. Patch*, 13 Gray, 261; *Stimpson v. Malden*, 109 Mass. 313; *Arlington v. Peirce*, 122 Mass. 270.

Knowlton, J., delivered the opinion of the court:

This is a petition for a writ of certiorari to quash alleged illegal assessments laid to meet the cost of watering streets in the city of Boston, under Stat. 1897, chap. 419. The first and most important question in the case is whether this statute is constitutional. The right of the legislature to raise money by taxation is founded upon article 4, § 1, chap. 1, of the Constitution of the commonwealth. Under this article there is authority "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities," etc. This authority we need not consider in the present case. Secondly, there is authority "to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and persons resident and estates lying within the said commonwealth." The watering of streets in thickly settled portions of cities is such a public benefit that it legitimately may be provided for at the public expense. So far as it promotes the comfort, convenience, and prosperity of the people generally as distinguished from landowners, it should be provided for by general taxation, which involves the assessment of proportional and reasonable taxes upon all persons and property within the city. The statute purports to authorize every city, not only to "appropriate money for watering the public ways, or portions thereof, within its limits, at the expense, in whole or in part, of the city," but also to "determine that certain other public ways or portions thereof shall be watered at the expense in whole or in part of the abutters thereon." Stat. 1897, chap. 419, § 1. This last provision calls for another kind of taxation, which is local and special. Such taxation, under the Constitution, can only exist when there is a special or peculiar benefit to certain real estate, different from that which is received by the inhabitants generally. The owners of the land upon which such an assessment is made must pay the same share of the general taxes in proportion to the value of their property that other persons pay. As the Constitution requires that taxes shall be proportional and reasonable, this additional special tax can be justified only when there is a special benefit to property from the expenditure on account of which the assessment is made. *Wright v. Boston*, 9 Cush. 233, 234; *Proprietors of Mt. Auburn Cemetery v. Cambridge*, 150 Mass. 12-14, 4 L. R. A. 836; *Dorgan v. Boston*, 12 Allen, 233-237; *Boston v. Boston & A. R. Co.* 170 Mass. 95; *Norwood v. New York & N. E. R. Co.* 161 Mass. 259-264, 24 L. R. A. 158; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. —; *Stuart v. Palmer*, 74 N. Y. 189, 30 Am. Rep. 289; *Sharpe v. Speir*, 4 Hill, 82; *Hammett v. Philadelphia*, 65 Pa. 146-157, 3 Am. Rep. 615; *Tidewater Co. v.*

Coster, 18 N. J. Eq. 527, 90 Am. Dec. 634; *Norfolk v. Chamberlain*, 89 Va. 196-213; *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *Thomas v. Gain*, 35 Mich. 162, 24 Am. Rep. 635; *Taylor v. Palmer*, 31 Cal. 254; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155, 11 Am. Rep. 412.

In the last analysis, the assessment is not laid as a part of the burden of public expenditure put upon the land; for the burdens which are strictly public are to be shared proportionally by all the people, according to the value of their taxable property. It is rather in the nature of a diminution of that which at first is a public burden, by subtracting from it the amount of the special enhancement of value of private property from the expenditure of public money in part for its benefit. It is taxation in the sense that it is a distribution of that which is originally a public burden, growing out of an expenditure primarily for a public purpose.

It is a grave question whether the benefit that comes to abutting property from the watering of the street in front of it is such an improvement to the property that it can be made the subject of an assessment upon it. There must be a real substantial enhancement of value growing out of a public work to warrant an assessment of special taxes upon particular estates on account of it. The watering of streets produces only transitory effects, and makes no permanent change in the condition of the property. It greatly promotes the health and comfort of the people generally, who use the streets from time to time, but its greatest benefit is to the abutting estates as places for residence or the transaction of business. Indeed, so much more important to the occupants than to the general public have been the benefits from watering streets that until lately the expense of the work in this commonwealth has usually been borne by the abutters, who have procured the watering to be done by private contractors. If a special benefit, accruing from day to day, which very materially increases the rental value of real estate by reason of the proximity of the property to the place where the beneficial work is done, can be treated as an improvement within the reason of the rule which permits special assessments, then such assessments may be made to pay the expense of watering streets. With some hesitation, we hold that there is an improvement of private property when this work is done by a city, which may warrant an assessment upon the abutters. It was so held in *State, Stateler, v. Reis*, 38 Minn. 371, and in *Reinkin v. Fuchring*, 130 Ind. 382, 15 L. R. A. 624, although the cases generally which uphold such assessments relate to improvements of a permanent character. Many improvements from which real estate receives an incidental advantage are held to justify only general taxation. *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255; *Erie v. Russell*, 148 Pa. 384-386; *Dyer v. Farmington*, 70 Me. 527; *State, McClosky, v. Chamberlin*, 37 N. J. L. 388; *Diets v. Neenah*, 91 Wis. 422-427, and 91 Wis. 430.

Treating the watering of a street in a city

as a work which may cause a direct, special, and peculiar benefit to abutting estates, and thus enhance their value so long as it continues, we come to the question whether the mode of assessment directed by this statute is within the constitutional power of the legislature. Section 2 of the statute is as follows: "If a city shall determine that the streets or certain streets or portions of streets within its limits shall be watered in whole or in part at the expense of the abutters, the expense of the watering of such streets or portions of streets for that municipal year, and the proportion of such expense to be borne by abutters, and the rate to be assessed upon each linear foot of frontage of estate upon such streets or portions thereof, shall be estimated and determined by the board of aldermen, and the expense so determined of such watering to be borne by the abutters, shall be assessed in the manner hereinafter provided upon the estates abutting on such streets or portions of streets in proportion to the number of linear feet of each estate upon the street or portion thereof so watered." Section 3 provides for a determination of the amount of the assessments, either by the board of aldermen, or by that one of several other specified boards of public officers which the aldermen may designate. Section 4 declares that each assessment shall be a lien upon the estate on which it is laid, and directs the collection of assessments in like manner as other taxes are collected, and provides for abatements. It is now established by the highest judicial authority that such assessments cannot be so laid upon any estate as to be in substantial excess of the benefit received. The case of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. —, contains an elaborate discussion of the subject, with a citation of authorities from many of the states, and holds that a local assessment for an amount in substantial excess of the benefit received is in violation of the 14th Amendment to the Constitution of the United States, inasmuch as it would deprive one of his property without compensation, and so without due process of law. The authority of this case is controlling in all state courts, and, if it were not, it is in accordance with sound principles, and with the great weight of authority in other courts. The principles which have often been stated by this court lead to the same result. *Boston v. Boston & A. R. Co.* 170 Mass. 95-101, and cases cited. The case of *Kingman, Petitioner*, 153 Mass. 560, 12 L. R. A. 417, dealt with a legislative distribution of public burdens among different political subdivisions of the commonwealth, and the language in it must be construed in reference to the facts to which it relates. The right to apportion public burdens among cities, towns, and counties, as it deems reasonable in reference to benefits and to other considerations which are not capable of exact estimation in money, is within the power of the legislature, under the first part of article 4, § 1, chap. 1, of the Constitution, and is not the same as the right to impose and levy taxes upon individuals. It is of the same nature as the right to create, 43 L. R. A.

change, or abolish cities, towns, or other political subdivisions of the commonwealth.

While these assessments must be founded upon benefits, the courts have generally recognized the difficulty, and in many cases the impracticability, of attempting to estimate benefits to estates one by one without some rule or principle of general application which will make the assessments reasonable and proportional, according to the benefits. Accordingly, the determination of such a rule or principle by the legislature itself, or by the tribunal appointed by the legislature to make the assessments, has commonly been upheld by the courts. If, however, its effect plainly is to make an assessment upon any estate substantially in excess of the benefit received, it is set aside. *Weed v. Boston*, 172 Mass. 28, 42 L. R. A. 642; *Village of Norwood v. Baker*, 172 U. S. 269, 43 L. ed.

— Assessments of special taxes by an estimate of the particular benefits to each lot, by measurement of the amount of frontage upon a street or sewer, by the measurement of the area of the lots, and by a valuation of the property, have all been sustained. *Springfield v. Gay*, 12 Allen, 612; *Dorgan v. Boston*, 12 Allen, 223; *Downer v. Boston*, 7 Cush. 277; *Wright v. Boston*, 9 Cush. 233; *Workman v. Worcester*, 118 Mass. 168; *Keith v. Boston*, 120 Mass. 108; *Snow v. Fitchburg*, 136 Mass. 183; *Howe v. Cambridge*, 114 Mass. 385; *Chapin v. Worcester*, 124 Mass. 464; *Camden v. Johnson*, 104 Mass. 491; *Leominster v. Conant*, 139 Mass. 384. But, as we have already intimated, the only ground on which they can properly rest is that they are methods reasonably determined upon, by the tribunals charged with the duty of determining, in reference to the ascertainment of the benefits actually received by the different estates on which assessments are to be laid. It may be that, in the light of recent decisions, some of these cases would have been decided differently; but, in general, they rest on sound principles, on the grounds already stated. Most of our cases and our statutes assume, under the Constitution, that these assessments, like other taxes, are to be reasonable, and, in a general sense, proportional.

Under the present statute, it is implied that the board of aldermen and the tribunal making assessments will proceed upon correct principles, and assess according to the benefits received, unless the requirement that the assessments are to be "in proportion to the number of linear feet of each estate upon the street or portion thereof so watered" is objectionable, as founded on a wrong principle. Such requirements in regard to ordinary estates fronting upon streets and sewers have often been upheld. On the other hand, in reference to estates differently situated, they sometimes would call for assessments far beyond any benefit received, and would therefore be unconstitutional and void. *Weed v. Boston*, 172 Mass. 28, 42 L. R. A. 642. No facts appear in the present case to show that this rule is not proper in its application to the petitioner's estates, as a method of determining benefits with such approximation to accuracy as can reasonably

be required. There may be unoccupied lands in the city which are so situated that they could receive no substantial benefit, either actually or potentially, from the watering of adjacent streets, so long as they remain in their present condition. Assessments made upon such lands might be void; but, as the case does not disclose such, we have no occasion to consider them. We see no reason why the legislature may not authorize a city to water some of its streets at the public expense, and to assess benefits for the watering of others upon abutters, as it deems best. As a result, some landowners get the benefit of watering streets adjacent to their estate without paying for the special benefit. But perfect equality in the distribution of public burdens is not attainable. We are therefore of opinion that, in its application to the facts of the present case, the statute is constitutional.

If the aldermen might cause some of the streets to be watered at the expense of the city, and others to be watered at the expense of the abutters, it is not shown that their determination in regard to it was improper.

Although the proceedings were in some respects informal, we see no fatal error in them. We are inclined to agree with the petitioner's counsel in his contention that the determination of the expense of watering streets to be watered in whole or in part at the expense of the abutters, and the proportion of such expense to be borne by the abutters, and the rate to be assessed upon each linear foot of frontage of estates upon which such streets or portions thereof abut, is to be by the board of aldermen, and cannot be delegated to any other board or tribunal. But we are also of opinion that the action of the superintendent of streets in making those assessments and reporting them to the board of aldermen, with the communication of the mayor and the subsequent order asking an appropriation, taken in connection with the previous orders, are equivalent to an original determination of these matters by the aldermen themselves. The petitioner shows no such error as to entitle him to a writ of certiorari.

Petition dismissed.

MICHIGAN SUPREME COURT.

Village of L'ANSE, *Plff. in Err.*,
v.
FIRE ASSOCIATION OF PHILADELPHIA.

(.....Mich.....)

A policy of insurance on a steam fire engine, hose pipe, and hose cart, while located and contained in the fire-engine house, "and not elsewhere," does not cover such property while being used in attempting to extinguish a fire several hundred feet from that building.

(March 6, 1899.)

ERROR to the Circuit Court for Baraga County to review a judgment in favor of defendant in an action brought to enforce payment of the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Philip R. McKernan and Frank E. Robson, for plaintiff in error:

The language of the policy being that of the insurer, and intended for his benefit, any reasonable doubt as to its meaning must be resolved in favor of the insured.

The language of the policy must be construed with reference to the character of and circumstances surrounding the property covered by it and the purposes for which it is ordinarily kept and used.

The purpose and intent of the contract being indemnity to the insured, the contract should be given effect, if possible, rather than made void.

May, Ins. §§ 174, 175, 177; Joyce, Ins. §§ 210, 212, 220, 221; *De Graff v. Queen Ins. Co.* 38 Minn. 501; *Jackson v. British America Assur. Co.* 106 Mich. 47, 30 L. R. A. 636.

The words "while located and contained as described herein, and not elsewhere," are not to be construed as words limiting or prohibiting the ordinary uses of the fire engine, etc., and are not a warranty, the terms of which would be broken by a temporary removal for the purpose of such uses.

The words "contained in" were in use before the adoption of the standard policy, and had a well-settled meaning. If applied to property, the natural use of which required it to be kept in one place, the insurance was lost if the property was removed to some other place.

English v. Franklin F. Ins. Co. 55 Mich. 273, 54 Am. Rep. 377; May, Ins. §§ 401 B, 401 C; Joyce, Ins. § 1742.

If, however, the property is of a sort that the natural uses of it require a temporary removal from the place designated in the policy, and while so temporarily absent the property is destroyed, it is still covered by the policy.

May, Ins. § 401 C; Joyce, Ins. § 1747; *Benton v. Farmers' Mut. F. Ins. Co.* 102 Mich. 281, 26 L. R. A. 237; *Jackson v. British America Assur. Co.* 106 Mich. 47, 30 L. R. A. 636; *John Davis & Co. v. Insurance Co. of N. A.* (Mich.) 4 Det. L. N. 905, 73 N. W. 393.

To give the words greater force by way of limitation when applied to property, the

NOTE.—As to location of movable property as affecting fire insurance thereon, see note to *Benton v. Farmers' Mut. F. Ins. Co.* (Mich.) 26 L. R. A. 237; also *Lakings v. Phenix Ins. Co.* 43 L. R. A.

(Iowa) 28 L. R. A. 70; *Grayville v. Penn Twp. Mut. F. Ins. Asso.* (Pa.) 29 L. R. A. 55; and *British America Assur. Co. v. Miller* (Tex.) 39 L. R. A. 545.

natural and ordinary use of which requires a temporary removal from time to time, is to read into the phrase the word "only" or a similar negative expression, and in effect to absolutely prohibit the ordinary uses of the property under pain of forfeiture, and defeat the indemnity bargained for. This the courts have declined to do.

Hall v. Concordia F. Ins. Co. 90 Mich. 403; *Jackson v. British America Assur. Co.* 106 Mich. 47, 30 L. R. A. 636; *Minnesota Threshing Mach. Co. v. Firemen's Ins. Co.* 57 Minn. 35, 23 L. R. A. 576; *Western & A. Pipe Lines v. Home Ins. Co.* 145 Pa. 346; *McKeesport Mach. Co. v. Ben Franklin Ins. Co.* 173 Pa. 53; *De Graff v. Queen Ins. Co.* 38 Minn. 501; *Niagara F. Ins. Co. v. Elliott*, 85 Va. 962; *Boyd v. Mississippi Home Ins. Co.* 75 Miss. 47; *Etna Ins. Co. v. Strout*, 16 Ind. App. 160.

Any ambiguous or doubtful expression should be construed in favor of the plaintiff.

Etna Ins. Co. v. Strout, 16 Ind. App. 160.

There was no increase of hazard within the recognized use of the term in insurance policies.

Holbrook v. St. Paul F. & M. Ins. Co. 25 Minn. 229; *Minneapolis Threshing Mach. Co. v. Firemen's Ins. Co.* 57 Minn. 35, 23 L. R. A. 576; *City Planing & Shingle Mill Co. v. Merchants' Mfrs. & C. Mut. F. Ins. Co.* 72 Mich. 654; *Smith v. German Ins. Co.* 107 Mich. 270, 30 L. R. A. 368; *May, Ins.* §§ 239, 219; *Joyce, Ins.* § 2207.

Mr. A. B. Gray for defendant in error.

Long, J., delivered the opinion of the court:

On April 9, 1896, the defendant issued its policy of insurance to the plaintiff for the term of one year from April 19, 1896. The policy provides that the association does "insure village of L'Anse . . . against all direct loss or damages by fire, except as hereinafter provided, to an amount not exceeding \$1,500, to the following described property, while located and contained as described herein, and not elsewhere, to wit: \$400 on the two-story frame, shingled roof, fire engine house, situate detached 70 feet, in the village of L'Anse, Baraga county, Michigan; \$700 on steam fire engine and heater attached; \$200 on hose and hose pipe; \$300 on hose cart, tools, and machinery not enumerated,—all contained in above-described building. \$1,500 other concurrent insurance noted." Then follows the usual Michigan form of standard policy. On May 9, 1896, the said steam fire engine hose, hose pipe, and hose cart, as covered by the policy, were burned and destroyed by fire. None of the above property was in the building at the time it was burned, but was being used in an attempt to extinguish a fire some 200 to 800 feet from the building. The defendant refused to pay the damages claimed by the plaintiff for the loss of the property, on the ground that, under the policy, it was insured only while contained in the building mentioned and described in the policy, and not elsewhere. The action brought to recover on the policy was tried before the court 43 L. R. A.

without a jury, and the court found in favor of defendant's contention, and thereupon entered judgment in its favor. Plaintiff brings error.

It is admitted by counsel for plaintiff that the case involves but the one question: What is the proper construction of the words in the policy, "while located and contained as described herein and not elsewhere"? It is argued by counsel that the usual purpose and use by the plaintiff of a fire engine, hose, hose cart, and other appliances described in the policy would be to extinguish fires in the village, and that, in order to be so used, it would be, as occasion might require, temporarily out of the engine house, which would be its place of deposit when not in use; that such use must have been contemplated by both parties to the contract; and that such use must be presumed to have been taken into consideration by the defendant in fixing the rate of premium. It is said by counsel that the words "contained in," etc., and like expressions, were in use before the adoption of the standard form of policy, and had a well-settled meaning, and, if applied to property the natural use of which required it to be kept in one place, the insurance was lost if the property was removed to some other place, but if, however, the property was of a sort that the natural use of it required a temporary removal from the place designated in the policy, and while so temporarily absent was destroyed, it was covered by the policy; that the words, "contained in," etc., were of further description, and indicated the place of deposit, when the property was not necessarily absent. It is therefore contended that, in framing the standard policy, the intention was to express and adopt this construction. On the other hand, counsel for the defendant claims that, even under the old forms of policy, the insurance did not continue while the property was removed from its place of deposit, where the limitations were as contained in this policy, to wit, "while located and contained as described herein, and not elsewhere." We think the cases cited by counsel for plaintiff clearly distinguishable from the policy in suit. Here the words are plain and unambiguous, and are not susceptible of construction other than that which the words themselves import. "While located and contained as described herein, and not elsewhere," means that the policy covered the property only while in that particular building, and did not cover it while it was anywhere else. In *Green v. Liverpool & L. & G. Ins. Co.* 91 Iowa, 615, the words of the policy were, "while contained in the two-story brick and frame dwelling house," etc. The court, in speaking of other cases to which its attention had been called by counsel for plaintiff, said: "This contract is widely different from those in the cases cited. The evidence shows that the property was kept sometimes in the chapel and sometimes in the house, and parts of it used in both places; and if we assume that the parties, when making the contract, knew of this, we have additional reason for limiting the

liability to losses while in the house. It is sufficient to say that the liability is thus limited, and the courts have no right to extend it." This case was followed by *Lakings v. Phoenix Ins. Co.* 94 Iowa, 476, 28 L. R. A. 70. In *Bahr v. National F. Ins. Co.* 80 Hun, 309, the limitation in the policy was, "while located . . . as described herein and not elsewhere, to wit. . . . while contained in the frame building occupied as a wheelwright shop," etc. The carriage was burned in a livery stable a block and a half away from there. Judgment for plaintiff was had below, and the court said: "This judgment cannot stand. The location of the insured property was a warranty, a breach of which avoided the policy." This rule was recognized by this court in *Wilday v. Farmers' Mut. F. Ins. Co.* 52 Mich. 446, and *English v. Franklin F. Ins. Co.* 55 Mich. 273, 54 Am. Rep. 377. The court below was not in error in directing judgment in favor of defendant.

That judgment must be affirmed.

The other Justices concur.

City of MARQUETTE

v.

Edwin C. WILKINSON *et al.*, Assignees of James M. Wilkinson, Deceased, *et al.*, Impleaded, etc., *Appts.*

(.....Mich.....)

1. Bondsmen on a banker who received city funds are not incompetent after his death, on the ground that they are the real parties in interest, to testify to an arrangement between him and other bankers for dividing the deposits, where the action is by the city for the funds held by the other banks and claimed by his assignee for creditors as part of his estate.

(*Per Grant, Ch. J., and Moors, J.*)

2. City funds received on deposit by a banker, but redeposited by him in other banks under an arrangement for sharing in the deposits, under which he receives from them the same interest that he pays the city, and agrees that they shall be drawn only to pay city orders, are held in trust for the city as against his assignee for creditors.

(March 6, 1899.)

APPRAL by defendants Wilkinson *et al.*, assignees of James M. Wilkinson, deceased, from a decree of the Circuit Court for Marquette County in favor of plaintiff in a proceeding brought to reach funds deposited by decedent in certain banks as being trust funds to which petitioner was entitled as against decedent's assignees for creditors. *Affirmed.*

Statement by Grant, Ch. J.:

James M. Wilkinson, deceased, was a private banker in the city of Marquette. Shortly before his death, and on January 22,

1898, he made a general assignment for the benefit of his creditors to the defendants, Edwin C. Wilkinson and Albert E. Miller. The assignment contained no schedule of assets. On April 29, 1897, the petitioner, the city of Marquette, entered into an agreement with Mr. Wilkinson for the care and custody of its funds upon the execution and delivery of a bond in the sum of \$75,000, with sureties, to be approved by the common council. The material part of this agreement is as follows: "The said James M. Wilkinson agrees to receive and safely keep all such moneys and funds of said city as may be offered or deposited by said city and the treasurer thereof, and to reimburse and pay the same to said city, the treasurer thereof, his successor in office, or whoever may be lawfully entitled to receive the same, whenever called for; and to pay interest on such moneys and funds so deposited with him at the rate of 2 per cent per annum on all daily balances which shall at the close of business each day equal or exceed the sum of two thousand dollars (\$2,000), but no interest to be paid on any balance for any day in which said balance shall at any time fall below the sum of \$2,000; all said interest to be paid on the 1st day of July next, and quarter-yearly thereafter, or at any other time when the account may be closed. It is mutually agreed by and between the respective parties hereto that the said James M. Wilkinson shall at all times keep a true and just account of all moneys and funds deposited by the said city and the treasurer thereof, as aforesaid, and render to said treasurer monthly statements thereof; and that the said James M. Wilkinson shall at all times honor and pay all proper drafts and checks of the said city and the treasurer thereof, as aforesaid, to the amount of the moneys and funds so deposited with him as aforesaid." A bond was executed and approved by the common council, signed by C. H. Call, S. R. Kaufman, E. H. Towar, and A. Matthews as sureties. Messrs. Call and Kaufman were officers of the defendant savings bank, and E. H. Towar an officer of the defendant national bank. The bond referred to the contract, and was conditioned that Wilkinson should "well and truly pay, or cause to be paid, on demand, to said city corporation, or proper officer thereof, or person entitled thereto, all such sums of money as shall be deposited with him by said city treasurer." The city and Mr. Wilkinson had made similar contracts for the years 1895 and 1896. The three banks had entered into an agreement by which all real competition for the keeping of these funds was prevented. Each bank put in a bid with the understanding that Wilkinson should bid 2 per cent as interest for the funds deposited, that the other banks would make lower bids, and that he should deposit one third of the funds in each of the other banks, and that each bank should pay him 2 per cent on such deposits,—the same which

NOTE.—As to trust in deposit of public moneys in bank, see *State v. Foster* (Wyo.) 29 L. R. A. 226; *State, First Nat. Bank, v. Bartley* 43 L. R. A.

(Neb.) 23 L. R. A. 67; *Allibone v. Ames* (S. D.) 33 L. R. A. 585; and *Bartley v. Meserve* (Neb.) 36 L. R. A. 746.

he paid the city. It was also agreed that no funds should be drawn from these two banks except to pay city orders. The arrangement between Wilkinson and the banks was carried out in good faith, and at the date of the assignment there was on deposit in each of said banks the sum of \$10,000. Each bank kept the account in the name of James M. Wilkinson. When Mr. Wilkinson applied to Mr. Call and the others to sign his bond, they objected. He then stated to them his agreement with the other banks, and that the money so deposited would reduce their liability to one third of the city funds, the money that was to be retained in his own bank. It was upon this assurance, and the understanding that it would protect the sureties of the amount so deposited, that the bondsmen executed the bond. Mr. Wilkinson honestly and faithfully kept his agreement, and drew from these banks only such funds as were necessary to pay city orders, simultaneously drawing the like amount from each bank. It appears from the finding and opinion of the circuit judge that Mr. Wilkinson's liabilities at the date of the assignment were \$130,000; that his assets were scheduled at something over \$200,000, and appraised at about \$146,000. It is insisted on the part of the assignees that these funds in question are a part of the general assets of Mr. Wilkinson's estate, and should be divided equally among his creditors. It is the contention of the city that they are trust funds; that they were deposited as such, and therefore belonged to the city. The defendant banks admit their obligation to pay the funds in their possession, but refused to pay them over except upon an order of the court of chancery, insisting that the assignees are not empowered to carry out the trust except as so authorized. The assignees instituted suits at law against the banks for the recovery of these funds, and recovered a judgment against the First National Bank for the money in its possession. At this stage in the proceedings this petition in chancery was filed, and further proceedings in the suits at law restrained. The object of this suit is to have the character of these funds declared, and the right thereto determined. The case was heard upon pleadings and proofs taken in open court, and decree entered for the petitioner, declaring that they were trust funds, and that the petitioner was entitled to them.

Mr. A. B. Eldridge, with **Mr. A. E. Miller**, for appellants:

There is no principle of law which gives to any creditor of an insolvent estate preference over any other creditor.

The only ground upon which any creditor may, under the law, have anything from an assigned estate beyond his *pro rata* share thereof upon distribution, is by showing that there has come into the hands of the assignee some property belonging to such creditor, and to which his title is superior to that of the assignee; or else by showing that the proceeds of his property are in the hands of the assignee in some other form, 43 L. R. A.

but so that it may be distinguished and pointed out.

Slater v. Oriental Mills, 18 R. I. 352.

The contracts between Wilkinson and the city established between them the relation of debtor and creditor only.

Perley v. Muskegon County, 32 Mich. 132, 20 Am. Rep. 637; *People v. Wadsworth*, 63 Mich. 500.

No trust was created in favor of the city of Marquette by reason of the actual arrangement made between the Wilkinson Bank and the other two banks.

The testimony of the sureties Towar, Kaufman, Call, and Mathews is not admissible.

How. Stat. § 7545, as amended by act No. 121, Laws 1895, p. 245.

These sureties are "opposite parties" both within the letter and the spirit of the statute.

Mundy v. Foster, 31 Mich. 313; *Bachelor v. Brown*, 47 Mich. 366; *Weinstein v. Patrick*, 75 N. C. 344; *Youngs v. Cunningham*, 57 Mich. 153; *Stackable v. Stackable*, 65 Mich. 515; *Buffum v. Porter*, 70 Mich. 623; *Ripley v. Seligman*, 88 Mich. 177; *Burke v. Dunn* (Mich.) 5 Det. L. N. 280, 75 N. W. 931; *Penny v. Croul*, 87 Mich. 15, 13 L. R. A. 83; *O'Neil v. Greenwood*, 106 Mich. 572.

The petition must be dismissed if the testimony of the sureties is stricken out.

Messrs. George P. Brown and Charles R. Brown for appellee.

Messrs. Clark & Pearl for First National Bank.

Mr. George Hayden for Marquette County Savings Bank.

Grant, Ch. J., delivered the opinion of the court:

Two questions are presented: 1. Five witnesses testified to the arrangement between Mr. Wilkinson and the banks for the deposit of these funds. Three are the bondsmen. It is insisted that their testimony is incompetent under How. Ann. Stat. § 7545, upon the theory that they are the real parties in interest, and are therefore excluded from testifying to matters equally within the knowledge of the deceased. Who are the real parties to this controversy, so as to make them "opposite parties," within the meaning of the statute? The estate of Mr. Wilkinson is not interested, because it is not concerned in the distribution of the fund. It cannot be depleted by establishing this agreement. Neither will it be increased thereby. The assignees, in any event, would receive this money only to pay it out, either to the general creditors or to the *cestui que trust*. They are not, therefore, opposite parties, within the meaning of the statute. The banks are not interested, because, in any event, they must pay the money. They are, therefore, not opposite parties. The bondsmen are only contingently interested. They may or may not become liable. Should the assets be sufficient to pay all the liabilities,—and there is nothing upon this record to show that they are not,—no liability will attach. In any event, they are only liable for such deficit as may remain

after the distribution of the entire estate among the creditors. It is true, they might be sued upon the bond before the estate is distributed, and in that event they would be subrogated to the rights of the city in the estate. This is a controversy between the creditors alone, to wit, the city and the other creditors; and the reason upon which the statute is founded, excluding testimony, does not apply. *McClintock's Appeal*, 58 Mich. 152; *Brown v. Bell*, 58 Mich. 58. The contingent liability of the bondsmen does not render them opposite parties within the meaning of the statute, or disqualify them from testifying. *Schofield v. Walker*, 58 Mich. 96; *Latourette v. McKeon*, 104 Mich. 156.

2. Are these trust funds? The character of the fund in Wilkinson's bank, as between him and the city, is not here in controversy. Nor is it material that the city had no knowledge of the arrangement with the other banks. *Cestuis que trust* are not debarred from enforcing a trust through ignorance of it at the time of its creation, but may enforce it whenever they ascertain its existence. *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446. It is urged that this agreement is void as against public policy. If this be granted, neither Wilkinson, nor the banks, nor the bondsmen could take advantage of it. The city alone could rescind it on this account. It has not chosen to do so, and no other party can complain. It is also clear that Wilkinson's assignees have no other or better title to these funds than did Mr. Wilkinson in his lifetime. Mr. Wilkinson had deposited these funds with the other banks as the city's money, to be paid out only for city purposes. They were not regular deposits to be drawn upon generally by Wilkinson, but were special deposits to be drawn upon for a special object. The funds had passed beyond Wilkinson's control, except under the terms of the agreement. Had Mr. Wilkinson given his check upon either of these banks to pay his personal debts, would the banks have been legally bound to pay? If the banks had been garnished for the personal debts of Wilkinson, could the garnishee suit be sustained? To so hold would be in direct violation of the express terms of the agreement, and defeat the very purpose for the deposit of these funds. If it be granted that the main purpose was to protect the bondsmen, the city is not thereby estopped to seek the fund thus deposited, and compelled to look to the bondsmen. Suppose the bondsmen had become irresponsible. The city would certainly then have a direct interest in the funds. It is, however, elementary that the *cestui que trust* may pursue his funds regardless of any security he may have by way of bonds. 43 L. R. A.

To apply another test, suppose these bondsmen had declined to sign the bonds unless Mr. Wilkinson would deposit with them two thirds of the city funds, to be kept by them, and paid out only on his check or order to pay city liabilities. Here the main purpose undoubtedly would be to protect the bondsmen. Upon an assignment for the benefit of the creditors, would the bondsmen be compelled to return the money to Mr. Wilkinson's assignees, to be distributed among the general creditors, rather than to devote them to the special purpose for which they were deposited? If not, then certainly there is no difference in principle when the funds are deposited with a third person to secure the bondsmen. Wilkinson, the banks, and the bondsmen saw fit to agree that, as fast as Wilkinson received the city's moneys, two thirds thereof should be deposited with the defendant banks, first, to preserve them for the benefit of the city, and, second, to secure the bondsmen. The transaction was legitimate, and impressed upon the funds the character of a trust. The banks were under obligation, both moral and legal, to hold the funds, and pay them out for the specific purpose agreed upon. We think our conclusion is clearly within the principle established by the following decisions: *Sherrwood v. Central Michigan Sav. Bank*, 103 Mich. 109; *Wallace v. Stone*, 107 Mich. 190; *Sunderlin v. Mecosta County Sav. Bank* (Mich.) 4 Det. L. N. 1115, 74 N. W. 478, and authorities there cited; *Cleveland, C. C. & St. L. R. Co. v. Hawkins*, 79 Fed. Rep. 29; *Montagu v. Pacific Bank*, 81 Fed. Rep. 602; *Lobby v. Hopkins*, 104 U. S. 393, 26 L. ed. 769; *People v. City Bank*, 96 N. Y. 32; *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Re Gaffney*, 146 Pa. 49; *Davis v. Noy*, 125 Mass. 500; *Reiff v. Horst*, 52 Md. 255. The death of Wilkinson terminated the agreement with the city. It was a personal contract, and not assignable. The court of chancery has jurisdiction to determine the rights of the parties, and direct the completion of the trust.

Decree affirmed, with costs.

Moore, J., concurred with **Grant, Ch. J.**

Hooker, J.:

We concur in the conclusion reached by the Chief Justice. We are of the opinion that the evidence, aside from that given by the bondsmen, clearly establishes the trust. We do not, therefore, pass upon the question whether the testimony of these bondsmen was admissible under the statute.

Montgomery and Long, JJ., concurred with **Hooker, J.**

MINNESOTA SUPREME COURT.

VEGA STEAMSHIP COMPANY, Appt.,
v.
CONSOLIDATED ELEVATOR COMPANY,
Resp't.

(.....Minn.....)

- *1. The bill of lading for a cargo of wheat provided that any deficiency in the amount of the cargo (delivered by third party from its elevator) should be paid for by the carrier, and any excess in the amount should be paid for by the shipper to the carrier. Held, when the carrier paid the shipper for such a deficiency, the former was subrogated to any rights which the latter had to recover for such deficiency from the keeper of the elevator.
2. Held, the legislature, by § 7675, Gen. Stat. 1894, intended to make conclusive the action of the state weighmaster in weighing wheat at terminal elevators in certain cities, notwithstanding the provisions of § 7706.
3. But held, it is not constitutional for the legislature to make such weighing conclusive, but the same can be impeached only when the party complaining was himself free from fault or negligence, and when it is demonstrated by clear, strong, and satisfactory evidence that there was, in fact, a substantial mistake in the weighing.

(January 20, 1899.)

A PPEAL by plaintiff from an order of the District Court for St. Louis County denying motion for new trial after verdict directed for defendant in an action brought to recover a deficiency in a quantity of wheat which had been delivered by defendant for transportation on one of plaintiff's boats. *Reversed.*

The facts are stated in the opinion.

Messrs. Searle & Spencer, for appellant:

In case a part of the cargo was not delivered it was due to a mutual mistake.

A mutual mistake is a mistake reciprocal and common to both parties where each alike labored under the same misconception of facts.

Botsford v. McLean, 45 Barb. 478.

Where parties contract under the impression that a certain state of facts exists, equity has power to relieve them from the effects of such contracts.

Shafer v. Davis, 13 Ill. 395; *Mays v. Dwight*, 82 Pa. 462; *Fleetwood v. Brown*, 109 Ind. 567.

Equity will grant relief on the ground of mistake, not only when it is expressly proved, but also when it may be inferred from the nature of the transaction.

Geib v. Reynolds, 35 Minn. 331.

Recovery may be had when there has been

a mutual mistake between parties to a transaction.

Duluth v. McDonnell, 61 Minn. 288; *Cobb v. Cole*, 51 Minn. 48; *Lane v. Holmes*, 55 Minn. 379.

If a mistake did occur as plaintiff contends then the defendant has 1,062 bushels of wheat that does not belong to it; and its refusal to deliver it to or make it good after demand constituted a conversion for which this action will lie.

Gen. Stat. 1894, § 7648; *Addison, Torts*, 461; *Adams v. Castle*, 64 Minn. 505.

The defendant was a bailee. It had received the wheat in store and issued its warehouse receipts. It was obliged to deliver the wheat on the surrender of the receipts. They were surrendered and canceled.

Gen. Stat. 1894, § 7645; *Weiland v. Krennick*, 63 Minn. 314; *St. Paul & S. C. R. Co. v. Gardner*, 19 Minn. 132, 18 Am. Rep. 334.

Had the defendant by mistake delivered to the plaintiff 1,000 bushels more than the vessel was entitled to receive, an action would lie against the vessel to recover it.

The vessel becomes surety for delivery of the full amount of the grain expressed in the bill of lading and under the law is compelled to do so or make good the deficiency.

Sawyer v. Cleveland Iron Min. Co. 35 U. S. App. 427, 69 Fed. Rep. 211, 16 C. C. A. 191.

A surety who becomes such at the request of the creditor and without any request from the debtor is, if he pay the debt, entitled to subrogation.

Brandt, Suretyship, § 260; *Swarthout v. Chicago & N. W. R. Co.* 49 Wis. 625; *Heisler v. C. Aultman & Co.* 56 Minn. 454.

This right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice, and is independent of any contractual relation or privity of interest between the parties.

Memphis & L. R. R. Co. v. Dow, 120 U. S. 287, 30 L. ed. 595; *Travers v. Dorr*, 60 Minn. 173; *Emmert v. Thompson*, 49 Minn. 386; *Felton v. Bissel*, 25 Minn. 15; *Daniels v. Palmer*, 41 Minn. 121.

The payment by plaintiff operated as an equitable assignment.

Connecticut F. Ins. Co. v. Erie R. Co. 73 N. Y. 399, 29 Am. Rep. 171; *Swarthout v. Chicago & N. W. R. Co.* 49 Wis. 625; *McArthur v. Martin*, 23 Minn. 74; *Emmert v. Thompson*, 49 Minn. 386.

The legislature doubtless may make official certificates prima facie evidence; but to make the acts of officials or their certificates conclusive in matters of this kind would deprive a person of the right of judicial inquiry into and redress for wrongs or mistakes committed, and of his property without due process of law.

*Headnotes by CANTY, J.

NOTE.—As to statutes creating presumptions to establish prima facie case, see *Wooten v. State* (Fla.) 1 L. R. A. 819; *Meadcroft v. People* (Ill.) 35 L. R. A. 176; *State v. Beach* (Ind.) 36 L. R. A. 179; *Pennsylvania Co. v. Mc* 43 L. R. A.

Cann (Ohio) 31 L. R. A. 651; *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 24 L. R. A. 141.

The statute condemned in the present case, it will be seen, provides that certain evidence shall be, not only prima facie, but conclusive.

Cooley, Const. Lim. 6th ed. p. 452; *Groesbeck v. Seeley*, 13 Mich. 329; *White v. Flynn*, 23 Ind. 46; *Abbott v. Lindenbower*, 42 Mo. 162; *McCreedy v. Sexton*, 29 Iowa, 356, 4 Am. Rep. 214; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209.

Messrs. Davis, Kellogg, & Severance for respondent.

Canty, J., delivered the opinion of the court:

Plaintiff is a common carrier of freight on the Great Lakes, between Duluth and Buffalo. Defendant owns and operates a public elevator at the dock in Duluth, in which the wheat of different parties is stored, commingled in a common mass. On October 20, 1896, Spencer, Moore, & Co. proceeded to ship from Duluth to Buffalo, on plaintiff's steamship, the Vega, 97,587 bushels of wheat. This wheat was stored in said elevator, and, while being delivered from the elevator to the ship, was weighed out by the assistant state weighmaster, under the laws of Minnesota. The cargo of wheat was delivered at Buffalo, but it is claimed that it fell short in weight, and that, by reason of mutual mistake in weighing the wheat at Duluth, 1,062 bushels less than the required amount were delivered on board the ship. The bills of lading delivered by plaintiff to Spencer, Moore, & Co. contain the following provisions: "All the deficiency in cargo to be paid for by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee." When the wheat was delivered at Buffalo to Spencer, Moore, & Co. the consignees, they deducted from the freight the sum of \$869.04, the market value of the 1,062 bushels; and plaintiff brought this action to recover this amount from defendant. On the trial the court ordered a verdict for defendant, and, from an order denying a new trial, plaintiff appeals.

1. We are of the opinion that, by reason of said clause in the bill of lading, plaintiff was an insurer that the amount of wheat called for had been delivered to it, and would be redelivered at the end of the route; and, when plaintiff paid the consignee for the deficiency, any cause of action held by the consignee therefor against defendant passed, by subrogation, to plaintiff.

2. Defendant claimed it had delivered the amount called for by the bills of lading. Elevator receipts for that amount were surrendered at the time. On the trial, plaintiff offered to prove that there were in fact delivered from the elevator to the ship, at Duluth, 1,062 bushels less wheat than the bills of lading called for. Defendant objected to the offer, and the court sustained the objection. This is assigned as error. Section 7675, Gen. Stat. 1894, provides: "Said state weighmaster and assistants shall, at the places of St. Paul, Minneapolis, Duluth, and St. Cloud, supervise and have exclusive control of the weighing of grain and other property which may be subject to inspection, except when otherwise ordered or directed by the party shipping the same, and the inspection of scales; and the action and certificates of such weighmaster and his assistants in the discharge of their aforesaid duties shall be conclusive upon all parties, either in interest or otherwise, as to the matters contained in said certificates." It seems that the trial court held that, under this section, the result arrived at by the state weighmaster in weighing this wheat at Duluth is conclusive, and cannot be questioned in this action. In answer to this, appellant cites § 7706, which is a part of the same act, and reads as follows: "Said weighmaster and assistants shall give upon demand to any person or persons having weighing done, a certificate under his hand and seal, showing the amount of each weight, number of car or cars weighed, if any, the initial of said car or cars, place where weighed, date of weighing and contents of car. And it is hereby provided that said weighmaster's certificate shall be admitted in all actions, either at law or in equity, as prima facie evidence of the facts therein contained, but the effect of such evidence may be rebutted by other competent testimony." These two sections are in *pari materia*, and must be construed together. They are in some respects in direct conflict with each other, but that conflict must be reconciled if it is reasonably possible to do so. Section 7675 does not attempt to make anything conclusive but the weight ascertained and the certificate of that fact, and does not provide for certifying to other facts. Section 7706 provides for certifying to a number of other facts, such as the number of cars, the initials of the car or cars, the contents of the car of cars, and the place where weighed. When these additional facts are certified to, the certificate itself is only prima facie evidence of any fact therein certified. But, if the weight is proved by competent evidence other than the certificate provided by section 7706, the intent of the statute is that such weight shall be conclusive.

3. But is it competent for the legislature to make the weight thus ascertained absolutely conclusive? We are of the opinion that it is not. The legislature cannot in this manner provide for the arbitrary exercise of power, so as to deprive a person of his day in court to vindicate his rights. And the law which closes his mouth absolutely when he comes into court is the same, in effect, as the law which deprives him of his day in court. See *Cooley*, Const. Lim. 6th ed. p. 452; 6 Am. & Eng. Enc. Law, 2d ed. p. 1050; *Graves v. Northern P. R. Co.* 5 Mont. 556, 51 Am. Rep. 81; *Moore v. State*, *Denny*, 55 Ind. 362, 363; *Wantlan v. White*, 19 Ind. 470. But we must give to the legislative intent the utmost effect which the Constitution will permit. The statute in question is a police regulation. The business of storing and handling grain in such an elevator is affected with a public interest, is merely a link in the chain of commerce, and may be regulated by the legislature to a very considerable extent. See *Munn v. Illinois*, 94 U. S. 126, 24 L. ed. 84. The legislature has the right to give to the act of the weighmaster in weighing grain a high character as evidence, and to provide that

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such act can be impeached only when the party complaining or the party under whom he claims was himself free from fault or negligence, and when it is demonstrated by clear, strong, and satisfactory evidence that there was in fact a substantial mistake in the weighing. No trivial error or trivial variation between different weights is sufficient to impeach the weighing of the state weighmaster; but the alleged error in this case is 1,062 bushels in a total of 97,587, and that is sufficiently substantial.

In our opinion the case is not exactly parallel to one where the parties, by voluntary contract, provide for an umpire to decide on the matters which will arise between them. There the decision of the umpire can only be impeached for fraud or such gross mistake as would imply bad faith or a failure to exercise an honest judgment. *Leighton v. Grant*, 20 Minn. 345 (Gil. 298); *St. Paul & N. P. R. Co. v. Bradbury*, 42 Minn. 222; *Langdon v. Northfield*, 42 Minn. 464; *Shaw v. First Baptist Church*, 44 Minn. 22. Under the statute, the party running the elevator has no option as to whether or not the state weighmaster shall weigh the grain; and, in our opinion, the state cannot force an umpire upon such party against his will, and then close his mouth, so that he cannot show that the umpire has made a substantial mistake, whether that mistake is the result of fraud or bad faith, or merely of negligence. Under the Constitution, no sound distinction can be made on the difference between a case of bad faith and a case of mere negligence. If a gross error has been committed, and his mouth is closed by the statute, he will be deprived of his property without due process of law, whether the error is the result of bad faith or not. True, in this case, the party running the elevator is not the one who is complaining. The plaintiff is enforcing merely the rights of the shipper, with whom,

under § 7675, Gen. Stat. 1894, it is optional whether the grain shall be weighed by the state weighmaster or not. The law does not force this statutory umpire onto the shipper. The umpire is one of his own selection; and it may be contended that, as to him, the case is the same as that of a case where the parties voluntarily agreed on an umpire, and that, therefore, he cannot impeach the weighmaster's decision without showing fraud or such gross mistake as will imply bad faith. But the statute never intended to make the weighing conclusive as to the shipper, and not conclusive as to the party operating the elevator. In this respect the rights of the parties should be held to be mutual and reciprocal, and the weighmaster's decision no more conclusive as to the one than it is as to the other. The legislature never intended to give the party running the elevator an advantage in this respect. The weighing contemplated by the statute is a weighing in the course of delivery, and as a part of that delivery. There are three parties to the transaction,—the shipper, the elevator keeper, and the state weighmaster, who is umpire for the other two. In this case the weighmaster was acting as umpire for the shipper and defendant; but, by reason of said clause in the bill of lading guaranteeing the weight, the plaintiff stepped into the shoes of the shipper in attending to the weighing and delivery of the wheat. Then, if plaintiff can, by clear, strong, and satisfactory evidence, prove the alleged error as a demonstrable mistake of fact, and can further prove that it was not guilty of any fault or negligence which contributed to that error, it should have been allowed to do so. Plaintiff should have been allowed to introduce the offered evidence.

The order appealed from is therefore reversed, and a new trial granted.

MISSOURI SUPREME COURT (In Banc).

STATE of Missouri, *ex rel.* Morris HEZEL
et al.,
v.

Charles C. BLAND *et al.*

(.....Mo.....)

1. A judge has sat in a case so as to be entitled to dissent from the decision and cause the case to be certified to another court on the ground of a conflict of decisions, notwithstanding the fact that he has not had any consultation with the other judges on the merits of the case, where he was on the bench when the case was argued and submitted, and afterwards agreed with the other judges that the decision should be withheld for a time, and on learning of a decision

NOTE.—The decision in the above case as to when a judge, may be regarded as sitting in a cause seems decidedly novel.

As to power of one of several judges in a case to act without consultation, see also *Butts v. Armor* (Pa.) 26 L. R. A. 213.
43 L. R. A.

rendered by them in his absence promptly sent to the judge who wrote the opinion a memorandum stating that it was in conflict with another decision, and that a motion for rehearing ought therefore to be granted, in addition to which he filed a dissenting opinion pending the motion for rehearing, and was on the bench, but not consulted, when his associates overruled that motion in accordance with an agreement they had previously made and of which they had notified him.

2. A judge may be considered as sitting in a case without taking part in it at every stage.

(March 21, 1899.)

APPLICATION for a writ of mandamus to compel respondents to certify and transfer to the Supreme Court a cause in which that court had rendered a decision which one of the judges therein sitting is alleged to deem contrary to a previous decision of the Supreme Court. *Writ awarded.*
The facts are stated in the opinion.

Messrs. Hiram J. Grover and Denis Devoy, for relators:

"A judge sitting in a case" must be one to whom a case has been submitted for decision; that is to say, for the application of the law to the facts, which are produced before him. Such application of law to facts may be made without either oral or written argument, and without consultation with anyone, as is done in the circuit courts.

Judge Biggs did sit in this case within the true spirit and meaning of § 6 of the Amendments to the Constitution of 1884. Upon his dissenting opinion being filed in the case, asking that the case be certified to this court, that should have been done.

The filing of the opinion of Judge Bland concurred in by Judge Bond, on the 21st day of June, 1898, did not constitute a decision of this case.

The rule of the court of appeals provided that in any case in which an opinion has been filed the party against whom the issues were found might within ten days from the rendition of the opinion, file an application for a rehearing.

The filing of that application for rehearing suspended the opinion, and there could be no decision of the issues in the case until the application for rehearing should have been overruled.

State, New York L. Ins. Co., v. Phillips, 96 Mo. 573.

Mr. Adiel Sherwood, for respondents:

A judge is not "sitting" in "any cause or proceeding" within the meaning of § 6 Amend. 1884, who merely hears an oral argument on the part of appellant, who knows nothing of the facts contained in the record, who never saw any brief on behalf of appellant (and none were filed by respondents), and who is absent from the state when the majority of the court discusses the facts contained in the record, and considers the law applicable thereto, and agrees upon and hands down an opinion announcing their conclusion and judgment.

A motion for rehearing does not affect the judgment entered in an appellate court as a result of its announced opinion.

Andrews v. Hovey, 124 U. S. 694, 31 L. ed. 557; *Ex parte Craig*, 130 Mo. 594; *Sparks v. Knight Templars & M. Life Indemnity Co.* 61 Mo. App. 117.

A motion for a new trial does not affect the judgment entered upon the verdict, because an execution may issue with a motion for new trial pending and not determined.

St. Francis Mill Co. v. Sugg, 142 Mo. 358; *Ex parte Craig*, 130 Mo. 594.

It is true that where a motion for rehearing is filed after the close of the term under a special order for that purpose or under a general rule authorizing a motion for rehearing within a certain fixed number of days, and the motion under such rule is filed after the close of the term and the mandate is held up, that the judgment is in a sense continued and the matter carried over to the term following when the motion for rehearing is overruled; but this is necessary because a vacation of court intervenes.

Childs v. Kansas City, St. J. & C. B. R. Co. 43 L. R. A.

117 Mo. 417; *State, New York L. Ins. Co., v. Phillips*, 96 Mo. 570.

But where a motion for rehearing is filed during the same term, the only purpose of said motion being to correct errors of law, such motion does not have any effect upon the judgment, and simply holds back the mandate, unless the motion for rehearing is sustained, in which event there is generally merely a reargument of the case, and then if the court reaches the same conclusion as before there is simply an announcement of the overruling of the motion for rehearing.

Any two of the judges of the St. Louis court of appeals constitute a quorum of the court, and exercise all of the powers and functions of the court.

Mo. Const. art. 6, § 14.

There is every presumption in favor of the correctness of the judgment or action of an appellate court.

Ex parte Craig, 130 Mo. 594; *State, Hyatt, v. Smith*, 105 Mo. 6.

The judgment of a court of record is always presumed to have been regularly rendered.

Herndon v. Hawkins, 65 Mo. 265; *Bouldin v. Ewart*, 63 Mo. 330; *Small v. Field*, 102 Mo. 119; *State v. Duestrow*, 137 Mo. 76.

The word "cause" and the word "proceeding," in § 6 of the Amendment of 1884, mean practically the same thing.

It cannot be contended that the motion for rehearing was a "cause or proceeding" within the meaning of this section, and that Judge Biggs was "therein sitting" and deemed the decision upon such motion contrary to some "previous decision" of this court, because in the latter part of this section it is provided that the "cause or proceeding" and the "original transcript" therein shall be certified and transferred to the supreme court, and manifestly there is no original transcript of a motion for rehearing.

Blyew v. United States, 13 Wall. 595, 20 L. ed. 643.

The word "case" conveys the precise meaning of the word "suit."

New Brunswick S. B. & Canal Transp. Co. v. Baldwin, 14 N. J. L. 442; *State v. Caffey*, 6 N. C. (2 Murph.) 320.

"Action on proceeding" is one by which some relief is sought against another.

Re McCausland, 52 Cal. 568.

"Proceeding" is equivalent to suit or action.

Hildreth v. Hopewell Twp. Overseers of Poor, 13 N. J. L. 5.

A judicial proceeding is a hearing and determination.

Robertson v. Barbour, 6 T. B. Mon. 528.

The presence of a judge is absolutely necessary. He certainly cannot be a sitting judge in any cause when he is absent in a distant state; nor can he be a sitting judge when the cause in which it is claimed he is sitting has long since been decided and the judgment of the court entered of record and a motion for rehearing filed, when the majority of the members of the court had agreed in consultation that the motion for rehearing should be overruled and this consultation and agreement took place before the

third judge made his appearance, and then sent a note to the majority of the judges in which he took the position that the motion for rehearing should be sustained.

Re Saline County Subscription, 45 Mo. 52, 100 Am. Dec. 337.

"Sitting in a cause" as applied to a judge, must refer to him when he is exercising judicial power, acting as judge.

State v. Duestrow, 137 Mo. 76; *Baldwin v. Baldwin*, 81 Va. 410; *Neil v. Neil*, 1 Leigh, 11; *Flournoy v. Jeffersonville*, 17 Ind. 173, 79 Am. Dec. 468; *Mason v. Woerner*, 18 Mo. 570.

It was the duty of the judge to have been personally present in court, and to find judicially the facts upon which his conclusion was based.

State v. Jefferson, 66 N. C. 312; *Johnson v. Lewis*, 1 Rich. Eq. 391; *Cock v. State*, 8 Tex. App. 666; *Crane v. Camp*, 12 Conn. 464; *St. Louis, K. & S. R. Co. v. Wear*, 135 Mo. 259, 33 L. R. A. 341.

A judgment is not merely what is entered on the record; that is the evidence of the judgment: but it is what is ordered and adjudged by the court.

1 Freeman, Judgm. 4th ed. § 38; *Re Cook*, 77 Cal. 220, 1 L. R. A. 567; *Schuster v. Rader*, 13 Colo. 329; *Re Newman*, 75 Cal. 213; *Davis v. Shaver*, 61 N. C. Phill. L. 18, 91 Am. Dec. 92; *Houston v. Clark*, 36 Kan. 414; *Lind v. Adams*, 10 Iowa, 398, 77 Am. Dec. 123; *Clay v. Hildebrand Bros.* 34 Kan. 695.

A motion for rehearing in an original proceeding is similar in principle to a motion for a new trial in the circuit court, except that the right to move for a new trial in the circuit court is given by statute, and the motion for rehearing depends on the practice of the appellate court.

The mere filing of a motion for new trial, or rehearing, constitutes no impediment to the judgment or decree.

Ex parte Craig, 130 Mo. 594; *Andrews v. Hovey*, 124 U. S. 694, 31 L. ed. 557; *Public Schools v. Walker*, 9 Wall. 603, 19 L. ed. 650; *Hanna v. Reynolds*, 16 U. S. App. 713, 59 Fed. Rep. 938, 8 C. C. A. 385; *Imperial L. Ins. Co. v. Newcomb*, 27 U. S. App. 290, 63 Fed. Rep. 560, 11 C. C. A. 340; *Five Hundred & Five Thousand Feet of Lumber*, 34 U. S. App. 45, 70 Fed. Rep. 1020, 17 C. C. A. 555; *United States v. Hall*, 21 U. S. App. 426, 63 Fed. Rep. 475, 11 C. C. A. 298; *United States v. Knight*, 1 Black, 488, 17 L. ed. 80; *Brown v. Aspden*, 14 How. 25, 14 L. ed. 311.

In the absence of the provision of the Constitution declaring two of the judges a quorum, and as a matter of law the court, the law would have so declared.

William v. Benet, 35 S. C. 150, 14 L. R. A. 826; *Ex parte Willcocks*, 7 Cow. 402; *Damon v. Granby*, 2 Pick. 353; *Kingsbury v. Centre School Dist.* 12 Met. 99; *Price v. Grand Rapids & I. R. Co.* 13 Ind. 58; *State, Van Vorst, v. Jersey City*, 27 N. J. L. 493; *State, Cadmus, v. Farr*, 47 N. J. L. 208; *State v. Delicsseline*, 1 McCord, L. 52; *State, Shinnick, v. Green*, 37 Ohio St. 227; *State v. Hugins*, Harp. L. 139; *Rea v. Miller*, 6 T. R. 43 L. R. A.

268; *Rea v. Bellringer*, 4 T. R. 810; *King v. Headley*, 7 Barn. & C. 496; *Blacket v. Blizard*, 9 Barn. & C. 851; 5 Dane, Abr. p. 150; *Kyd, Corp.* p. 111; *Ang. & A. Corp.* § 205; *Kent, Com.* p. 293; *Cushing, Legislative Assemblies*, § 247.

The word "sitting" means participation, consideration, deliberation, and actual determination of the questions of law submitted to the court.

State v. Parker, 106 Mo. 226; *State v. Orrick*, 106 Mo. 128; *State v. Armstrong*, 106 Mo. 421, 13 L. R. A. 419; *Corning v. Slosson*, 16 N. Y. 294.

Valliant, J., delivered the opinion of the court:

This is an application for mandamus to compel respondents, who are judges of the St. Louis court of appeals, to certify and transfer to this court a cause in which that court has rendered a decision which it is alleged one of the judges therein sitting deems contrary to a previous decision of this court. The respondents in their return say that the judge who deems the decision contrary to a previous decision of this court did not sit in the case and for that reason they refuse to certify it up to this court.

There is a motion on file by respondents to strike out certain evidence, but it will not be necessary to pass on the motion, since it will not be necessary to look into the evidence; the petition and return to the alternative writ show admitted and undisputed facts sufficient for a determination of the case; from which sources we gather the following facts:

At the March term, 1897, a suit was pending in the St. Louis court of appeals from the circuit court of the city of St. Louis, wherein the Barber Asphalt Company, plaintiff below, was appellant, and Morris Hezel and others, the relators herein, defendants below, were respondents. The cause came on for hearing in the St. Louis court of appeals on March 26, 1897, before the Honorable Charles C. Bland, the Honorable William H. Biggs, and the Honorable Henry W. Bond, then and now constituting that court. All three of those judges were on the bench at the time, and the cause was then argued by counsel and duly submitted to the court and taken under advisement. After the case was submitted, without consultation on its merits it was assigned to Judge Bland to prepare an opinion. Afterwards and before an opinion was prepared the three judges in consultation together agreed that because they were informed that a cause was then pending in this court involving the same questions of law, it would be advisable to withhold a decision of the case they had until they should see the decision of this court in the case they were informed was here. The opinion of this court in that case reached the court of appeals June 7, 1898; then, pursuant to the understanding, Judge Bland turned his attention to the case in question, and prepared an opinion which, after consultation with Judge Bond, Judge Biggs being absent, was, on June 21, delivered as the

opinion of the court, directing a judgment reversing the judgment of the circuit court and remanding the cause; when the opinion was delivered from the bench, only Judges Bland and Bond were present; the opinion is signed by Judge Bland, and this memorandum at the foot "Judge Bond concurs, Judge Biggs absent."

On June 30, within the time allowed by the rules of the court, relators, defendants in that suit, filed a motion for rehearing; on July 5, during the same term, and before the motion for rehearing was overruled, the three judges present on the bench, Judge Biggs delivered a dissenting opinion in which he cited the case of *Verdin v. St. Louis*, 131 Mo. 26, and therein stated that he regarded that as the last controlling decision on the subject involved, and that the majority opinion filed June 21, was in conflict with that decision, and requested that the cause be certified to the supreme court. The action of the court on that request is expressed in its record of July 5, as follows:

"Now at this day there is filed a dissenting opinion by Judge Biggs, asking that this cause be certified to the supreme court of this state, but as Judge Biggs was not sitting, and took no part when the opinion and judgment were rendered herein by this court on the 21st day of June, 1898, reversing and remanding this cause, a majority of the judges of this court are of opinion that no ground for certifying this cause exists within the meaning of § 6 of the Amendment to the Constitution of Missouri, limiting and defining the jurisdiction of this court;" after which the motion for rehearing was overruled. Immediately on the refusal of the court to certify the case, as Judge Biggs had requested, the relators by their counsel then present asked leave to file a motion to that effect; but the court refused their request, and then adjourned for the term. It is stated in the reply, and, without looking into the evidence, for the purpose of this suit we will take it for true, that there was never any consultation on the merits of the case between Judge Biggs and the other two judges; that after the majority opinion was filed, and while the motion for rehearing was pending, Judge Biggs sent a written memorandum to Judge Bland in which he stated that he considered the majority opinion in conflict with the decision in *Verdin v. St. Louis*, 131 Mo. 26, and he was in favor of sustaining the motion for rehearing, but Judge Bland by similar means informed Judge Biggs that Judge Bond and himself had previously talked the matter over and had agreed to overrule the motion and that would be the order; then Judge Biggs, without further interchange of views on the subject with the other two judges, or either of them, prepared his dissenting opinion, which was delivered on July 5.

The only question presented for our consideration by this record is, Did Judge Biggs sit in that case?

Judge Biggs was on the bench when the case was argued, and submitted and taken under advisement; the case then rested as much on his conscience as on that of the other judges; its assignment to another judge in no sense withdrew the responsibility from him; he counseled with the other members of the court on the wisdom of waiting for further light on the subject from this court; within a few days after the majority opinion was delivered, and during the same term, and while the motion for rehearing was pending, he communicated to the writer of the opinion his views, and cited a decision of this court which he thought was being contravened, and expressed his opinion that the motion for rehearing ought to be sustained. It appears from the return that Judges Bland and Bond, before the return of Judge Biggs, consulted on the motion for rehearing; and after due deliberation came to the conclusion that it ought to be overruled. But it by no means follows that because they had agreed on the opinion in the first instance they would agree to overrule the motion for rehearing. A motion for a rehearing is a very serious stage of the case; it often saves the court from error and the party from wrong. The case is pending for all there is in it, in the appellate court, until that motion is overruled. *State, New York L. Ins. Co., v. Philips*, 96 Mo. 573. Now, suppose Judges Bland and Bond had become divided in opinion, one favoring granting and the other denying the motion, then Judge Biggs's vote would have accomplished an entire change in the case; yet his vote was as valid when it stood alone for the rehearing, as it would have been if it had been cast with the majority.

While the motion was pending, if Judge Biggs thought the decision was wrong it was his duty as a judge to exert his influence to correct the error. 'It is not necessary that a judge of an appellate court should be in session with the other judges at every stage of the case in order to enable him to perform any duty which his mind and conscience dictate in reference to the case; and it is not necessary that he should take part in every stage before he can be considered as sitting in it.

Under the facts of this case, Judge Biggs is to be adjudged as having sat in it; was entitled to file his dissenting opinion, and, upon his statement that he deemed the majority opinion contrary to the decision he mentioned, that court ought to have certified and transferred the cause to this court in accordance with the requirement of § 6 of the Amendment of 1884, of the Constitution. The peremptory writ of mandamus is awarded.

All concur except Judge Burgess, absent.

NEW JERSEY COURT OF ERRORS AND APPEALS.

NEW JERSEY ELECTRIC RAILWAY
COMPANY, *Plff. in Err.*,
v.

NEW YORK, LAKE ERIE, & WESTERN
RAILROAD COMPANY, by John G. Mc-
Cullough *et al.*, Receivers.

(61 N. J. L. 287.)

- *1. One who has a fixed reversionary interest in personal property has the right to sue one who is not in possession thereof for such an injury by him thereto as will depreciate its value when it comes to his hands.
2. A bailor when he makes a bailment for hire locatio rei parts with the possession to the chattels to the bailee; but, if any permanent injury be done to a chattel by a third party during the continuance of the bailment, he may maintain an action against such third party, whether an action might or might not be maintained against such party by the bailee for trover, trespass, or replevin to control the immediate possession.
3. A bailor need not look alone to his bailee for a wrong by a third party in connection with the bailee done to the chattel which is the subject of the bailment for hire. If the bailee assumes to pledge or sell the bailed goods as his own, such an act amounts to a conversion, and the bailor may at once bring his action against the third party in whose possession the property is found. While a mere misfeasance may not terminate the bailment, yet, when, by the negligence of the bailee, either alone or in conjunction with the negligence of a third party, the chattel bailed is no longer fit and suitable for, and cannot be devoted to, the use for which it was hired, the bailment is at an end, and bailor can maintain his action for the injury done to it.
4. The servants of the bailee in a bailment for hire are not the servants of the bailor, and he is not responsible to a third party for the negligence of the servants of the bailee in respect to the bailment. The bailee does not stand in the place of the bailor, nor represent him in such relation as to render the bailor liable for the negligent acts of the bailee or his servants or agents; and while, in an action by the bailee for injuries against a third party, occasioned by his negligence, the contributory negligence of the bailee or his servants or agents will constitute a defense to the action, yet in an action by the bailor, who is the owner, against a third party, for injury to the bailment, the negligence of the bailee or his servants or agents is not imputable to such bailor, and will not prevent a recovery.
5. A bailment for hire for use distinguished from a bailment for the carriage of goods by a common carrier.

(November Term, 1897.)

*Headnotes by LIPPINCOTT, J.

NOTE.—The above case is an especially valuable discussion of the liability of a third person to a bailor for injury to property in the hands of the bailee. The somewhat analogous question of the liability of a servant to a third per-

son for injuries done in the course of his employment, for which the master is liable, is the subject of a note to *Mayer v. Thompson-Hutchinson Bldg. Co.* (Ala.) 28 L. R. A. 433.

son for injuries done in the course of his employment, for which the master is liable, is the subject of a note to *Mayer v. Thompson-Hutchinson Bldg. Co.* (Ala.) 28 L. R. A. 433.

LIPPINCOTT, J.:

In this case the action is brought by the New York, Lake Erie, & Western Railroad Company, by its receiver, against the defendant, to recover damages sustained by the locomotive engine and cars of the plaintiff, in a collision between the locomotive engine and an electric car of the defendant company, at a crossing over a public highway, at Singac, in Passaic county, on September 2, 1895. The locomotive and some of the cars of the train belonged to the plaintiff company, and by it had been hired by the day, and from day to day for use, to the New York & Greenwood Lake Railway Company, which latter company was, with its own engineer, fireman, and employees, running the same over and upon its own roadbed and rails, at such highway crossing, at the time and place of collision. The defendant was a street electric railway company, running along and upon the Little Falls road, which is a public highway from Paterson to Passaic and Rutherford. The tracks of the New York & Greenwood Lake Railway cross this highway at Singac. At the same point, the electric car tracks of the defendant company cross the tracks of the plaintiff railroad company, and the collision between the electric car and the locomotive, while both were in the act of making this crossing, caused the damage to the locomotive and cars of the plaintiff. The cause was tried at the Passaic circuit, together with the case of the New York & Greenwood Lake Railway Company against the defendant, for damage to the tracks of the railroad, and to other cars owned by it, before the same jury, and the evidence is the same as to both cases except as to damages. Both cases were argued in this court at the November term, 1896,—the former case upon a rule to show cause why the verdict, which was for the defendant in that case, should not be set aside, which rule was discharged at the February term, 1897, upon an opinion of the court rendered at that term. 60 N. J. L. 52, 38 L. R. A. 516. In that case, this court, in its opinion, held that there existed no error of the trial court in the admission or rejection of evidence, or in its instruction to the jury, nor was the verdict against the evidence or the weight thereof, nor contrary to the charge of the court. In the cause now in hand the trial justice directed the jury

to return a special verdict. The jury were directed to find by their verdict—First, whether the collision or accident occurred by reason of the negligence of the employees of the defendant in charge of and operating the electric car of the defendant company; secondly, whether the negligence of the employees of the New York & Greenwood Lake Railway Company, the bailee of the plaintiff company of the locomotive and some of the cars of the train, contributed to the collision or accident; and, thirdly, what amount of damages had the plaintiff suffered. The jury, by their special verdict, found negligence of the employees of the defendant company causing the accident; also that the negligence of the employees of the New York & Greenwood Lake Railroad Company contributed thereto; and also that the plaintiff company had suffered damage to the amount of \$1,475. On this verdict the postea was framed, and the motion now is for judgment thereon.

The right of the plaintiff to recover against the defendant is denied on the ground, first, that, under the verdict finding that the contributory negligence of the New York & Greenwood Lake Railway Company having concurred and co-operated with the negligence of the defendant in causing the injury, therefore the action should be against that company alone, and that for such injury action only can be had against the New York & Greenwood Lake Railroad Company, which was the bailee of the plaintiff of the locomotive and cars, and that it cannot be maintained against the defendant, although its negligence contributed to the injury. This contention involves the question of the right of the bailor against a third party as wrongdoer in relation to the subject-matter of a bailment for hire for use. There is no question but that, for the injury to the actual possession of the bailee, action against a third party will lie only at the suit of the bailee; and the general current of authority appears to be that the bailee can include in such suit damages for the entire injury to the subject of the bailment, but no case is found which denies the right of the bailor to sue and recover for the permanent injury to the property even before the expiration of the bailment. One who has a fixed reversionary interest in property has a right to sue one who is not in possession thereof for an injury to such property which will depreciate its value when it comes to his hands, and is entitled to recover damages to the extent of such depreciation. The owner of a reversionary interest in personal property has the same right of action for an injury thereto as in the case of real property. *Shearm. & Redf. Neg.* § 119. The bailor, when he makes a bailment for hire, parts with the right of possession to the chattel; and it has been held that he cannot during the existence of the bailment maintain an action of trespass for its asportation, or trover for its mere conversion, or replevin to recover back its possession against any third person; but it seems to be the accepted doctrine at present that, if any permanent in-

jury be done to the chattel, he may maintain a special action on the case against a third party for injury done by such third party to the reversionary interest, and this seems to be both by reason and authority the rule, whether an action might or might not be maintained by the bailee against such party for trover, trespass, or replevin, to control the immediate possession. *Pollock, Torts*, p. 432. A person who has let a chattel out to hire may, nevertheless, sue a third party for damages in respect to the permanent injury to the reversionary interest. *Addison, Torts*, p. 410. In *Mears v. London & S. W. R. Co.* 11 C. B. N. S. 850, the case was that a barge was let to hire. The defendant, who was not the bailee, was engaged in raising a boiler out of the barge, when the boiler was negligently allowed to fall, destroying the barge. The court held that the plaintiff, who was the owner of the barge, had the right to sue a third party whose negligence caused the injury, and laid down the rule that, although the owner could not bring an action when there had been no permanent injury to the chattel, where there is such permanent injury the owner might maintain an action against the person whose wrongful act had caused the injury. The general rule appears to be that the owner of a chattel which is out on hire for an unexpired term may maintain an action against a third person for a permanent injury thereto. This seems to be the rule whether the bailment has expired or not. *Howard v. Farr*, 18 N. H. 457; *White v. Griffin*, 49 N. C. (4 Jones, L.) 139; *Lexington & O. R. Co. v. Kidd*, 7 Dana, 245; *Hawkins v. Phythian*, 8 B. Mon. 515. A bailor need not look alone to his bailee for a wrong by a third party in connection with the bailee, as respects the contract of bailment. If a bailee assumes to pledge or sell the bailed goods as his own, such an act amounts to a conversion, and the bailor may immediately bring an action of trover or replevin against the third party in whose possession the property is found. *Story, Bailm.* 9th ed. § 413. In *Enos v. Cole*, 53 Wis. 235, the right of the action of trespass against a third party to whom the bailee had improperly sold the goods bailed was distinctly recognized. Whether the bailment in the case in hand had expired or not, it seems, can make very little difference. This bailment or hire of this locomotive and cars was presumably by the bailor at its will. A bailment may be determined by the mere efflux of time, as where the chattel is bailed for a stated period. Here the bailment was not for any stated period. It may be determined by the accomplishment of the object for which the thing was bailed, as where the chattel is hired for a particular purpose, or is pledged until the loan is repaid. It may be dissolved by mutual agreement at any time. And either party, as has been said, where the bailment is not for any particular time, may terminate it at will. It may be determined by the total or partial destruction of the subject-matter of the bailment, as where a chattel is lost or is destroyed. It may be also terminated where the bailee dis-

poses of it contrary to the terms of the bailment. In this case the bailment was terminated at the time of the injury, for then it was no longer, under the evidence, fit and suitable for the use which the contract of bailment contemplated. While a mere misuse might not terminate the bailment, yet, when by the negligence of the bailee either alone or in conjunction with the negligence of a third party, it is no longer fit and suitable for the uses for which it was hired, both by reason and all the authorities, the contract of bailment is at an end. It would seem to be clear that, under general principles, a bailor can maintain an action for injury to the property bailed, at the hands of a third party, who is a wrongdoer in relation thereto, especially wherever the injury is of a permanent character. Therefore the contention of the defendant that the right of action was alone against the bailee must fail.

But the right to recover is secondly denied upon the ground that the contributory negligence of the New York & Greenwood Lake Railroad Company, the bailee of the locomotive and cars, is a bar to recovery by the plaintiff company, which was the bailor of the same, and that the contributory negligence of the bailee is imputable to the plaintiff as bailor, and therefore prevents a recovery. It is contended that, in law, the bailee could have included the injuries to the locomotive and cars in his action against the defendant, and that its contributory negligence would have been a complete defense to the action, and, this being so, that this same contributory negligence can be successfully set up against the plaintiff, who is the owner of the property; or, in other words, that the possession by the bailee involves the bailor in all the consequences of the default of the bailee, however much the act of wrongdoing by the third party might be the joint cause of injury to the chattels in the possession of the bailee. The reason of this contention, as it appears to the court, is not apparent or well-founded. It need only be said that a bailment is a contract which is interpreted by the same rules as other contracts. The bailor and bailee are just as independent of each other in regard to the subject-matter as the contract by its terms permits them to be. It is the delivery of a thing in trust for some special object or purpose, upon a contract, express or implied, to conform to the object or purpose of the trust. Story, Bailm. 8th ed. p. 4. This is evidently true as to a bailment for hire to use *locatio rei*. If not a part of the express contract, the law impliedly engages to allow the full use and enjoyment of the chattel by the bailee, to the extent of the use and enjoyment of the object of the hiring, and for the time hired. This right of the bailee is quite independent of any control by the bailor, but there is also the right of the bailee to have the thing used with care and moderation; to have it applied to the use for which it is hired, and no other; to have it used with reasonable care for its preservation; and to have redelivery when

the use to which it is to be devoted is completed or performed, or the bailment has otherwise expired. The bailee is responsible to the bailor for injuries to the subject of the bailment by reason of the negligence of the bailee, and of his servants in the course of his employment, occasioning injury to the property. The general property remains in the bailor, and the bailee only has a special interest for the express or implied objects of the bailment. Under these general principles, now well established as governing the contract of bailment, it would be entirely too artificial to say that no right of action existed by the bailor against a third party as a wrongdoer for injury, by negligence or otherwise, to the chattel which was the subject of the bailment. It is not an answer that the bailee has his right of action for the full injury against the wrongdoer, for the bailee may never choose to seek such a remedy, nor can he be compelled to do so, nor can it be said with any greater reason that the bailor must resort alone to the bailee for redress for the injury, for it may have occurred in spite of the exercise of the full degree of care required of the bailee as in case of theft, by the servants of the hirer, for which he is not, generally speaking, liable, unless there are some circumstances which impute to him a want of due diligence. *Vere v. Smith*, 1 Vent. 121, 2 Lev. 5; Story, Bailm. 8th ed. §§ 38, 407. The servants of the bailee are responsible to the bailor for their malfeasance, not because they are the servants of the bailee, but because they are active wrongdoers to the bailment. *Lane v. Cotton*, 12 Mod. 488; Story, Bailm. 8th ed. § 405; Story, Agency, §§ 309-320. The care or diligence required to be exercised depends upon the nature of the subject, and it rises in proportion to the demand for it; and, when the required care is exercised, the bailee is no longer responsible to the bailor. Therefore, there is nothing in the relation of the bailor and bailee which of itself can prevent the bailor from seeking out the third party as the wrongdoer, and imposing upon him the liability for the results of his conduct to the subject of the bailment. It would seem, upon reason, that there could exist no objection to the joint liability of the wrongdoer and the bailee when the joint negligent act of both caused the injury.

But the defendant distinctly contends that the negligence of the bailee or its servants in the operation of this locomotive and train of cars by reason of this bailment, contributing to the injury, is imputable to the bailor, and prevents a recovery on the part of the bailor against the defendant as a third party, who is a joint wrongdoer with the bailee. This joint negligence by the special verdict is found to have been the cause of the collision and injury, and therefore the case must be considered with the fact of the contributing negligence of the bailee established. In a contract of bailment of things for hire, the bailor is not responsible to a third party for injuries occurring to such third party by reason of the negligent use of the thing hired by the bailee, nor for the

negligence of the servants of the bailee in respect thereto. The bailee does not stand in the place of the bailor, nor represent him in such relation as to render the bailor liable for such injuries; nor are the servants of the bailee the servants of the bailor, or in any sense acting for him; and the contract of bailment is in so far entirely an independent one, and the liabilities of the bailor and bailee to third parties are essentially independent of each other. In this case it cannot be contended that the plaintiff company would have been responsible to the defendant if the negligent use of the locomotive by the servants of the New York & Greenwood Lake Railroad had occasioned an injury to the defendant's car at this crossing. This negligence, however much it might be the occasion of the injury to the defendant, could not have rendered the plaintiff company responsible, so long as in this case no act or conduct of the plaintiff company was in question. It did not in fact advise, encourage, or permit in the hands of its bailee the negligent use of this locomotive. The contributory negligence of a third person can only be set up in defense when it is legally imputed to the plaintiff, and its existence must depend upon some connection or relation between the plaintiff and the third person from which such legal responsibility may arise. It is a general rule that it is no justification of the misconduct of the defendant that some third person, a stranger, was also in the wrong. The negligence of the servant in the course of his master's employment is imputable to the master, and so as between agent and principal. But the negligence of one passenger in a car standing alone, inflicting injury upon another passenger, is not imputable to the railroad company, a common carrier of passengers. There must exist concurring negligence in some respect in the railroad company. *Sheridan v. Brooklyn City & N. R. Co.* 36 N. Y. 39, 93 Am. Dec. 490; *Cannon v. Midland Great Western R. Co.* Ir. L. R. 6 C. L. 199. If the defendant be negligent, the fact that the negligence of others co-operated or concurred with it in effecting the wrong does not affect the question or measure of liability. *Mott v. Hudson River R. Co.* 8 Bosw. 345; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 50 Am. Rep. 352.

It may be deemed to be settled in this state that the employees of servants of a bailee are not the servants of the bailor in any such relation as to make the bailor liable to third parties for their negligence or misconduct in relation to the thing bailed; as where A hired a coach and horses with a driver from B to take his family on a particular journey, and in the course of the journey, in crossing the track of a railroad, the coach was struck by a passing train, and A was injured. In an action by A against the railroad company for damages, it was held that the relation of master and servant did not exist between the plaintiff and the driver, and that the negligence of the driver, co-operating with that of the persons in charge of the train which caused the acci-

dent, was not imputable to the plaintiff as contributory negligence to bar his action. It was further held that for whatever purpose the negligence was invoked, whether as an action for injury done by the driver, or as contributory negligence to bar the action by the passenger against the third person for an injury sustained, the negligence to be imputed to the passenger must be such as arises in some manner from his own conduct. The negligence of the driver without some co-operating negligence on his part cannot be imputed to the passenger in virtue of the simple act of hiring. *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161, 54 Am. Rep. 126; *Bennett v. New Jersey R. & Transp. Co.* 36 N. J. L. 225, 13 Am. Rep. 435. There is no perceivable distinction between the case in hand and the cases last cited. Both rest upon a contract of bailment for the hire of a thing for use, and although a contract mutually beneficial to each of the parties, they are so independent of each other that the negligence of one cannot be imputable to the other. It is only when the contributory negligence is of such a character, and the third person is so connected with the plaintiff, that an action might be maintained against the plaintiff for damages for the consequences of such negligence, then when the plaintiff brings the action, that negligence is, in contemplation of law, the plaintiff's negligence, and it is justly imputed to him. This relation does not exist between the bailor and bailee under the ordinary contract of bailment. The case of *Hawkins v. Pythian*, 8 B. Mon. 515, is a case very similar in the application of the principles of law to the one in hand. In this case the plaintiff hired a slave to A, who allowed him to go with B. While B had the slave, he put him on a restive horse, which threw the slave, and killed him. The plaintiff sued A and B together. The verdict was allowed to stand against B, although it was set aside as to A by reason of an erroneous instruction of the court to the jury. The cases cited by the defendant in his argument are mainly based on the doctrine laid down in *Thorogood v. Bryan*, 8 C. B. 114, in which the deceased intestate, while alighting from the omnibus in which he was a passenger, was knocked down by the defendant's omnibus, and received injuries from which death ensued. The court held in that case that, if the want of care on the part of the driver of the omnibus in which the deceased was riding in not driving up to the curb to put the deceased down had been conducive to the injury, the plaintiff could not recover, although the defendant's driver had been guilty of negligence. It is sufficient to say that this doctrine has been thoroughly disapproved in this state in the case of *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161, 54 Am. Rep. 126. Before the *Steinbrenner Case* had been decided, Chief Justice Beasley, in the case of *Bennett v. New Jersey R. & Transp. Co.* 36 N. J. L. 225, 13 Am. Rep. 435, had repudiated the doctrine. It has now been overruled in England in the *Bernina Case*, L. R. 12 Prob. Div. 58.

The Supreme Court of the United States, in the case of *Little v. Hackett*, 116 U. S. 366, 29 L. ed. 652, also repudiates it. There is a line of cases concerning the peculiar contractual relations between a shipper of goods and the common carrier thereof, *locatio operis mercium vehendarum*, who is liable to the shipper against all events except the acts of God or the public enemy or the natural wear and tear of the article shipped, and responsible for all the consequences of his conduct as an insurer against loss except from such excepted causes, which hold the carrier alone responsible for injury. The shipper, according to such authorities, cannot recover against a third party for negligence in the care of such goods or injuries to them. The distinction between the relation which exists in law between the shipper and the common carrier of goods and the bailment for hire of a chattel for use is so obvious as not to need discussion. The carriage of goods is by all legal writers classed as a different contract of bailment, having peculiarities and governed by principles characteristic of the relation quite apart from the contract of bailment of chattels for hire. The cases cited by the defendant are *Vanderplank v. Miller*, *Moody & M.* 169; *Simpson v. Hand*, 6 Whart. 311, 36 Am. Dec. 231; *Covington Transfer Co. v. Kelly*, 36 Ohio St. 86; and *Arctic F. Ins. Co. v. Austin*, 69 N. Y. 470, 30 Am. Rep. 221. These cases are all cases which arise under the contract of bailment for the carriage of goods and chattels, not by a special, but by a common, carrier. He is treated as an insurer against all but the excepted perils (Jones, Bailm. p. 101); and the shipper cannot look beyond him for liability; and this rule is said to be grounded upon public policy.

I cannot perceive that whether, in respect to this action, the duty of the defendant and the bailee were joint or separate can make any difference. If the same duty of care was due and owing to the plaintiff, then a common neglect of that duty would render them both liable as joint tortfeasors. If the duty to plaintiff was a separate one, which was neglected to be performed by each of them, although the duties were diverse and disconnected, and the negligence of each was without concert, if such neglects concurred and united in causing the injury, the tort still is equally joint, and the tortfeasors are subject to a like liability. *Matthews v. Delaware, L. & W. R. Co.* 56 N. J. L. 34, 22 L. R. A. 261. The bailee was bound to use reasonable care and diligence in the preservation of the property from injury. The defendant, in the operation of the electric car, was bound to exercise reasonable care in avoiding injury to the property of which the plaintiff was the owner. It would seem that the intervention of the negligence of the bailee could not shield the defendant from injury caused by its own negligence. Both might have been selected as joint tortfeasors, or the action could be maintained against either. The conclusion reached is that the plaintiff had the right to sue either or both these companies for the injuries 43 L. R. A.

arising from their negligence to the locomotive and cars of the plaintiff, and it is not a defense to the action that the accident was contributed to by the negligence of the other. Each is liable upon its own negligence and the negligence of the bailee is not imputable to the plaintiff as a shield to the defendant against recovery.

Judgment must be entered on postea for the damages found by the jury.

Mr. William Gourley for plaintiff in error.

Messrs. Cortlandt Parker and Cortlandt Parker, Jr., for defendant in error:

A bailor may recover for the injury which he suffers by reason of permanent injury to the bailment.

Shearm. & Redf. Neg. § 119; *Addison, Torts, Dudley & Baylies'* ed. p. 505; 1 *Chitty*, Pl. p. 139; *Mears v. London & S. W. R. Co.* 11 C. B. N. S. 850; *Hall v. Pickard*, 3 Campb. 187; *Lotan v. Cross*, 2 Campb. 464; *Hawkins v. Pythian*, 8 B. Mon. 515; *Tancred v. Allgood*, 4 Hurlst. & N. 438, 28 L. J. Exch. N. S. 362; *Howard v. Farr*, 18 N. H. 457; *White v. Griffin*, 49 N. C. (4 Jones, L.) 139; *Lexington & O. R. Co. v. Kidd*, 7 Dana, 245. The owner of a reversionary interest in personal property has the same right of action in respect to injury thereto as in case of real property.

This case has been settled by adjudications in respect to real property heretofore made in this state.

Halsey v. Lehigh Valley R. Co. 45 N. J. L. 26; *Potts v. Clarke*, 20 N. J. L. 536; *Beavers v. Trimmer*, 25 N. J. L. 97; *Tinsman v. Belvidere Delaware R. Co.* 25 N. J. L. 255, 64 Am. Dec. 415.

We do not dispute that the bailee has also his action, but that does not prevent the bailor from having his.

2 Bl. Com. p. 396; *Story*, Bailm. sec. 394, § 94; *Rindge v. Coleraine*, 11 Gray, 157.

The fact that the jury found the railroad company's dead fireman and, therefore, the railroad company, guilty of negligence is no bar to the plaintiff's action.

Contributory negligence will not be imputed unless the plaintiff is identified with the person who actually committed the negligent act.

New York, L. E. & W. R. Co. v. Steinbrenner, 47 N. J. L. 161, 54 Am. Rep. 126; *Bennett v. New Jersey R. & Transp. Co.* 36 N. J. L. 225, 13 Am. Rep. 435.

The lessor being then free from imputed negligence he is in the same position as a person injured by the joint negligence of two defendants. He may then sue and recover against one or both.

Newman v. Fowler, 37 N. J. L. 89; *Matthews v. Delaware, L. & W. R. Co.* 56 N. J. L. 34, 22 L. R. A. 261.

The bailees did not hold the goods as common carriers.

The railroad company was not an insurer, but only responsible for lack of ordinary care.

Story, Bailm. §§ 398, 399; *Roth v. Wilson*, 1 Barn. & Ald. 59.

Per Curiam:

The judgment in this case is affirmed upon the opinion in the Supreme Court.

For affirmance: **The Chancellor, Chief**

**Justice, Collins, Depue, Dixon, Gam-
mere, Ludlow, Adams, Bogert, Hen-
drickson, Nixon, Vredenburg,—12.**

For reversal: none.

NEW YORK COURT OF APPEALS.

STANDARD FASHION COMPANY, *Respt.,*

v.

SIEGEL-COOPER COMPANY *et al., Appts.*

(157 N. Y. 60.)

1. An injunction will lie to prevent a department store from violating its contract with one occupying floor space for the sale of a particular article not to allow to be sold on the premises during the duration of the contract any other make of such article.
2. The fact that enforcement of a contract may require a multiplicity of orders by the court in its endeavor to superintend the business to which it relates does not deprive the court of jurisdiction, but justifies its refusal, in its sound discretion, to exercise it.
3. A complaint which states a good cause of action is not demurrable because it is of the class in which the court may refuse to act owing to the difficulty of enforcing its decree.
4. A bill to enforce specific performance of a contract by a department store giving a certain person the exclusive right to sell a certain article in the store states a good cause of action, although owing to the difficulty attending the enforcement of the decree and the absence of public interest the court may refuse relief.

(October 18, 1898.)

A PPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, reversing a judgment of a Special Term for New York County in defendant's favor in an action brought to enforce specific performance of a contract to give to plaintiff the exclusive sale of paper patterns in the defendant's store. *Affirmed.*

Statement by Vann, J.:

The complaint, after setting forth the corporate character of each party to the action, alleges: That the plaintiff and the defendant the Butterick Publishing Company are rivals and competitors in the business of preparing and selling paper dress patterns and designs. That the defendant the Siegel-Cooper Company is engaged in the business of selling at retail all articles required by people for consumption and use, and that it occupies and carries on the greatest department store in the world, covering half a

block in the city of New York. That on the 16th of July, 1897, the plaintiff and the Siegel-Cooper Company entered into an agreement, of which, omitting the formal parts, the following is a copy: "The Siegel-Cooper Company is hereby appointed an agent for the sale of Standard patterns and Standard fashion publications for a term of two years from the date the contract goes into effect, and said term to be extended from year to year thereafter until closed by three months' notice in writing by either party. to be given within thirty days after said two years or any one year thereafter. The Standard Fashion Company agrees to conduct at its own expense and risk a pattern department on the ground floor of the Siegel-Cooper Company's store on Sixth avenue and 18th street, New York City, said Standard Fashion Company furnishing its own employees, such employees to be subject to the employees' rules of the Siegel-Cooper Company. The Standard Fashion Company further agrees to furnish, free of charge, not less than 250,000 eight-page fashion sheets, of the kinds sold at \$10 per thousand, to the Siegel-Cooper Company, per annum, as long as this contract continues, and to print the advertisements of said Siegel-Cooper Company on front and back thereof without charge, to be changed monthly, if so desired; such fashion sheets to be distributed by the Siegel-Cooper Company from its store, or from pattern counter or any other of the business, without expense to the Standard Fashion Company. The Siegel-Cooper Company to furnish wrapping paper and twine, free delivery, and other store facilities. Said Siegel-Cooper Company agrees not to sell, or allow to be sold, on its premises during the duration of this contract, any other make of paper patterns. Siegel-Cooper Company agrees to pay over to the Standard Fashion Company two thirds of all the moneys received from the sale of patterns and fashion publications, making weekly settlements with the Standard Fashion Company, said Siegel-Cooper Company to make no charge for cashing. The remaining one third to be the remuneration of said Siegel-Cooper Company for the permission to the Standard Fashion Company to conduct said department. The said Siegel-Cooper Company agrees to allow the use of the present pattern fixtures and the present position for paper patterns but in case a change of location should be deemed advisable, such new location not to be less prominent, nor to occupy less space, than the present one, except between Thanksgiving and Christmas of each year. This contract to go into effect either on September 12th or December

NOTE.—For specific performance of business contract, see also *Wely v. Jacobs* (Ill.) 40 L. R. A. 98.

As to mandatory injunction for specific enforcement of contract, see *note to Moundsville v. Ohio River R. Co.* (W. Va.) 20 L. R. A. 187. 43 L. R. A.

12th, 1897, according to the choice of said Siegel-Cooper Company, such choice depending upon the question of whether the contract between the said Siegel-Cooper Company and the Butterick Publishing Company, now existing, will be terminated in September or December of this year. The Standard Fashion Company agrees to assume all risk of loss by fire, water, etc., or risk of theft, or other unforeseen damage to or destruction of pattern stock, and to hold the Siegel-Cooper Company harmless in that respect. Said Siegel-Cooper Company to make, at the expense of the Standard Fashion Company, frequent mention of the fact that they are agents for the sale of the Standard patterns in its daily New York newspaper advertisements, and also to allow reasonable display of attractive show cards and signs furnished by the Standard Fashion Company, and subject to the approval of said Siegel-Cooper Company, at convenient places in its store; the expense of such signs to be entirely borne by the Standard Fashion Company." The complaint further alleges that said agreement "as defendant the Siegel-Cooper Company well knew, at the time it was entered into," was for the purpose of securing to the plaintiff the great advantage and prestige to be obtained from the sale of its paper patterns exclusively in said store and to prevent the Siegel-Cooper Company from selling or allowing to be sold on its premises any make of paper patterns other than those of the plaintiff. After alleging willingness to perform on its part, the plaintiff alleged refusal to perform on the part of the Siegel-Cooper Company, and that it has entered into an agreement with its codefendant to sell in said store the paper patterns made by the Butterick Publishing Company, during the whole or part of the term of the agreement made with the plaintiff; that it has given notice that it will not sell the paper patterns of the plaintiff, nor allow the plaintiff to sell its paper patterns in said store, nor permit plaintiff to enter or occupy said store, or any part thereof; that the Butterick Publishing Company knew of said agreement with the plaintiff, and induced the Siegel-Cooper Company to break the same, promising to save it harmless against any recovery by the plaintiff on account of the said breach, and to defend at its own expense any action brought on account thereof; that the plaintiff will be put to irreparable loss and injury if the Siegel-Cooper Company is suffered to break its agreement; that it will be damaged in its business if that company sells the patterns of the Butterick Publishing Company, the rival and competitor of the plaintiff, by loss of the prestige aforesaid, as well as by the loss of receipts from the sales of its patterns in said store in a manner altogether impossible to be compensated for in an action for money damages, and that in no place can the plaintiff obtain the same advantages for the sale of its patterns as in said store. The relief demanded is that the Siegel-Cooper Company be required to specifically perform its contract with the plaintiff, and that both defendants be restrained from selling in said 43 L. R. A.

store any paper patterns except those made by the plaintiff "from December 12, 1897, to December 12, 1899, and for three months thereafter." There is also a prayer for damages and general relief. The separate demurrers interposed to this complaint on the ground that it did not state facts sufficient to constitute a cause of action were sustained at special term, but upon appeal the appellate division reversed the interlocutory judgment entered below, holding that, while the plaintiff could not have a specific performance of the contract, as it would impose too great a burden upon the court, still it was entitled to an injunction to enforce a negative covenant of the Siegel-Cooper Company that it would not sell, or allow to be sold, on its premises, during the duration of the contract, any other make of paper patterns. The defendants appealed to this court by permission of the appellate division, which certified the following question: "Does the complaint in this action state facts constituting a cause of action against either of the defendants?"

Messrs. Edward C. Perkins and Thomas M. Debevoise, for appellants:

It does not appear from the complaint that there is no adequate remedy at law.

It is the function of a complaint to furnish the court with premises, not with conclusions.

McHenry v. Jewett, 90 N. Y. 58.

There is an adequate remedy by an action at law for damages.

Texas & P. R. Co. v. Marshall, 136 U. S. 392, 34 L. ed. 385; *Dickinson v. Hart*, 142 N. Y. 183; *Wakeman v. Wheeler & Wilson Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676; *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756; *Dart v. Lambeer*, 107 N. Y. 664; *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415; *Burdon Cent. Sugar Ref. Co. v. Leocrich*, 37 Fed. Rep. 67; *Masterton v. Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38; *Taylor Mfg. Co. v. Hatcher*, 39 Fed. Rep. 440, 3 L. R. A. 58; *Heater v. Knox*, 63 N. Y. 561.

Whether there is an adequate remedy at law or not, the contract is not one of which a court of equity will grant specific performance.

22 Am. & Eng. Enc. Law, p. 1002; *Fargo v. New York & N. E. R. Co.* 3 Misc. 205; *Beck v. Allison*, 56 N. Y. 366, 15 Am. Rep. 430; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. ed. 955; *Gervais v. Edwards*, 2 Dru. & W. 80; *Blackett v. Bates*, L. R. 1 Ch. 117; *Ryan v. Mutual Tontine Westminster Chambers Assn.* [1893] 1 Ch. 116; *Suburban Construction Co. v. Naugle*, 70 Ill. App. 384; *Wolverhampton & W. R. Co. v. London & N. W. R. Co.* L. R. 16 Eq. 433; *Hills v. Oroll*, 2 Phill. Ch. 60; *Port Clinton R. Co. v. Cleveland & T. R. Co.* 13 Ohio St. 545; *Richmond v. Dubuque & S. C. R. Co.* 33 Iowa, 422; *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84; *Powell-Duffryn Steam Coal Co. v. Taff Vale R. Co.* L. R. 9 Ch. 331; *Campbell v. Rust*, 85 Va. 653; *Starnes v. Nesom*, 1 Tenn. Ch. 239; *Blanchard v. Detroit, L. & L. M. R. Co.* 31 Mich. 43, 18 Am. Rep. 142; *Caswell v. Gibbs*, 33 Mich. 331; *Pullman Palace Car*

Co. v. Texas & P. R. Co. 11 Fed. Rep. 632; *Iron Age Pub. Co. v. Western U. Teleg. Co.* 83 Ala. 498; *Grape Creek Coal Co. v. Spellman*, 39 Ill. App. 630; *Marshall v. Texas & P. R. Co.* 136 U. S. 393, 34 L. ed. 385; *Kidd v. McGinnis*, 1 N. D. 331; *South & North Ala. R. Co. v. Highland Ave. & Belt R. Co.* 98 Ala. 400; *Young Lock Nut Co. v. Brownley Mfg. Co.* (N. J. Eq.) 34 Atl. 947; *Electric Lighting Co. v. Mobile & S. H. R. Co.* 104 Ala. 190; Pom. Spec. Perf. §§ 307, 312.

An exception to the principle exists in case of contracts relative to the management of railroads, on the express ground that railroads being public functionaries, this burden should be assumed by the court, not out of consideration for the plaintiff, but out of regard for the rights of the public at large.

Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843; *Prospect Park & O. I. R. Co. v. Coney Island & B. R. Co.* 144 N. Y. 152, 26 L. R. A. 610.

Specific performance should be refused on the same principle upon which the courts decline specifically to enforce the carrying out of a partnership agreement.

Lindley, Partn. § 475; *Collyer*, Partn. § 250; *Story*, Partn. §§ 188, 224.

The court below erred in holding that it could enforce the specific performance of a single term of the contract by enjoining the sale of any patterns but the plaintiffs'.

Curtis, Equity Precedents, pt. 2, p. 415, chap. 1, subhead LI.; *Johnson v. Shrewsbury & B. R. Co.* 3 DeG. M. & G. 914; *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84; *Brett v. East India & L. Shipping Co.* 2 Hem. & M. 404; *Meason v. Kaine*, 63 Pa. 735; *Steinau v. Cincinnati Gaslight & Coke Co.* 43 Ohio St. 324; Pom. Spec. Perf. § 25; *Pickering v. Ely*, 2 Younge & C. Ch. Cas. 249; *Ross v. Union P. R. Co.* 1 Woolw. 26; *Blackett v. Bates*, L. R. 1 Ch. 117; *Mair v. Himalaya Tea Co.* L. R. 1 Eq. 411; *Richmond v. Dubuque & S. C. R. Co.* 33 Iowa, 422; *Pullman Palace Car Co. v. Texas & P. R. Co.* 11 Fed. Rep. 632; *Duff v. Hopkins*, 33 Fed. Rep. 599; *Young Lock Nut Co. v. Brownley Mfg. Co.* (N. J. Eq.) 34 Atl. 947; *Norris v. Fox*, 45 Fed. Rep. 406; *Cooper v. Pena*, 21 Cal. 411; *Wakeham v. Barker*, 82 Cal. 46; *Tyson v. Watts*, 1 Md. Ch. 12; *Duval v. Myers*, 2 Md. Ch. 401; *Waterman*, Spec. Perf. § 196; *Fry*, Spec. Perf. §§ 440, 441.

The principle which deters the court from enforcing the entire contract against only one of the parties also applies, with at least equal strength, to prevent the enforcement of a single term in the contract, and it can hardly be claimed that the granting of an injunction is anything more than the specific performance of a single term of the agreement, or that the right to an injunction depends on any separate principle.

Pom. Eq. Jur. § 1341; *Merchants' Trading Co. v. Banner*, L. R. 12 Eq. 23.

Lumley v. Wagner, 1 DeG. M. & G. 604, was plainly at variance with the earlier English cases on the subject, and with those of our own state.

Morris v. Colman, 18 Ves. Jr. 437; *Clarke v. Price*, 2 Wils. 157; *Kemble v. Kean*, 6 43 L. R. A.

Sim. 334; *Kimberley v. Jennings*, 6 Sim. 340; *Baldwin v. Society for Diffusing Useful Knowledge*, 9 Sim. 393; *DeRivafinoli v. Corsetti*, 4 Paige, 264; *Sanquirico v. Benedetti*, 1 Barb. 315; *Burton v. Marshall*, 4 Gill, 487.

The present position of the English courts is well defined in *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch. 416.

The American courts, where they have followed the decision of *Lumley v. Wagner*, have been careful to restrict themselves from any further extension of this exception to the general rule.

Strobridge Lithographing Co. v. Crane, 35 N. Y. S. R. 473.

In cases in which injunctions have been granted against the violation of a right originating in contract, the contract has been so far performed that the plaintiff's rights have been transmuted into actual rights of property, or the defendant has assumed a relation of trust towards the plaintiff which subjects him to the jurisdiction of a court of equity by reason of its general jurisdiction over matters of trust, or on other grounds of special equity jurisdiction, apart from mere inadequacy of legal remedy.

Bagg v. Robinson, 12 Misc. 299; *Banker & C. Co. v. Stimson*, 40 N. Y. S. R. 740; *Beer v. Canary*, 2 App. Div. 519; *Bickford v. Davis*, 11 Fed. Rep. 549.

Messrs. John M. Bowers and James W. Gerard, Jr., for respondent:

The negative covenant not to permit any other patterns to be sold entitles the plaintiff to the injunctive relief sought in the complaint.

Bispham, Eq. 5th ed. p. 577; *High*, Inj. p. 416; 3 *Wait*, Act. & Def. p. 693; *Singer Sewing-Mach. Co. v. Union Button-Hole & E. Co.* Holmes, 253; *Goddard v. Wilde*, 17 Fed. Rep. 846; *Western U. Teleg. Co. v. Union P. R. Co.* 3 Fed. Rep. 429; *Western U. Teleg. Co. v. St. Joseph & W. R. Co.* 3 Fed. Rep. 434; *Chicago & A. R. Co. v. New York, L. E. & W. R. Co.* 24 Fed. Rep. 521; *Western U. Teleg. Co. v. Rogers*, 42 N. J. Eq. 311; *Lacy v. Heuck*, 12 Ohio L. J. 209.

Lumley v. Wagner has been followed in England in the case of *Grimston v. Cuningham* [1894] 1 Q. B. 125.

It has been followed in this state in numerous cases.

Daly v. Smith, 49 How. Pr. 150; *Metro-politan Exhibition Co. v. Ward*, 24 Abb. N. C. 393; *Canary v. Russell*, 9 Misc. 558; *Davies v. Racer*, 72 Hun, 43; *Donnell v. Bennett*, L. R. 22 Ch. Div. 835.

The plaintiff has no adequate remedy at law.

Pratt v. Montegriffo, 25 Abb. N. C. 334; *Dickinson v. Hart*, 142 N. Y. 183; *Bernstein v. Meech*, 130 N. Y. 354; *Moss v. Tompkins*, 69 Hun, 290, Affirmed without opinion in 144 N. Y. 659; *Cutting v. Miner*, 30 App. Div. 457; *Wakeman v. Wheeler & Wilson Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676; *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415.

The court should decree specific performance of the agreement.

Waterman, Spec. Perf. of Contr. §§ 1, 6; *Union P. R. Co. v. Chicago, R. I. & P. R. Co.*

163 U. S. 600, 41 L. ed. 278; *Prospect Park & O. I. R. Co. v. Coney Island & B. R. Co.* 144 N. Y. 160, 26 L. R. A. 610; *Lumley v. Wagner*, 1 DeG. M. & G. 618; 3 Parsons, Contr. 352.

Vann, J., delivered the opinion of the court:

Contracts which require the performance of varied and continuous acts, or the exercise of special skill, taste, and judgment, will not, as a general rule, be enforced by courts of equity, because the execution of the decree would require such constant superintendence as to make judicial control a matter of extreme difficulty. *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 358, 19 L. ed. 955, 961; *Beck v. Allison*, 56 N. Y. 366, 370, 15 Am. Rep. 430; *Gervais v. Edwards*, 2 Dru. & W. 80; *Blackett v. Bates*, L. R. 1 Ch. 117; *Fargo v. New York & N. E. R. Co.* 3 Misc. 205; Pom. Spec. Perf. § 312; *Fry, Spec. Perf.* § 69. An exception to this rule, founded upon the rights of the public rather than those of the plaintiff, obtains with reference to contracts relating to the management and control of railroads and other agencies of transportation which enjoy special privileges conferred by statute, and promote the general welfare. *Joy v. St. Louis*, 138 U. S. 1, 47, 34 L. ed. 843, 858; *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.* 144 N. Y. 152, 26 L. R. A. 610. When the inconvenience of the courts in acting is more than counterbalanced by the inconvenience of the public if they do not act, the interest of the public will prevail. But even if, upon a trial of the action, specific performance of the contract in its entirety were refused as impracticable, still the bill should be retained as one permitting an injunction, in the sound discretion of the court, to restrain the defendants from violating the negative and severable covenant of the Siegel-Cooper Company that it would not "sell, or allow to be sold, on its premises, during the duration of this [the] contract, any other make of paper patterns" than those of the plaintiff. The learned appellate division, one of the judges dissenting, overruled the demurrers on this ground, holding that the court should extend its remedy as far as it is able, and thus prevent the principal defendant, not only from making money by breaking its agreement, but from inflicting a double wrong upon the plaintiff by depriving it of the right to sell, and conferring that right on a business competitor. We think this is a sound and just conclusion, because it will compel the Siegel-Cooper Company to either perform its agreement or lose all benefit from breaking it, and at the same time will shield the plaintiff from part of the loss caused by the breach, if persisted in. *Lumley v. Wagner*, 1 DeG. M. & G. 604; *Donnell v. Bennett*, L. R. 22 Ch. Div. 835; *Montague v. Flockton*, L. R. 16 Eq. 189; *Singer Sewing Mach. Co. v. Union Button-Hole & E. Co.* Holmes, 253; *Chicago & A. R. Co. v. New York, L. E. & W. R. Co.* 24 Fed. Rep. 516, 521; *Goddard v. Wilde*, 17 Fed. Rep. 846; *Western U. Teleg. Co. v. Union P. R. Co.* 3 43 L. R. A.

Fed. Rep. 423, 429; *Western U. Teleg. Co. v. Rogers*, 42 N. J. Eq. 311.

The injunction, when granted, may not be absolute, but may be based on some equitable condition that will prevent either party from taking advantage of the other, such as the waiver by the plaintiff of the breach of the contract by the principal defendant. The question raised by the demurrer does not relate to any matter of discretion or propriety, but to the power of the court to grant any relief, conditional or otherwise. We are satisfied with the opinion below upon the subject, and should adopt it as our own without comment, but for a point, not thus far considered, which seems to us a conclusive answer to the demurrers, and which, if overlooked, might lead to some confusion. The action is for the specific performance of a lawful contract, duly executed by both the parties thereto. It is capable of performance by both, and there is no reason for non-performance by either. A court of equity has jurisdiction of such actions, and the complaint sets forth the contract,—readiness to perform on one side, a refusal to perform on the other,—and facts showing no adequate remedy at law. A complete cause of action is, therefore, alleged, and the only reason for not awarding general relief to the plaintiff is that its nature is so complicated as possibly to require a multiplicity of orders by the court in its efforts to superintend the details of an extensive and peculiar business. This fact does not deprive the court of jurisdiction, but justifies a refusal, in its sound discretion, to exercise it. It confers no right upon either party. The court does not refuse to act because the defendants object to its acting, for it would refuse, under the circumstances, if both parties requested it to proceed; but it refuses because the execution of its decree would require protracted supervision. It is the difficulty of enforcing, not of rendering, judgment that causes it to hesitate. The office of a demurrer is to sweep away a defective pleading, and in the case before us it attacks the substance of the complaint; yet the complaint is good in substance, for it sets forth a cause of action in equity. While it is true that the court, in its discretion, may not hear the cause, or, after hearing, may refuse relief owing to the difficulty of enforcing its decree, still this does not make the complaint defective, nor authorize a general demurrer, which "must be founded upon an absolute, certain and clear proposition that, taking the charges in the bill to be true, the bill would be dismissed at the hearing." Beach, *Modern Eq. Pr.* § 225. Upon the facts before us, it is in the power of the court to enforce the agreement the same as in the case of railroad contracts, but the difficulties attending the enforcement are so great that the court would ordinarily refuse to undertake it, as there is no public interest involved. As there was complete jurisdiction and a perfect cause of action against both defendants, the demurrers must be overruled. *Coatsworth v. Lehigh Valley R. Co.* 156 N. Y. 451.

The order of the appellate division should be affirmed, with costs, and the question certified answered in the affirmative.

All concur.

George W. PERKINS, President of Cigar Makers' International Union of America, *Respt.*,

v.

Henry H. HEERT *et al.*, *Appts.*

(158 N. Y. 306.)

1. A statute for protecting labels of labor unions, which applies to every locality in the state and embraces every association or union of workmen or women, is a general law and in no sense local or private.
2. But one subject is indicated in the title of an act for the protection of skilled labor and the registration of labels, trademarks, names, brands, or devices covering the products of such labor associations or unions.
3. A statute authorizing associations or unions of workmen to adopt labels or devices to distinguish the products of their labor does not make an unjust discrimination against nonunion workmen.
4. The boycotting of nonunion laborers, to deprive them of the legitimate fruits of their labors, cannot be deemed the purpose for which a statute for the protection of union labels was procured, so as to make the statute invalid.

(February 28, 1899.)

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term for New York county in favor of plaintiff in an action brought to enjoin defendants from using Union labels on cigars. *Affirmed.*

The facts are stated in the opinion.

Messrs. John A. Straley and Morris S. Wise, for appellants:

Chapter 385 of the Laws of 1889 is unconstitutional and void, because it grants an exclusive privilege to a private association in contravention of the provisions of the Constitution, § 18, art. 3.

A fundamental error at the very basis of plaintiff's claim is that he assumes that the creation and registration of the label gives his association an exclusive right therein.

He confounds certain rights given under the common law with label rights under the statutes, as if the invention of a label would give rights therein which a court of equity would protect.

Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutillier, 47 Hun, 521; *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* 142 Ill. 494.

The individual workman might acquire for himself under well-established rules of law

—NOTE.—As to trademarks of labor unions, see note to *State v. Bishop* (Mo.) 29 L. R. A. 200; also *Hetterman Bros. v. Powers* (Ky.) 39 L. R. A. 211; and *Tracy v. Banker* (Mass.) 39 L. R. A. 508.

43 L. R. A.

trademark rights as a manufacturer or dealer, but it does not follow that because he could do so, an association of independent members could do the same and transfer the trademark or label from person to person.

United States v. Steffens, 100 U. S. 82, 25 L. ed. 550.

A trademark cannot be acquired at common law unless the owner is a maker or selector of an article of traffic which he himself places upon the market and sells as his, using the trademark to indicate its origin, or ownership, or to indicate the particular business or place of business of a company doing a particular business.

Cigar Makers' Protective Union No. 98 v. Conhaim, 40 Minn. 243, 3 L. R. A. 125; *Schneider v. Williams*, 44 N. J. Eq. 391; *Weener v. Brayton*, 152 Mass. 101, 8 L. R. A. 640; *State v. Berlinheimer*, 62 Mo. App. 168; *Carson v. Ury*, 39 Fed. Rep. 777, 5 L. R. A. 614.

The statute, if it supports plaintiff's claim, must be held to be creative, and make the rights of property in a label or trademark registered thereunder a species of property *per se*, and this without reference to whether at common law the trademark is valid or not.

An entirely new cause of action has thus been created by this statute. The ownership of a trademark is an exclusive right.

Browne, Trademarks, 2d ed. p. 162.

Such a right created by statute would be analogous to a patent right.

Re Union Ferry Co. 98 N. Y. 150.

Why should discrimination be made in favor of this body of so-called union workmen as against the nonunion operatives of the shops or of other manufactories who do not exclusively employ union workmen, and why should selling premiums be placed by this state upon such union-made product by the official sanction of a union merchandise label and trademark?

Schmalz v. Wooley, 56 N. J. Eq. 649.

Chapter 385 of the Laws of 1889 is a private bill, and is unconstitutional and void because within the condemnation of § 16 of art. 3 of the Constitution.

Re Paul, 94 N. Y. 497; *People, Lee. v. Chautauqua County Suprs.* 43 N. Y. 10; *Kerrigan v. Force*, 68 N. Y. 383; *Sweet v. Syracuse*, 129 N. Y. 316.

A statute must stand or fall just as it is enacted without reference to extraneous facts developed in cases under it.

23 Am. & Eng. Enc. Law, p. 232; *Messenger v. State*, 25 Neb. 674. See also *McGee's Appeal*, 114 Pa. 470; *Bell v. New York*, 105 N. Y. 139.

This is class legislation and within the prohibition of the Constitution.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *People v. O'Brien*, 38 N. Y. 193.

Chapter 385 of the Laws of 1889 is unconstitutional and void because the act is contrary to public policy in that it unjustly discriminates in favor of the labor of members of associations or unions as against that of nonunion workmen.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636;

26 Am. & Eng. Enc. Law, p. 342; *Weener v. Brayton*, 152 Mass. 101, 8 L. R. A. 640; *Strasser v. Moonelis*, 108 N. Y. 611; *McVey v. Brendel*, 144 Pa. 235, 13 L. R. A. 377.

The implication and inference are absolute that the obvious intention of the language employed in the label in suit was to attack all nonunion labor.

By placing such terms on their label even though in a negative form, the union virtually branded and stamped all other forms of labor as being of a kind properly subject to condemnation, and the goods of all other workmen as being goods which should not be purchased or used.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *Townshend, Slander & Libel*, 3d ed. p. 178; *Com. v. Kneeland*, 20 Pick. 206; *Wandlerip v. Roe*, 23 Pa. 82; *Dellevene v. Percer*, 9 Dowl. P. C. 245; *New York & R. Cement Co. v. Copley Cement Co.* 45 Fed. Rep. 212; *Schneider v. Williams*, 44 N. J. Eq. 391.

Messrs. Antonio Knauth and Tracy O. Becker, for respondent:

Irrespective of the statute the label of the cigarmakers' international union is entitled to protection against imitation.

Bloete v. Simon, 12 N. Y. Civ. Proc. Rep. 114; *Strasser v. Moonelis*, 23 Jones & S. 197, 108 N. Y. 611; *People v. Fisher*, 50 Hun, 552; *Carson v. Ury*, 39 Fed. Rep. 777, 5 L. R. A. 614; *State v. Bishop*, 128 Mo. 373, 29 L. R. A. 200; *State v. Hagen*, 6 Ind. App. 167; *Delaware & H. Canal Co. v. Olark*, 13 Wall. 311, 20 L. ed. 581; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, 25 L. ed. 993; *Godillot v. Harris*, 81 N. Y. 263; *Koehler v. Sanders*, 122 N. Y. 65, 9 L. R. A. 576; *Waterman v. Shipman*, 130 N. Y. 301; *Allen v. McCarthy*, 37 Minn. 349; *Cohn v. People*, 149 Ill. 486, 23 L. R. A. 821; *Schnalz v. Woolley* (N. J. Err. & App.) ante, 86, 41 Atl. 939; *Cigar Makers' Protective Union v. Lindner*, 2 Ohio N. P. 114.

The object of the trademark is to denote, not necessarily the owner, but the maker or producer, of the article as well. Origin or ownership are the things to be designated by a trademark.

Caswell v. Davis, 58 N. Y. Rep. 223, 17 Am. Rep. 233; *Godillot v. Harris*, 81 N. Y. 263; *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946, 39 Am. Rep. 286; *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, 25 L. ed. 993.

As this statute did not create a right, but recognized and sanctioned a right already existing, the objection that it grants an exclusive privilege to a private association in contravention of the provisions of the Constitution is without foundation.

Re New York Elev. R. Co. 70 N. Y. 327; *McKenna v. Edmundstone*, 91 N. Y. 234; *White v. Syracuse & U. R. Co.* 14 Barb. 559; *Smith v. Strong*, 2 Hill, 241; *State v. Bishop*, 128 Mo. 373, 29 L. R. A. 200; *Tracy v. Banker*, 170 Mass. 266, 30 L. R. A. 508; *Schnalz v. Woolley* (N. J. Err. & App.) ante, 86; *Cohn v. People*, 149 Ill. 486, 23 L. R. A. 821; *State v. Hagen*, 6 Ind. App. 167; 43 L. R. A.

Hottelerman Bros. v. Powers, 19 Ky. L. Rep. 1087, 39 L. R. A. 211.

The act of 1889 does not unjustly discriminate in favor of the labor of members of associations or unions as against that of non-union workmen.

New York & R. Cement Co. v. Copley Cement Co. 45 Fed. Rep. 212.

Haight, J., delivered the opinion of the court:

This action was brought by the plaintiff, as president of the Cigar Makers' International Union of America, under the provisions of chapter 385 of the Laws of 1889, for an injunction to restrain the defendants from using an alleged imitation of the union's label, a copy of which had been filed in the office of the secretary of state under the provisions of that law, and also for an accounting for profits. The Cigar Makers' International Union of America is a voluntary unincorporated association, consisting of a large number of persons, who are practical cigar makers, residing in the United States, with its principal office located at Buffalo. The purpose of their organization is the promoting of the mental, moral, and physical welfare of its members by assisting them to obtain labor at remunerative wages, and by affording them pecuniary aid in case of sickness, and generally, to maintain a high standard of workmanship. They adopted a label upon blue paper, with an ornamental border, containing the following:

Sept., 1890.

Issued by authority of the Cigar Makers' International Union of America. Union Made Cigars. This certifies that the cigars contained in this box have been made by a first-class workman, a member of the Cigar Makers' International Union of America, an organization opposed to inferior ratshop, coolie, prison, or filthy tenement-house workmanship. Therefore we recommend these cigars to all smokers throughout the world. All infringements upon this label will be punished according to law.

G. W. Perkins,
President C. M. I. U. of America.

On one end was a copy of the seal of the union, and on the other end a place was reserved for a local stamp. After the passage of the act in question, they caused a copy of this label to be filed in the office of the secretary of state. The defendants are cigar manufacturers in the city of New York, and are not members of the union. They caused to be printed counterfeits of the blue label adopted by the union, and pasted it upon boxes containing the cigars manufactured by them, and then, through their agents, sold their cigars to the public, with the intent, as has been found, to defraud the union and the purchasers and to impose upon the public. The case was tried before the court without a jury, and a decision was rendered in favor of the plaintiff, awarding a perpetual injunction against the defendants, and for damages and costs.

It is claimed, on behalf of the appellants, that the label had been abandoned by the union; that it contained matter libelous and defamatory, which a court of equity would not protect; and that the statute in question had been repealed. These questions were fully considered by the learned appellate division, and we fully concur with the views of that court, as expressed in the prevailing opinion, with reference thereto. The only questions which we deem it necessary to here consider are those raised with reference to the constitutionality of the act.

The statute is as follows: "Sec. 1. Every union or association of workmen or women, adopting a label, mark, name, brand, or device, intended to designate the products of the labor of members of such union or association of working men or women, shall in order to obtain the benefits of this act, file duplicate copies of such label, mark, name, brand, or device in the office of the secretary of state, who shall, under his hand and seal, deliver to the party filing or registering the same a certified copy and a certificate of the filing thereof, for which he shall receive a fee of \$1.

"Sec. 2. Every union or association of workmen or women adopting such label, mark, name, brand, or device, and filing the same, as specified in the first section of this act, may proceed, by suit in any of the courts of record of the state, to enjoin the manufacture, use, display or sale of counterfeits or colorable imitations of such label," etc.

It is claimed that the act in question is void for the reason that it grants an exclusive privilege to a private association, in contravention of the provisions of the Constitution. Const. art. 3, § 18. That section of the Constitution, so far as material, provides as follows: "The legislature shall not pass a private or local bill in any of the following cases. . . . granting to any private corporation, association, or individual any exclusive privilege, immunity, or franchise whatever. . . . The legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment may be provided for by general laws."

It will be observed that the prohibition contained in this provision of the Constitution has reference to private or local bills, and that it requires the legislature to pass general laws providing for the cases in which private and local bills are prohibited. The question, therefore, arises as to whether the act in question is a general law or a private and local bill. It is entitled "An Act for the Better Protection of Skilled Labor, and for the Registration of Labels, Marks, Names, Brands, or Devices Covering the Products of Such Labor of Associations or Unions of Workingmen or Women." There is nothing in the title or the provisions of the act that in any manner limits its provisions to any particular locality of the state or to any designated association or union of working men or women. Instead, the provisions are all general, including every locality in the entire state, and embracing every association

or union of workmen or women existing or that may be thereafter organized. It is in no sense local or private, but is in every sense a general law.

Again it is claimed that the act is within the condemnation of § 16 of article 3 of the Constitution, which provides that "no private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title." We have already shown that the act is a general law, and not a private nor local bill. It, consequently, is not brought in conflict with this provision. Furthermore, we think but one subject is mentioned in the title, and that is the better protection of skilled labor by the registration of labels, etc., covering the products of such labor.

Finally, it is insisted that the act is unconstitutional and void, for the reason that it is contrary to public policy, in that it unjustly discriminates in favor of the labor of members of associations or unions as against that of nonunion workmen. The questions arising under this contention are more serious and require deliberate consideration. While private and local bills, granting to a private corporation, association, or individual any exclusive privilege, immunity, or franchise whatever, are prohibited, the Constitution authorizes the legislature to pass general laws under which grants may be made to corporations, associations, or individuals of an exclusive privilege, immunity, or franchise. An exclusive privilege or franchise is, therefore, authorized, if obtained under general laws. Among the exclusive privileges and franchises which have been made the subject of grants to private corporations, and with which we are all familiar, are those made by municipal governments, under the authority of general laws, of the right to occupy streets or highways for the construction and operation of street railroads. In all of these grants there is, of necessity, discrimination. Some particular corporation is singled out, to which the grant is given, and which thereafter enjoys the exclusive privilege of operating its railroad through the streets or highways specified in the grant; but, the grant being authorized, the discrimination is not unlawful. It is not contrary to public policy, for the reason that the constitution is the foundation upon which the public policy of the state is based. It embodies the policy of our government. It authorizes that which is politic, and prohibits that which is deemed impolitic. Where, therefore, the Constitution grants, or authorizes a grant through legislative action, of an exclusive privilege, it must be deemed to be in accord with the policy of the state. As we have seen, the label authorized was by a general, and not a local, act. No particular association or union has been given the exclusive privilege of adopting a label but every association or union of every kind of working men or women is given the right to adopt its own label, which may indicate its own workmanship. It consequently follows that whatever discrimination there may be is authorized, and therefore not unjust, and

that the privilege granted under the general law is in accord with public policy.

We are aware that the courts of sister states have had trouble with similar legislation in their states, that very much has been written upon the subject, and that the conclusions reached by the courts in the different states have widely differed. We have not thought it profitable to enter upon an elaborate discussion of these cases. The questions here presented arise under our own Constitution and are confined within narrow limits. We have not overlooked the intimation that the passage of this act was procured for the purpose of enabling union labor organizations to boycott nonunion laborers, and to deprive them of the legitimate fruits of their labors. We cannot, however, assume that such was the purpose and intent of the legislature, or that the association of which the plaintiff is president will resort to acts which are unlawful and crim-

inal. The act allows the members of the union to send the products of their labors into the markets of the country, marked in such a way as to indicate the character of their workmanship. This is legitimate and proper. It is a right that the law accords to every manufacturer. We must assume, therefore, that the legislature, in passing the act, had in view the lawful and legitimate purpose, and that it did not contemplate that the provisions of the act might be used for illegitimate purposes. These views render it unnecessary to consider the question as to whether the label was a valid trademark at common law.

No question is raised as to the right of the plaintiff to prosecute the action as president of the association.

The judgment should be affirmed, with costs.

All concur.

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina

v.

John P. MONROE, Appt.

(121 N. C. 677.)

A druggist who drops croton oil on candy for a customer in quantity sufficient to produce serious injury if taken into a person's system, knowing or reasonably believing that it is intended for a practical joke on someone and not for medicinal purposes, will be guilty of assault upon one injured by its administration by way of joke.

(December 21, 1897.)

A PPEAL by defendant from a judgment of the Superior Court for Union County imposing upon him a fine for alleged assault and battery. *Affirmed.*

Ernest Barrett was given some quinine in lemonade as a practical joke by W. W. Horn. He informed Horn that he would get even with him by giving him a dose of croton oil. The same evening Horn gave to Barrett some candy which made Barrett sick and it subsequently appeared that the candy contained croton oil. It appeared that Horn had gone into a drug store in which defendant was a clerk and asked him to drop a dose of croton oil into a piece of candy, which defendant did. Defendant denied that he knew that the oil was wanted for the playing of a practical joke; he denied that he had told Barrett that he fixed the dose for him, or that he had said that Horn told him he wanted it "for a fellow," which statement another witness testified that he had made, although he admitted that he knew of the giving of the quinine. The defendant asked the court to instruct that in no view of the

case can the jury convict unless they find beyond a reasonable doubt that Monroe knew at the time he sold Horn the oil that Horn intended to give it to Barrett for an unlawful purpose. This was refused, and the court instructed that if defendant sold Horn an unusual dose of croton oil, and he administered it to Barrett, who took it, and it had a serious and injurious effect upon him, and the defendant knew, or had reason to believe and did believe, that it was intended for Barrett or some other person by way of trick or joke, and not for a medicinal purpose, defendant would be guilty of assault and battery.

Further facts appear in the opinion.

Messrs. Covington & Redwine and E. Y. Webb, for appellant:

The character of the weapon, and the nature of the damage are not so set out in the bill as to show that the former was deadly, and the latter serious; and the evidence shows that the drug administered was oftentimes used in larger doses, and fails to disclose any serious damage.

State v. Cunningham, 94 N. C. 824; *State v. Earnest*, 98 N. C. 740; *State v. Shelly*, 98 N. C. 673; *State v. Porter*, 101 N. C. 713.

The defendant, being a licensed pharmacist, had a right to sell croton oil in "usual doses," or upon the "prescription of a physician."

Code, § 3143; *State v. Kearney*, 8 N. C. (1 Hawks) 53; *Hines v. Wilmington & W. R. Co.* 95 N. C. 434.

Defendant's offense is complete with the sale, and he is not responsible for the subsequent act of the purchaser, unless he knew of, and participated in, his unlawful act.

Poland v. Earhart, 70 Iowa, 285; *King v. Henkie*, 80 Ala. 505, 60 Am. Rep. 119; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Meyer v. King*, 72 Miss. 1, 35 L. R. A. 474; *Gilson v. DeKa-*

NOTE.—As to liability for damage done by practical joke, see also *Wartman v. Swindell* (N. J.) 18 L. R. A. 44.
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ware & H. Canal Co. 65 Or. 213, 36 Am. St. Rep. 807, note.

Messrs. Adams & Jerome, for the State:

Defendant engaged in an unlawful act in that he unlawfully started in motion a deadly weapon, to wit, an overdose of a poisonous drug.

Code, § 3143.

The circumstances under which the oil was sold, the fact that it was put up in an unusual way, that it was not labeled, that no inquiry was made as to its intended use, that no representation was made that it was intended for a legitimate purpose, that defendant knew that Horn had recently given the prosecutor quinine as a joke, the fact that Horn told defendant that he wanted it "for a fellow,"—all justified the jury in finding that the defendant knew, or had every reason to believe, and did believe, at the time, that the dose was intended for Barrett, or some other person, by way of a trick or joke, and not for a medicinal purpose.

A battery is the unlawful touching of the person of another by the aggressor himself, or by any substance unlawfully put in motion by him.

Kirland v. State, 43 Ind. 146, 13 Am. Rep. 392.

Where there is physical injury to another person, it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts.

Com. v. Stratton, 114 Mass. 303, 19 Am. Rep. 350; *Roscoe*, Crim. Ev. 8th ed. 296; 3 Bl. Com. p. 120, and notes.

An assault may be committed without intending injury to any particular person.

State v. Myers, 19 Iowa, 517; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Clark*, Crim. L. p. 210; *Scott v. Shepherd*, 2 W. Bl. 892; 1 Wharton, Crim. L. 1012.

Where the facts are such that had the defendant killed the prosecutor he would be guilty of manslaughter, he is guilty of assault and battery.

State v. Leary, 88 N. C. 615.

Mr. Zeb V. Walser, Attorney General, also for the State:

Administering any harmful drug or substance amounts to assault and battery.

1 Am. & Eng. Enc. Law, 1st ed. p. 804; *Com. v. Stratton*, 114 Mass. 303, 19 Am. Rep. 350; *Reg. v. Button*, 8 Car. & P. 660; *Oarr v. State*, 135 Ind. 1, 20 L. R. A. 863.

If injury would be the natural consequence of the action of the defendant, an un- 43 L. R. A.

lawful intent is presumed, unless such presumption is repelled by the evidence.

8 Am. & Eng. Enc. Law, 2d ed. p. 954; *State v. Crawford*, 13 N. C. (2 Dev. L.) 425.

An assault and battery may be committed without any actual or specific intent.

Mercer v. Corbin, 117 Ind. 450, 3 L. R. A. 221; *Peterson v. Haffner*, 59 Ind. 130, 26 Am. Rep. 81.

An assault involves every attempt or offer to injure another with force or violence.

Markley v. Whitman, 95 Mich. 236, 20 L. R. A. 55.

Faireloth, Ch. J., delivered the opinion of the court:

Will Horn administered to Ernest Barrett a dose of croton oil, and the oil had an injurious effect on Barrett. Defendant admits he sold the oil to Horn, and at his request dropped it into a piece of candy, but says he did not know that these parties were playing practical jokes on each other, and did not know for what purpose Horn wanted the oil. Another witness testified that defendant said that Horn said he wanted the oil "for a fellow." Defendant denied saying this. Another witness testified to the quinine episode, and to Barrett's and Horn's tricks with each other. Defendant testified that he knew that a day or two before Horn had given Barrett a dose of quinine as a joke, in lemonade. There were other witnesses on these matters. Defendant is indicted for an assault on Barrett. If guilty, he must be so as a principal, not as an accessory. His guilt, then, depends upon whether he knew, or had reason to believe, that the dose was intended for Barrett or some other person as a trick, and not for medicinal purposes. The whole evidence was submitted to the jury, who rendered a verdict of guilty. His honor instructed the jury that when the defendant sold the oil, if he "knew or had reason to believe, and did believe, that it was intended for Barrett or some other person by way of a trick or joke, and not for a medicinal purpose, the defendant would be guilty of assault and battery." He also charged that it was not necessary that it should be a poisonous or deadly dose; that it was sufficient if it was an unusual dose, likely to produce serious injury. To this instruction we see no objection, and we think it covers the substance of the defendant's prayers proper to go to the jury. There was no exception to the evidence. For duties of druggists, see Code, §§ 3143-3145.

Affirmed.

TEXAS COURT OF CRIMINAL APPEALS.

Ex parte Charles BATTIS.

(.....Tex.....)

An ordinance prohibiting hackmen and draymen from stopping their vehicles on certain streets except when actually engaged in receiving or delivering passengers or goods is not within charter authority to prevent the encumbering of streets, and is unreasonable and void.

(December 22, 1898.)

A PPEAL by petitioner from a judgment of the District Court for Tarrant County refusing to discharge him upon writ of habeas corpus from custody to which he has been committed for alleged violation of an ordinance of the City of Ft. Worth. *Petitioner discharged.*

The facts are stated in the opinion.

Mr. Wilson Gregg for relator.

Mr. W. D. Williams for respondent.

Henderson, J., delivered the opinion of the court:

Relator was arrested for an alleged violation of a city ordinance, and sued out a writ of habeas corpus before the district judge, who, after hearing the evidence, remanded the prisoner, and he prosecutes this appeal.

The complaint is as follows: "In the Name and by the Authority of the City of Ft. Worth. In the City Court. Before the undersigned authority, this day personally appeared L. P. Moore, who, being duly sworn, upon oath deposes and says that on the 17th day of November, 1898, and before the filing of this complaint, one Charles Battis, within the corporate limits of the city aforesaid, who was then and there using a certain street carriage and hack for the purpose of conveying passengers from one part of the city to another for hire, and who did then and there stop, stand, and detain said carriage and hack on Main street, of said city, when not actually engaged in receiving and delivering passengers and goods and merchandise, in violation of the ordinances of said city in such cases made and provided, contrary to the law of the state of Texas, and against the peace and dignity of the city of Ft. Worth," etc.

The portions of the charter of the city of Ft. Worth introduced in evidence are as follows: Section 53 provides that the city council, among other things, shall have power "to prevent the encumbering of the streets, alleys, sidewalks, and public grounds with carriages, wagons, carts, hacks, buggies, or any vehicle whatsoever." Special Laws 1889, p. 76. Section 53a provides that the city council shall have power "to license, tax, and regulate hackmen, draymen, omnibus drivers, baggage-wagon drivers, and drivers of vehicles of every kind . . . and to regulate stands for vehicles," etc. Special Laws

1891, p. 16. The ordinance passed by the city of Ft. Worth under said provisions of the charter is as follows: Chapter 7, art. 55: "Any person or persons owning or using any street carriage, hack, or other vehicle for the purpose of conveying passengers, goods, wares, or merchandise from one part of the city of Ft. Worth to another, for hire, who shall stop, stand, or detain any such carriage, hack, or vehicle on Main or Houston streets, or upon any cross streets running east and west between said Main and Houston streets, commencing with Weatherford street on the north, and ending with Seventh street on the south, or in front of any public hotel in said city, except when actually engaged in receiving or delivering passengers, goods, wares, or merchandise, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than \$5 nor more than \$25" etc. Appellant proposed to introduce witnesses to show the conditions surrounding said streets constituting the *locus in quo*, in connection with his proposition that the ordinance in question was an unreasonable exercise of the power of said city. The court, however, refused to hear testimony on the subject. We think the bill is defective in failing to state the facts desired to be proved. So, we will consider the question of the reasonableness of said ordinance on this phase as presented by the charter and ordinance.

There is no question that the authority granted to the city by the legislature in its charter to regulate the use of the streets and alleys and public grounds, and prevent the encumbering of the same by carriages, wagons, etc., is ample; that is, the legislature, in the charter, distinctly gave to the city of Ft. Worth the power to regulate the use of the public streets, alleys, etc., by vehicles. "Where the power to legislate on a given subject is conferred, and the mode or its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." See 1 Dill. Mun. Corp. § 328, and note 1. It is contended here, however, that the ordinance in question, prohibiting the stopping of vehicles on said streets of Ft. Worth for all purposes, except loading and unloading, is an unreasonable exercise of the power of the municipality, and is in excess of the charter right to regulate the use of said streets, and to prevent the encumbrance thereof. It is the general doctrine in this country that every ordinance of a corporation must be either authorized by the charter of such corporation, or one of the incidental powers of the corporation, which is implied; furthermore, that every by-law must be reasonable, and the reasonableness of a by-law is a subject to be passed on by the courts. 1 Dill. Mun. Corp. § 319, and authorities cited in note. It is held, furthermore, that the courts will be liberal in upholding an ordinance, and, if

NOTE.—As to license fees for use of streets by hacks or other vehicles, see note to *Tomlinson v. Indianapolis* (Ind.) 36 L. R. A. 414. 43 L. R. A.

its reasonableness be doubtful, it will not be held void. *Ex parte Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516. Ordinances, to be reasonable and lawful, must not be oppressive, must be impartial, fair, and generally may regulate, but not prohibit, matters of common right. 1 Dill. Mun. Corp. §§ 320-323, 325. Now, applying these rules to the above ordinance, does it appear that the same was a reasonable exercise of the power of the municipality under its charter? The ordinance in question, it will be noted, inhibits the stoppage of vehicles on said streets in the city of Ft. Worth for any purpose, except to receive and discharge freight or passengers. Under it, no matter what the emergency might be, a person stopping a vehicle, outside of the exceptions, would violate the ordinance, and be subject to punishment. A great many exigencies might occur for a person to stop a vehicle for the transportation of goods or passengers, which he might be

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driving, entirely reasonable; but under the ordinance, if he delay but a moment, he would be subject to a fine. There can be no question that, under a proper ordinance, the municipality has authority to prevent the encumbering or obstruction of its streets, alleys, and highways by vehicles, and, to that end, can regulate their use, can fix stands for vehicles, and permit them to use no other place as stands. This would be a proper exercise of its power to regulate; but it occurs to us that the sweeping declaration in this ordinance, inhibiting the stoppage of vehicles for any purpose, outside of the exceptions mentioned, is oppressive, and is in contravention of common right, and so is unreasonable, and, in our opinion, is not authorized by the charter.

We therefore hold the city ordinance void, and *relator is ordered discharged*.

Hurt, P. J., absent.

END OF CASES IN BOOK 43.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Third Quarter of the Judicial Year Beginning with October 1, 1898, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS; ASSOCIATIONS; FRANCHISES.
- IV. DOMESTIC RELATIONS.
- V. PERSONAL CAPACITY.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; WILLS; LIENS.
- VIII. CIVIL REMEDIES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Courts.

The question whether a judge is to be deemed to be sitting in a certain case or not is considered in a case which holds that he did sit in the case and is entitled to dissent and cause the case to be certified to another court for conflict of authority, although he has no consultation on the merits of the case with the other judges, where he was on the bench when it was argued and submitted, and on learning of its decision in his absence notified the judge who wrote the opinion that it was in conflict with a decision of the supreme court, and that a rehearing ought to be granted, in addition to which he filed a dissenting opinion pending the rehearing, and was on the bench, but not consulted, when his associates overruled the motion for rehearing, as they had previously concluded to do, and notified him of their purpose. (Mo.) 845.

The question of the personal liability of the judge of an inferior court for decisions not justified by law is decided in exoneration of the officer in a case in which an unlawful sentence was imposed under an illegal ordinance which the court held valid. (Ga.) 630.

Officers.

Residence in a suburb before its annexation to a city is held equivalent to residence within the city for the purpose of determining the eligibility to a city office of the resident on annexation. (Ky.) 699.

A change in the time of electing officers so that more than four years would elapse between elections is held not to violate a constitutional provision against creating an office the tenure of which shall be longer than four years, where, if the officers hold more than four years, it will be by virtue of another constitutional provision by which they hold over until their successors qualify. (Ind.) 408.

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Right to vote.

Requiring signers of nomination papers to pledge themselves that they will vote for the candidates named therein is held to be no infringement of the constitutional right to vote. (Ohio) 90.

Official certificates.

A statute making the certificate of a state weighmaster of the weight of grain delivered from a public elevator absolutely conclusive, when the owner of the elevator is compelled to have the grain weighed by him, is held unconstitutional. (Minn.) 843.

Corruption of city council.

The corruption of a city council in passing a resolution is held to be a defense to the city in an action against it based on the resolution, and such a resolution to settle and compromise the claim of a contractor is held to be an administrative, and not a legislative, act. (N. Y.) 678.

Municipal liability.

City waterworks are held to be within the rule which makes a city liable for negligence in respect to property which it owns in its private capacity as distinguished from that which it holds as a governmental or public agency. (Or.) 435.

Personal injuries caused by the shooting of fireworks, firearms, etc., on the public streets, with the consent of the authorities, are held to give no right of action against the town. (W. Va.) 295.

See *infra*, II., as to county warrants.

Parks.

A city which has dedicated for park purposes land conveyed to it for a common or street, subject to reversion if used for other purposes, is held to violate its trust by granting the right to lay a railroad across it and then attempting to abandon the park and confirm the title of the reversioner. (Ala.) 376.

Public landing.

The lease by a city of a part of a public landing to a private person is held invalid. (Pa.) 502.

Fisheries.

A statute limiting to taxpayers the right to take oysters in public waters is held unconstitutional. (Tex.) 615.

A statute authorizing fish commissioners who have placed fish in a stream to prohibit fishing therein for three years, and also making the waters public for five years more, is held constitutional. (Vt.) 290.

Public funds.

A private bank is held not to be a "regularly organized bank," within the meaning of a statute as to the deposit of public funds. (Ill.) 644.

City funds deposited by a banker who received them from the city in other banks, under an arrangement to share the deposits with them, whereby they were to be drawn only to pay city orders, are deemed to be held for the city in trust, as against his assignees for creditors. (Mich.) 840.

Highways—eminent domain.

Poles for electric-light wires, authorized by a town, in a country highway, for the lighting of which the town has made a contract, are held not to constitute an additional burden upon the fee. (N. Y.) 672.

The change of a county road to a city street, caused by incorporating a city, is held not to make a new and additional burden which requires new condemnation. (Or.) 444.

Following the great weight of authority, it is held that an electric motor railway is not an additional servitude on a highway. (Ala.) 233.

Locating an electric street railway within 7 feet of a building is held to give the abutting owner no right to compensation. (Ky.) 554.

The consent of abutting owners is held not to be necessary for the use by one street-railway company of the tracks of another company which has a contract therefor with the former. (N. Y.) 236.

A railroad company is held under the obligation to alter the grade of its crossing at its own expense when a highway is laid across it requiring a different grade. (Ga.) 638.

Ordinance as to use of streets.

An ordinance prohibiting hackmen and draymen from stopping their vehicles on

certain streets except when engaged in receiving or delivering passengers or goods is held unreasonable and void. (Tex.) 863.

Taxes.

The forfeiture of land under the West Virginia Constitution for five years' failure to enter it for taxation is held to constitute due process of law because this practice existed before the provision of the Federal Constitution on this subject was adopted. (W. Va.) 727.

A lessee's interest in oil wells while the oil remains in place in the earth is held not to be taxable as personal property. (W. Va.) 725.

A municipal tax on business or property so situated that no protection or benefit can be received from the municipality is held unconstitutional as a taking of private property for public use without just compensation. (Utah) 81.

Dormitories and dining halls of a college are held to be buildings exclusively occupied as a college, within the meaning of a statute exempting college property from taxation. (Conn.) 490.

A school created and maintained by voluntary contributions but open to all children of every creed, color, race, or condition free of charge, is held to be within the constitutional provision for the exemption of purely public charities. (Pa.) 489.

Assessments.

See also *infra*, VIII.

Frontage assessments on abutting property for the expense of sprinkling streets are held valid, even when the expense of sprinkling other streets is paid by the city. (Mass.) 834.

The assessment of abutting owners for new sidewalks or drains required because of a change of street grade is held unconstitutional in South Carolina, where the Constitution requires all taxes for a public purpose to be assessed on all the property in the corporation. (S. C.) 101.

Regulation of rates.

Competition is held not to prevent similar circumstances and conditions within the meaning of a statute regulating railroad charges. (Ky.) 541.

Restriction of business.

A statute prohibiting persons from engaging in the business of ticket brokers unless they are duly appointed agents of transportation companies is held unconstitutional. (N. Y.) 264.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

A promise to pay when the debtor feels able is held equivalent to a promise to pay when he knows he is able, and, although he is the judge of that fact, his judgment must be honestly exercised. (Md.) 219.

A written contract to extend the time for payment of a mortgage, when made without any new consideration, is held invalid and of no effect to relieve a surety. (N. Y.) 685.

Mutual and dependent stipulations.

An agreement contemporaneous with a 43 L. R. A.

note, to the effect that it should be given back on the surrender of stock, is treated as constituting, with the note, a single transaction with mutual and dependent stipulations. (Me.) 449.

Statute of frauds.

An instrument written and signed by one person for another in the latter's presence and by his direction, though without any written authority from him, is held sufficient under the statute of frauds. (Ill.) 529.

An oral agreement with children who become members of the family of the promisors, that, in consideration of their services and also of their giving them the proceeds of their property, the promisors will leave them all their property at death, is held to be taken out of the statute of frauds. (Minn.) 427.

Quitting work.

Threats excusing an employee for quitting service in breach of his contract are held not to relieve him from the liability for damages caused his employer by such breach, although they entitle him to recover for the net benefit conferred by his services. (Wis.) 810.

Public policy.

A contract for the sale at an advance, of the bid or interest of a successful bidder at a judicial sale, before its confirmation, is held void on grounds of public policy, unless the advance inures to the benefit of the parties to the suit. (Va.) 146.

Exclusive right.

The right of a railroad company to give one hackman the exclusive use of its station grounds to solicit passengers is denied. (Miss.) 134.

Curing invalidity.

A statute taking away the defense of usury is held to be valid, as it does not change the contract, but only removes an obstacle to its enforcement. (Iowa) 689.

Brokers.

A broker employed by a person who is acting for an undisclosed principal, but whose agency is disclosed after the broker has brought a person to take an option, but before a binding contract is made, has no claim for commissions against the agent. (Tex.) 593.

Lease.

The flow of water from upper to lower rooms of a leased building because of defective plumbing which the lessor refuses to remedy within a reasonable time after notice is held to constitute a breach of the implied covenant for quiet enjoyment. (Mont.) 125.

Bonds.

The loss of money taken from the pockets of a man who is drunk is held not to be included in the damages occasioned by the sale of liquor to him, within the meaning of a statute requiring dramshop bonds. (Ark.) 143.

County warrants.

County warrants which have been indorsed. "Not paid for want of funds," and thereby become interest-bearing by force of statute, are held to be contracts for interest at the rate then fixed by law, so that the rate cannot be reduced by a subsequent statute. (Or.) 634.

Bills and notes.

The negotiability of a note is held to be unaffected by a clause retaining title to property for which the note was given, with the right to retake it in case of nonpayment. (Mich.) 277.

The indorsement of commercial paper by an executor in the name of the estate, de-

scribing himself as executor, is held insufficient to make him personally liable. (Mass.) 831.

The indorsement of a bill of exchange by a person bearing the same name as the payee is held to pass no title if it is done with the intent to perpetrate a fraud. (Ill.) 654.

Demand on a receiver *pendente lite* of an insolvent bank is held insufficient to bind an indorser of a negotiable certificate of deposit issued by the bank before its insolvency. (Or.) 128.

Insurance.

Insurance on a fire engine and similar property while contained in a fire-engine house, and not elsewhere, is held not to cover the property when burned several hundred feet from that house, while being used in an attempt to extinguish a fire. (Mich.) 833.

While a building is in course of construction by a contractor it is held that the owner has an insurable interest, although the contract would cast the loss on the contractor in case of fire. (N. Y.) 664.

A member of a mutual benefit association is held to be under no liability to pay assessments after he lets his policy lapse, as the contract is purely unilateral. (Ill.) 648.

Death caused by the rupture of an artery while one was reaching over a chair to close a window shutter is held not to be accidental, where he did not slip or fall, and nothing happened which he had not planned, except the rupture of the artery. (Iowa) 693.

An insurance policy containing no stipulation as to suicide is held not to be avoided, as against a beneficiary named therein, by the suicide of the assured. (Iowa) 536.

Carriers.

See also *infra*, VI.

The liability of a carrier for injury to a passenger by explosion of a lamp at a hotel is denied in a case where the conductor of a train which had taken the passenger past her destination placed her in the hotel to wait for a return train. (Ga.) 402.

One who attempts to ride on a ticket which he knows does not, on its face, entitle him to a ride, although he thinks the limitation expressed upon it is unreasonable, is held to have no right of action for ejection, if he refuses to pay fare. (Iowa) 136.

The mere stamping or printing of a limitation upon a railroad ticket, or the posting of notices in waiting rooms, is held insufficient to bind a passenger in the absence of actual notice. (Tenn.) 140.

Small packages of merchandise which a passenger does not take for use on his journey or in accomplishing its purpose are held not to be within his common-law right to take baggage in a passenger car, but when long acquiescence in the taking of such packages, and provision for them, have made a regulation of the carrier, it is held that this cannot be rescinded without reasonable notice. (N. J.) 284.

A contract for interstate transportation, which by mistake names a less rate than that scheduled, is held to be governed by the interstate commerce law, and to be insufficient to prevent the carrier from recover-

(CORPORATIONS; ASSOCIATIONS; FRANCHISES.)
ing the full schedule rate notwithstanding
a state law to the contrary. (Ala.) 385.

The failure of a railroad company to furnish cars to a shipper when duly demanded is held to create a liability for the damages sustained by him under Texas statutes, but the statutory penalty is denied when the cars were demanded at a switch at which the company had no agent. (Tex.) 225.

Telegram.

The sending of a message to a telegraph office by telephone is held not to make the telegraph agent the agent of the sender because of a regulation that he must receive

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DOMESTIC RELATIONS. PERSONAL CAPACITY.)
messages only in writing unless the sender had knowledge thereof. (Mich.) 280.

Abandonment.

The fact that a small quantity of ore was not free from foreign substances as required by a contract for successive shipments was held not to justify an abandonment of the entire contract. (Ala.) 382.

Forfeiture.

Moneys paid on a contract for land of which time is the essence are held to belong to the vendor on default by the vendee without excuse, and cannot be recovered by the latter without excusing his default. (Cal.) 199.

III. CORPORATIONS; ASSOCIATIONS; FRANCHISES.

See also *infra*, VI., as to Illegal Construction.

The right of a private party to maintain a suit in equity against a corporation to prevent its wrongful assumption of a name belonging to the former is sustained against the contention that such suit is in effect to annul the corporation, and can only be brought by the state. (R. I.) 95.

The fact that a certificate of stock in a corporation is issued in the name of a secretary is held to be insufficient to put a party upon inquiry as to whether the secretary is rightfully the owner of it, and if such certificate is issued by the proper officers one who purchases it in the open market has good title to it as against a corporation, even if it was fraudulently issued. (Ohio) 777.

Building and loan association.

The acceptance of a negotiable order by a building and loan association when nothing was due to the drawer is held binding in favor of a bona fide holder when the association had power to execute negotiable paper for some purposes. (C. C. App. 7th C.) 419.

Labor unions.

A statute to protect labels of union workmen is held to make no unjust distinction against nonunion workmen, and the court refuses to assume that it was procured for the purpose of boycotting nonunion workmen. (N. Y.) 858.

State corporation.

The right to sue a state board of managers of World's Fair Exposition without the consent of the state is upheld, where the board is authorized to contract and funds are furnished it, while the state expressly declares that it will not be liable for any expenses or indebtedness of the board. (Ky.) 703.

Warehousemen.

A licensed warehouseman is held to have no right to deal in grain and store it in the licensed warehouse, and this rule is held applicable to the stockholders of a corporation so licensed. (Ill.) 658.

IV. DOMESTIC RELATIONS.

The fact that a man's consent to marriage was yielded reluctantly under pressure of the wife's relatives and in the belief that it was his duty to marry her because he had wronged her by seduction is held insufficient ground for annulling the marriage. (La.) 814.

The effect of the subsequent marriage of the parents of an illegitimate child and the acknowledgment of the child by the father to make the child legitimate under the terms of the statute is held to be the same in case of an adulterine bastard as in other cases. (Ohio) 772.

A woman living with a man with whom she has entered into a void marriage without any fraud on his part, but while she has

another husband from whom she has not obtained a legal divorce, is held to have no right of action for damages because of a venereal disease contracted while living with him. (Idaho) 207.

The acceptance of a divorce decree by the defendant, who remarried, is held insufficient to estop him against contesting the validity of a subsequent *ex parte* proceeding wherein judgment is opened and a decree for alimony entered. (C. C. App. 1st C.) 618.

A mortgage of an infant's property, made under order of court, is held void, when its sole purpose, as appeared from the papers, was to pay the debt incurred by the guardian in carrying on business without authority. (N. Y.) 256.

V. PERSONAL CAPACITY.

See also *infra*, VII., as to Deed for Lunatic.

The liability of an insane person for negligence is again presented in the case of the captain of a ship who has chartered it and becomes mentally deranged by over exhaustion during a storm. It is held that he is not liable for subsequent want of skill or care in navigation while so deranged. (N. Y.) 253.

VI. TORTS; NEGLIGENCE; INJURIES.

A druggist who drops croton oil on candy for a customer as a joke is held liable for an assault. (N. C.) 861.

Members of a trade association who combine to induce or compel other persons not to deal or enter into contract with a person who will not join the association or conform to the prices fixed by it are held liable to him for the injury thus caused to his business. (Ill.) 797.

An unusual case presenting a new line of reasoning holds that the withdrawal of patronage from a person by members of an association is illegal because of the element of coercion, although they united with the association voluntarily, when a by-law under which they acted imposed a penalty for its violation. (Vt.) 803.

Procuring a divorce is held not to prevent a woman from maintaining an action against a third person for prior alienation of her husband's affections. (Wash.) 114.

Innkeepers' liability.

Lack of fire escapes on a hotel when required by ordinance is held not to create any liability for the death of a guest by fire, unless the death was due to the lack of the fire escapes. (Tenn.) 185.

Injury to servant.

A railroad company operating a single-track road is held not to be negligent in failing to give those in charge of a train moving in the same direction telegraphic information as to their relative positions. (Conn.) 305.

The same is held in another case, which also decides that the reasonableness of rules adopted by railroad companies for the movement of trains is a question of law for the court. (C. C. App. 8th C.) 349.

Carriers.

See also *supra*, II.

The liability of a carrier for a malicious assault on a passenger by its employee is sustained on the ground of the special duty to the passenger, and it is held that the ordinary rule applicable to acts of agents or servants does not apply. (N. J.) 84.

A somewhat unusual question of the liability for incidental injury to a person by a lawful act toward another person is presented in a case which holds that a passenger on a street car cannot recover for injury caused by the fall of a drunken man upon her when jostled by the conductor in properly removing another drunken man. (Mass.) 832.

In case of an injury to the arm of a lady passenger caused by her attempting, in haste and fright, to escape from a car in which an oil lamp had caught fire, it was held to be a question for the jury whether her conduct was reasonable, and, if it was so, and was caused by mismanagement of the carrier, the carrier was liable. (Mass.) 833.

A passenger who goes out of a car and gets on the lower step when it is slowing down and crossing a street, where he expects to get off, at the speed of about 3 miles an hour, is held not to be guilty of negligence as matter of law. (Ala.) 297.

A passenger riding on a car platform when there are no vacant seats inside is held to be not necessarily guilty of negligence. (Wash.) 300.

A stock owner on a freight train whose contract requires him to care for his stock, but to ride in the caboose, is held not to be negligent in remaining in the stock car if the train starts before he has finished attending to his stock. (Ill.) 210.

Remote cause.

Although the negligence of parents contributing to the death of a minor child is held to be a defense to an action by the personal representative for their benefit as next of kin, yet their negligence in permitting the child to go upon the streets is deemed remote and not proximate, where the child was injured in attempting to cross in front of a street car. (Vt.) 108.

Negligence of landowner.

Another of the cases which repudiate any liability of a landowner for injury to trespassers because of defects in the premises holds, with some of the other decisions, that this rule applies to trespassing children. (W. Va.) 148.

Impure water supply.

A water company supplying water so impure as to be dangerous to consumers is held not to be liable on an implied warranty of the purity of the water, but liable for fraud or negligence, if it knowingly supplies such water, causing injury to one who was not guilty of contributory negligence. (Wis.) 117.

Injury by electricity.

An electric company maintaining overhead wires along a public alley is held *prima facie* liable for injury to persons rightfully in the alley by live ground wires. (Wis.) 505.

VII. PROPERTY RIGHTS; WILLS; LIENS.

See also *infra*, VIII., as to Lands in Other State.

Corpse.

The disposal of the body of a person who has made no testamentary provision therefor is held to belong to his widow as against a stranger to his blood to whom the court in probate attempts to give authority. (Cal.) 388.
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Bailment.

The rights of a bailor of property as against a third person who injures it are held to be unaffected by the negligence of the bailee or his servants contributing to the injury. (N. J.) 849.

Easement.

Electric light wires strung over a private alley to furnish light for one of the owners of the easement therein, without the consent of the others, are held to be an improper obstruction to the alley, although about 14 feet above the ground. (Ill.) 645.

Water rights.

A small stream of water coming through a hole in the bed rock several feet below the surface of the ground but following no well-defined channel is regarded as percolating water which can be appropriated by the owner of the land without liability to the owner of a spring into which some of the water has been accustomed to flow. (Vt.) 105.

A prior appropriator of water by a ditch across lands subsequently patented to another person, without any reservation of his right, is held to have a vested right which is protected, and may enter upon such lands to repair the ditch. (Or.) 130.

Piers in lake.

Piers built out into the waters of a lake to protect land from erosion, but not to aid navigation, and the effect of which is to reclaim the land, are held to be a purpresture which the state may require to be removed. (Ill.) 790.

Cotenancy.

A peculiar case of the holding over of a firm of tenants under a permit from one of them who was a tenant in common of the property holds that this did not have the effect of renewing the lease. (N. Y.) 687.

Pledge.

Although a pledgee cannot without express agreement with the pledgor purchase the pledged property at his own sale, he is held not to become liable for conversion by the mere fact that he has made such purchase, but such purchase does not change the relations of the parties. (Ohio) 737.

Trademarks.

The original manufacturer of Waltham watches is held entitled to an injunction against the use of the word "Waltham" by another manufacturer of watches at the same place, except in connection with dis-

tinguishing words which will prevent deception of the public. (Mass.) 826.

The right of labor unions to a trademark, although they do not own the goods on which the trademark is used, is sustained. (N. J.) 80.

Trust.

Money withheld by a mortgagee in breach of a promise to advance the full amount of a mortgage loan for building purposes is held subject to a constructive trust in favor of persons who have contributed labor or materials to the buildings in reliance upon the mortgagee's representations that the money would be paid over to the mortgagor. (D. C.) 622.

Will.

A condition in a will that a gift to the testator's son shall be only for his life unless he procures a divorce from his wife is held not to be void on the ground of public policy, where an action for divorce was pending at the time. (Ill.) 526.

Mortgage; liens.

A mortgage made by a foreign corporation to nonresidents in another state, to secure an antecedent debt, is held valid in the state where the land lies, although it would not be upheld in the state where it was made, on the ground that it would be deemed an unlawful preference. (Ind.) 820.

The provision in a lease for a lien for rent on personal property afterwards brought on the premises is held ineffectual as against a mortgage on such property. (Neb.) 588.

A statutory lien for harvesting grain is held not to be superior to a chattel mortgage given before the grain was ready to cut. (Cal.) 524.

On redemption from mortgage foreclosure when a portion of the mortgage debt remains unpaid it is held that the lien of the mortgage is not restored. (Ark.) 519.

Vendor's lien.

On a sale of real and personal property for a gross consideration without apportionment of the price it is held that a vendor's lien may be enforced against the real estate for the full amount. (Ky.) 551.

VIII. CIVIL REMEDIES.

Appeal.

The right of appeal is held not to be a common-law right, but subject to legislative restriction, notwithstanding a constitutional provision that all courts shall be open. (S. D.) 287.

Cancellation.

A suit for the cancellation and surrender of a receipt renewing a lapsed life insurance policy obtained by fraud is held to be within the jurisdiction of equity, though the fraud would be a good defense to a pending action on the policy. (Mich.) 566.

Injunction.

A contract by a department store for the exclusive sale of a certain kind of article for a certain period on its premises is held enforceable by injunction. (N. Y.) 854.

The power of a court of equity to grant an

injunction against enforcing illegal assessments upon resident members of a foreign insurance company, and determine the true basis of assessment, when assessments are payable at the home office of the company, is denied, on the ground that this would require the control of the internal affairs of the company. (D. C.) 390.

Res judicata.

An attempt to bring a second action for negligence alleging other elements of negligence in respect to the same occurrence, after one decision on the merits, is held improper, and the cause of action for negligence held indivisible. (U. C. App. 1st C.) 195.

Land in other state.

A deed by a committee of a lunatic cannot be authorized by judgment of a court of an-

other state, in which the lunatic and the committee reside. (Va.) 806.

A judgment rendered at the domicile of a decedent making a family allowance to his widow is held not to be binding on his lands in another state whose law does not recognize such an allowance. (Ill.) 403.

Right of nonresident.

A nonresident creditor of a foreign corporation in the hands of a receiver when not a resident of the state in which the receiver is appointed, is held entitled to the same protection that resident creditors have against the receiver's claim to property. (Md.) 222.

Foreign receiver.

The right of a receiver appointed in another state to sue is held to be dependent on the discretion of the court and he is denied the right to sue stockholders for liability created by the law of another state, where that would be injurious to citizens of the state where suit is brought. (Iowa) 695.

Joint debtors.

Suit against one maker of a joint note, which by statute is made joint and several, though followed by judgment and execution, is held not to release the other makers from liability for the amount remaining unpaid. (Tenn.) 161.

Bankruptcy.

A claim on a covenant of warranty is held not to be provable under the former bankrupt act as a "contingent debt" or "contingent liability" until a hostile assertion of the paramount title. (Tenn.) 189.

Recovering money paid city.

The right of a property owner who has been compelled to pay assessments to recover back the money so paid from the city is enforced where the improvement was never completed but was wholly abandoned. (Minn.) 584.

Evidence.

The right to read medical books, although

admitted to be standard, as evidence, is denied on the ground that they tend to confuse the jury, and also that their authority is constantly shifting. (Iowa) 533.

The rule as to the necessity of proving a freedom from contributory negligence is enforced in a case in which employees using an old punt in going to their work were drowned, without any evidence as to the cause or manner of the accident. (Me.) 437.

Witnesses.

One who puts a witness on the stand, but does not ask him any material question, is held not to be precluded thereby from cross-examining him and proving his contradictory statements out of court, if he is examined by the other party on matters material to the issues. (N. Y.) 676.

Damages.

A telegraph company is held liable for punitive damages when one agent maliciously sends a libelous message to another for delivery to a third person. (Minn.) 581.

The loss of a reward offered for the capture of a criminal is held to be within the damages recoverable for failure to deliver a telegram, although this did not on its face contain information as to the reward. (Iowa) 214.

The measure of damages for wrongful ejection from a street car is held not to be limited to the price of a ticket for another fare which the passenger had and could have used, where the conductor failed to investigate the facts as he might have done, but ejected the passenger on a false charge of attempting to beat the company. (Wash.) 706.

Damage for pain and suffering are held not to be recoverable in an action for the negligent killing of a passenger in a railroad accident in which many were instantly killed and there is nothing to show that his death was not instantaneous. (Mich.) 568.

IX. CRIMINAL LAW AND PRACTICE.

The provision of the Utah Constitution allowing verdicts by eight jurors except in capital cases is sustained against the contention that it violates the provision of the Federal Constitution as to right of trial by jury, or due process of law. (Utah) 33.

Special jury.

A statute providing for a special jury list to be made by a commissioner from the general list is held constitutional. (N. Y.) 247.

Ex post facto law.

A statute limiting the right of a prisoner to deductions for good behavior and permits to be at liberty during such good time is held *ex post facto* as applied to offenses committed before its passage. (Mass.) 154.

Contempt.

The publication of articles tending to embarrass a court pending a suit, even after the decision of the case and after the time for rehearing has elapsed, but while time still remains to apply for modification of the opinion, is held to constitute a punishable contempt. (Wash.) 717.
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Pardon.

The pardoning power of the governor is held to extend to cases of contempt. (Tenn.) 788.

The pardon of a person imprisoned for felony is held to prevent that imprisonment from being considered as one of the two former imprisonments required to make an habitual criminal. (Ohio) 94.

Sale of intoxicants.

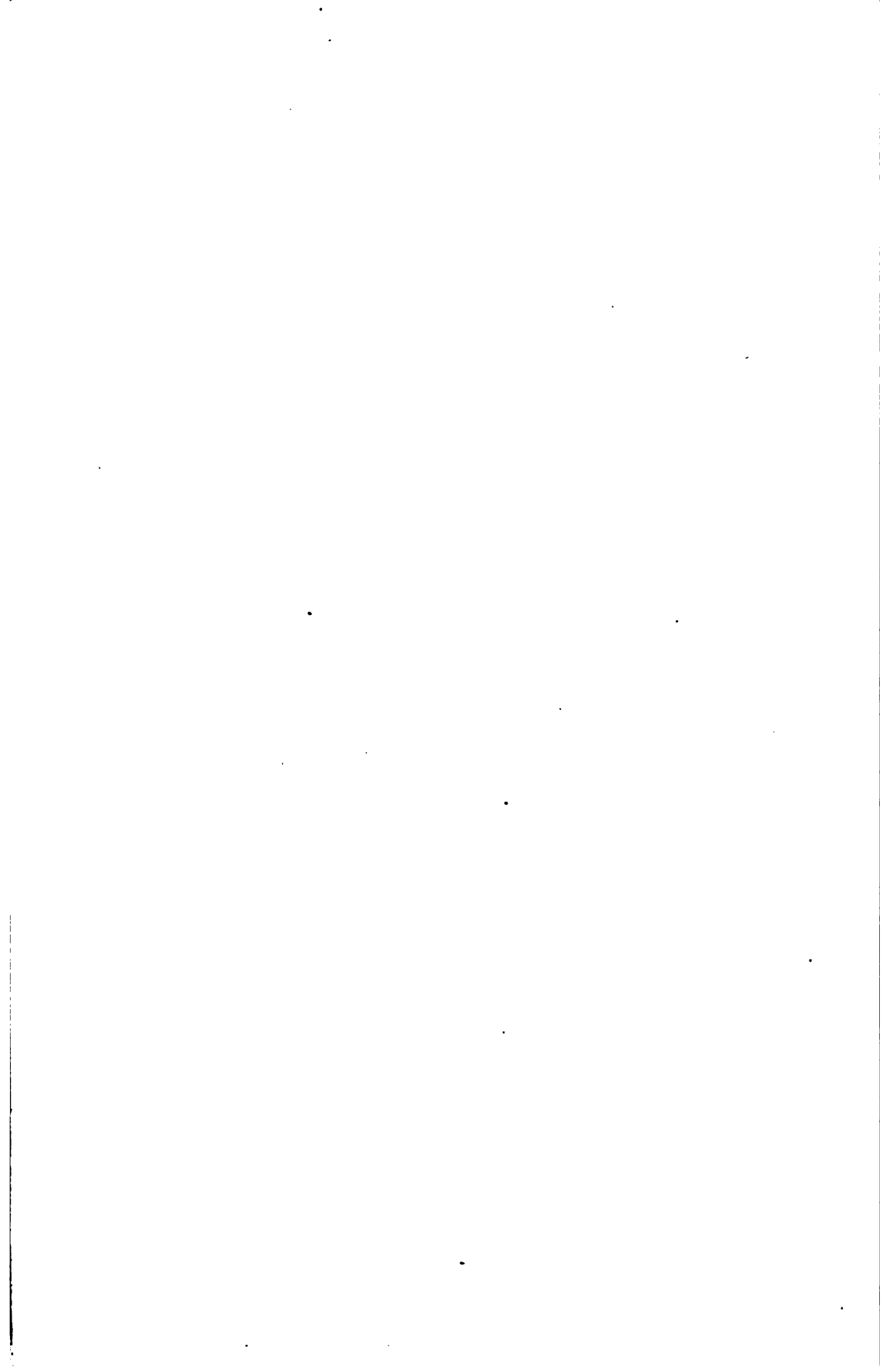
A social club in which intoxicating liquors are sold is held to be within the Georgia statute against keeping tippling houses open on the Sabbath day. (Ga.) 396.

Prostitutes.

An ordinance prohibiting prostitutes from going upon the streets or alleys of a city between 7 P. M. and 4 A. M. without reasonable necessity therefor is sustained as a valid exercise of the police power. (Ky.) 701.

Evidence.

A judgment in a divorce suit is held inadmissible in criminal prosecution for the support of the defendant's wife, although the same acts are in issue in both cases. (Conn.) 620.



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ACTION OR SUIT.

1. The breach of a mortgagee's promise to advance funds to the mortgagor does not create any liability in equity to creditors of the mortgagor who would have derived benefit from the performance of the promise, unless the mortgagee owed them some obligation or duty. *Anglo-American Sav. & L. Asso. v. Campbell* (D. C. App.) 622

2. Corruption in the passage of a resolution by a city council may be set up by the city in defense of an action which is based on the resolution. *Weston v. Syracuse* (N. Y.) 678

NOTES AND BRIEFS.

Action; for violation of ordinance. 185
By *particeps criminis*; based on one's own wrong. 208

ADVERSE POSSESSION.

The mere construction, maintenance, and occasional use by a railroad company of an ordinary railroad track across a platted street while it still remains unimproved and unfit for use, and before public convenience or necessity requires it to be opened and improved for use as a street, does not constitute adverse possession as against the public, but must be presumed to be subject to the paramount right of the public. *St. Paul & D. R. Co. v. Duluth* (Minn.) 433

NOTES AND BRIEFS.

Adverse possession; hostility of. 434

AGENCY.

See PRINCIPAL AND AGENT.

AGREED STATEMENT.

An admission in an agreed statement of facts that under the laws of another state a claim has been allowed by its courts against a decedent's estate does not admit that the claim is valid and enforceable under the laws of the state where it is sought to be enforced. *L. R. A.*

forced against real property belonging to the estate. *Smith v. Smith* (Ill.) 403

ALIENATION OF AFFECTIONS.

See HUSBAND AND WIFE, 3, 4.

ALIMONY.

See JUDGMENT, 3.

ALLEYS.

See EASEMENTS, 4.

APPEAL AND ERROR.

See also TRIAL, 13.

1. The right to appeal from the rulings of the trial court upon challenges to jurors is entirely within the legislative judgment. *People v. Dunn* (N. Y.) 247

2. The right to appeal is not a common-law right, but depends upon written law. *McClain v. Williams* (S. D.) 287

3. Legislative power to limit appeals to a defined class of cases is not restricted by a constitutional provision that all courts shall be open and every man have a remedy by due course of law. *Id.*

4. The legislature may limit the right to appeal to cases involving at least a specified amount under constitutional provisions that the supreme court shall have appellate jurisdiction only which shall be coextensive throughout the state, and that appeals shall be allowed under such regulations as may be prescribed by law. *Id.*

5. The amount involved necessary to authorize an appeal cannot be fixed at different sums in suits in county and circuit courts if in some counties the two courts have concurrent jurisdiction in a large class of cases and the Constitution provides that laws relating to courts shall have general and uniform operation throughout the state and that the practice of all courts of the same class or grade so far as regulated by law shall be uniform. *Id.*

6. A law limiting the right to appeal to cases involving at least a specified amount will, unless otherwise provided, apply to pending appeals as well as to those subsequently taken. *Id.*

What reviewable.

7. That a statute providing for licensing 875

public warehousemen provides an efficient remedy for violation of their duty cannot be raised for the first time on appeal in an equity case to enjoin them from using their privileges to suppress competition. *Central Elevator Co. v. People*, Moloney (Ill.) 658

8. If the trial court sustains the objection of the losing party to remarks by the opposing counsel in argument to the jury, he cannot complain on appeal that they were not ruled out if he did not ask that they should be. *Illinois C. R. Co. v. Beebe* (Ill.) 210

9. Failure of the superior court to determine the facts correctly cannot be considered in the supreme court of errors. *Nolan v. New York, N. H. & H. R. Co.* (Conn.) 305

10. An erroneous conclusion drawn by the trial court from facts found by it from the evidence offered may be corrected on appeal. *Id.*

11. A finding of negligence cannot be reviewed for error in law if a separate statement of the facts ascertained and the application of the law thereto is impracticable, so that the case cannot serve as a precedent. *Id.*

12. A finding that conditions attending two trains moving in the same direction on a single-track road created an emergency for which the rules governing the operation of trains did not provide, requiring the exercise of ordinary prudence in giving special instructions, is a finding of law reviewable by the appellate court. *Id.*

13. Findings by a trial court that a railroad did not sufficiently provide for the operation of two trains which came into collision; that it was negligent in failing so to provide by special order in addition to the general rules; that an injury resulted from this negligence; and that the railroad did not exercise ordinary care in the movements of trains,—although called findings of fact are reviewable by the appellate court as conclusions of law. *Id.*

Grounds of reversal.

14. Excluding evidence of a fact which is otherwise indisputably proved is not material error. *Houston, E. & W. T. R. Co. v. Campbell* (Tex.) 225

15. Excluding answers to pertinent questions is not ground for reversal, unless the record affirmatively shows that the answers would have been competent and material. *Weeks v. McNulty* (Tenn.) 185

16. The abandonment of common counts makes the failure to elect between them and others immaterial. *Carland v. Western U. Teleg. Co.* (Mich.) 280

17. Refusal to allow a pleading to be amended during trial will not be ground for reversal, where no abuse of discretion or necessity to amend is shown. *York v. Steward* (Mont.) 125

18. Refusal to take the case from the jury is not error if there is evidence tending to support the cause of action set up in the declaration. *Illinois C. R. Co. v. Beebe* (Ill.) 210

19. Error, if any, in refusing defendant in 43 L. R. A.

an action on a life insurance policy the right to open and close is not ground for reversal, where defendant was not thereby prejudiced in any manner. *Sailer v. Economic L. Assn.* (Ia.) 537

20. An instruction on a life insurance policy that fraud is not to be presumed, but like any other fact may be proved by circumstances from which the inference of fraud is natural and "irresistible" is not ground for reversal because of the use of the word "irresistible" where it is so qualified by the instruction given immediately thereafter that its use could not have prejudiced appellant. *Id.*

ASSAULT.

See also CARRIERS, 5.

A druggist who drops croton oil on candy for a customer in quantity sufficient to produce serious injury if taken into a person's system, knowing or reasonably believing that it is intended for a practical joke on someone, and not for medicinal purposes, will be guilty of assault upon one injured by its administration by way of joke. *State v. Monroe* (N. C.) 861

NOTES AND BRIEFS.

Assault; without intending injury; by administering drug. 861

ASSESSMENTS.

See ASSUMPSIT, 2; INSURANCE, 4, 5, 11, 12; PUBLIC IMPROVEMENTS.

ASSOCIATIONS.

See CONSPIRACY; CONSTITUTIONAL LAW, 13; DAMAGES, 1.

ASSUMPSIT.

1. An action for breach of the contract of a telegraph company may be brought in assumpsit, and need not be *ex delicto*. *Carland v. Western U. Teleg. Co.* (Mich.) 280

2. One who is compelled by judicial proceedings to pay assessments for a street improvement which is never completed, but is wholly abandoned by the city, is entitled to recover from the city the amount so paid by him, as upon a failure of consideration. *McConville v. St. Paul* (Minn.) 584

ATTACHMENT.

A claim filed with a receiver of a corporation by a nonresident creditor, with an express reservation or condition that by filing it he does not intend to abandon any rights gained by reason of an attachment suit previously brought in another state, does not estop the creditor from pursuing the attachment. *Linville v. Hadden* (Md.) 222

BAGGAGE.

See CARRIERS, 21, 22.

BAIL AND RECOGNIZANCE.

See NEGLIGENCE, 3.

BAILMENT.

See also MASTER AND SERVANT, 11.

1. A bailment of hire is terminated when

the property is no longer fit and suitable for and cannot be devoted to the use for which it was hired, so as to give the bailor the right to maintain an action for injury done to the property. *New Jersey Elec. R. Co. v. New York, L. E. & W. R. Co.* (N. J. Sup.) 849

2. A bailor can maintain an action against a third party for injury done to a chattel during the continuance of the bailment, whether an action might or might not be maintained against such third party by the bailee for trover, trespass, or replevin to control the immediate possession. *Id.*

NOTES AND BRIEFS.

Bailment; right of action for injury to property by third person. 853

BANKRUPTCY.

There is no liability on a covenant of warranty which was provable as a "contingent debt" or "contingent liability" under the bankrupt act of 1867 (U. S. Rev. Stat. § 5068), until there was a hostile assertion of the paramount title. *Wight v. Gottschalk* (Tenn.) 189

BANKS.

1. A private bank is not a "regularly organized bank" within the meaning of Ill. Rev. Stat. 1874, p. 228, § 9, authorizing the deposit of municipal funds in regularly organized banks. *Du Quoin v. Kelly* (Ill.) 644

2. City funds received on deposit by a banker, but redeposited by him in other banks under an arrangement for sharing in the deposits, under which he receives from them the same interest that he pays the city, and agrees that they shall be drawn only to pay city orders, are held in trust for the city as against his assignee for creditors. *Marquette v. Wilkinson* (Mich.) 840

BENEVOLENT SOCIETIES.

See INSURANCE.

BID.

See JUDICIAL SALE.

BILLS AND NOTES.

See also BUILDING AND LOAN ASSOCIATIONS, 1, 2; EXECUTORS AND ADMINISTRATORS, 1; FORGERY.

1. The negotiability of a note is not destroyed by a clause stating that it is given for certain property the title to which shall not pass until the note is paid, and which is subject to be retaken in case of nonpayment of the note. *Choate v. Stevens* (Mich.) 277

2. A promissory note, and a contemporaneous written agreement referring thereto and providing that the maker may receive back the note on surrendering certain stock, constitute an entire contract the stipulations of which are mutual and dependent, rather than independent and collateral. *American Gas & V. M. Co. v. Wood* (Me.) 449

3. The drawee of a draft cannot be compelled to make payment to one who holds un-

der a spurious indorsement, although the draft was taken in good faith in due course of business. *Beattie v. National Bank of Illinois* (Ill.) 654

4. Title to a bill of exchange is not transferred by indorsement of one bearing the name of the payee, but who was in fact a stranger to the bill and who acquired possession of it by mistake. *Id.*

5. Presentment and demand of payment made on a receiver *pendente lite* of an insolvent bank and notice of nonpayment by him are sufficient to bind an indorser of a negotiable certificate of deposit issued by the bank before its insolvency. *Jackson v. McInnis* (Or.) 128

6. The other makers of a joint note which by statute is made joint and several remain liable for the amount unpaid on it including the sum not realized by a suit against one maker for his proportionate share, although that proceeded to judgment and execution against his property. *Sully v. Campbell* (Tenn.) 161

NOTES AND BRIEFS.

See also BUILDING AND LOAN ASSOCIATIONS.

Reservation of title to property as affecting negotiability of note for purchase price:—General rule; modification of the rule; the effect of statutes; the Michigan decisions. 277

Contemporaneous agreements and their breach as a defense to a promissory note:—

(I.) Scope of note; (II.) parol agreements: (a) general rule; (b) that note is not to be paid; (c) that payment is to be conditional, (d) as to time of payment; (e) as to place of payment; (f) as to medium of payment; (g) as to mode of payment; (h) as to amount to be paid; (i) as to capacity of maker; (j) as to negotiation; (k) as to subject-matter of the consideration; (III.) collateral and independent agreements: (a) general rule; (b) what agreements are collateral and independent; (IV.) mutual and dependent agreements: (a) general doctrine; (b) what agreements are mutual and dependent; (c) must be between same parties; (d) mortgage contemporaneous with note; (V.) consistent agreements constituting parts of a whole transaction; (VI.) agreements constituting consideration for note: (a) scope of the subject; (b) the general doctrine; (c) application to parol agreements; (d) what agreements are within the rule; (VII.) agreements constituting condition of delivery; (VIII.) agreements constituting satisfaction or discharge; (IX.) executed agreements; (X.) effect on transferee of note 449

Rights of bona fide holders of paper issued without authority. 424

Demand and notice to charge indorser. 129

BOUNDARIES.

The owner of premises bounded on Lake Michigan takes no title to any submerged land under the waters of the lake. *Revell v. People* (Ill.) 790

BOYCOTT.

See CONSPIRACY, 1.

BROKERS.

See also EVIDENCE, 11.

A person employing brokers to sell land is not liable to them for commissions, where he was acting for an undisclosed principal, and his agency was disclosed after the brokers had brought persons to accept an option merely, but before a binding agreement was made. *Brackenridge v. Claridge* (Tex.) 593

NOTES AND BRIEFS.

Brokers; real-estate broker's commissions as affected by the negligence, fraud, or default of the principal, and a defective title:—(I.) Default of principal in entering into or carrying out contract with purchaser: (a) in general; (b) refusal to enter into written contract or to make the sale; (c) refusing to accept purchaser found; (d) where the contract is oral, (e) when a binding contract exists; (f) principal's refusal to enforce contract, and release of purchaser; (g) refusing to execute deed or conveyance; (h) refusal of other parties to convey; (i) inability of principal to complete sale; (j) negligence of principal; (k) refusing to accept purchase money; (l) purchaser's pecuniary responsibility; (m) necessity of tender of performance by purchaser; (n) effect of stipulations in broker's contract; (o) principal's acts justified; (p) actions relating to and damages therefor; (II.) default in carrying out contract with broker: (a) principal's interference with broker; (b) wrongful termination of agency; (III.) defective title: (a) general doctrine; (b) the question of notice; (IV.) misrepresentation and fraud of principal. 593

BUILDING AND LOAN ASSOCIATIONS.

See also CONSTITUTIONAL LAW, 9.

1. The right of a building, loan, and investment society to execute negotiable paper is implied in the power to incur debts for various purposes and to sell and mortgage property. *Gronmes v. Sullivan* (C. C. App. 7th C.) 419

2. The acceptance of a negotiable order by a building, loan, and investment society which has power to execute negotiable paper under some circumstances is binding on the corporation in favor of a bona fide holder, although nothing was due to the drawer of the order when it was accepted. *Id.*

3. The necessary expenses of perfecting a loan may be taken out of the money loaned to a member by a loan association. *Iowa Sav. & L. Assn. v. Heidt* (Iowa) 689

4. The exaction of an arbitrary sum in addition to interest from a borrower, when there is no competition, is not authorized by Iowa Code 1873, tit. 9, chap. 6, allowing premiums bid for the right of precedence in taking loans. *Id.*

5. A deduction of a specified part of the dues paid to a loan association for necessary expenses of management is lawful. *Id.* 43 L. R. A.

6. A fine of 5 cents for the first default on each share, and 10 cents for each subsequent default by a member of a loan association, is not exorbitant. *Id.*

NOTES AND BRIEFS.

Building and loan associations; power of building association to issue negotiable paper. 419

Ultra vires acts of. 422

Validity of premium; validity of contract of. 689

BUILDINGS.

1. Failure to construct fire escapes on a hotel as required by an ordinance does not make the proprietor liable for the death of a guest by fire, unless that was caused by the lack of the fire escapes. *Weeks v. McNulty* (Tenn.) 185

2. Want of fire escapes is not shown to be the cause of the death of a guest in a hotel by fire, where it is not shown that he was at a window or in any position where a fire escape would have afforded him any benefit, but there is evidence that he had locked himself in his room and tried to break the door to make his escape, and also that he could have safely escaped by leaping from the window to the roof of an adjoining building. *Id.*

NOTES AND BRIEFS.

Buildings; liability for failure to provide fire escapes. 185

BURDEN OF PROOF.

See EVIDENCE, 1-12.

BY-LAWS.

See CONSPIRACY, 2.

CANCELATION.

See EQUITY, 2.

CARRIERS.

See also CONFLICT OF LAWS, 2; DAMAGES, 5-9; EVIDENCE, 36, 37; HACKS; INDICTMENT, ETC.; PROXIMATE CAUSE, 1; STATUTES, 11; SURREGATION; TICKET BROKERS; TRIAL, 6, 8, 9.

1. The failure of a railroad company to furnish accommodations for its passengers on a train, so that a large number of them are compelled to stand in the aisles and upon the platforms of the cars, constitutes negligence. *Graham v. McNeill* (Wash.) 300

2. Failure of a railroad company to have a good, substantial, and safe track for its trains, or to see that its trains are properly managed, will render it liable for an injury to a passenger therefrom. *Illinois C. R. Co. v. Beebe* (Ill.) 210

3. A passenger lawfully on a freight train, who in the exercise of due care arises when the train comes to a standstill either to leave the train or to feed stock which his contract requires him to do, may recover from the carrier for injuries caused by a sudden start or unusual jerking of the train. *Id.*

4. The conductor of a train on which a passenger has been carried past destination has no implied authority to constitute the proprietor of a hotel an agent of the carrier for the purpose of caring for such passenger until a return train comes, so as to render the company liable for injuries to the passenger in consequence of the hotelkeeper's negligence. *Central of Ga. R. Co. v. Price*, (Ga.) 402

Assault on passenger.

5. A common carrier is liable for a malicious assault made by its employee upon a passenger. *Haver v. Central R. Co.* (N. J. Err. & App.) 84

6. A passenger on whom a drunken man is thrown by being jostled while the conductor is removing another drunken man from the car rightfully and without negligence has no right of action therefor against the carrier. *Spade v. Lynn & B. R. Co.* (Mass.) 832.

Fright of passenger.

7. A street-car conductor's knowledge of the peculiar sensitiveness of a lady passenger does not increase the carrier's obligation toward her, although in case of a wrong toward her the carrier will be liable for the actual consequences, even if the effect would have been less upon a normal person. *Id.*

8. The impulsive and unguarded act of a lady passenger, by which she is hurt, while trying to escape from a car because of a reasonable fear due to mismanagement of the carrier, is to be deemed a consequence of such mismanagement, for which the carrier is responsible. *Gannon v. New York, N. H. & H. R. Co.* (Mass.) 833

Passenger's fault or negligence.

9. Mere standing place on the inside of a car is not ordinarily such proper accommodation for a passenger as will make it negligence for him to stand on the car platform. *Graham v. McNeill* (Wash.) 300

10. The rule of a railroad company that passengers must not stand on platforms is waived by receiving passengers for whom it fails to provide suitable accommodations inside its coaches. *Id.*

11. A passenger is not guilty of negligence in standing on the platform of a car when there are no vacant seats in the car and the platform is the most comfortable and convenient place for him to occupy on the trip. *Id.*

12. A passenger who gets on the step of a car for the purpose of alighting, when the car is slowing down at a stopping place, is not riding on the platform, within the meaning of the carrier's regulations, but is merely using it as a means of egress. *Watkins v. Birmingham R. & E. Co.* (Ala.) 297

13. A passenger who leaves his seat in a car on a dummy railroad and goes down on the lower step of the back platform as the train slows up for a street crossing at which he is to stop, and while it is passing over the street at a speed of about three miles an hour, is not guilty of negligence, as matter of law, which will preclude his recovering for injuries caused by the sudden increase of speed, which throws him to the ground. *Id.* 43 L. R. A.

14. A shipper traveling on a freight car with the consent of the carrier, to care for his stock, is regarded as a paying passenger. *Illinois C. R. Co. v. Beebe* (Ill.) 210

15. A stockowner on a freight train, under a contract to care for his stock, but to ride in the caboose, will not be negligent in remaining in the stock car if before he has finished attending to the stock the train starts and proceeds upon its journey. *Id.*

Ejection.

16. One who gets upon a train with a ticket which he knows does not upon its face entitle him to passage because the time for which it purports to be valid has expired, although he thinks the limitation unreasonable, cannot recover damages for being ejected, if he refuses to pay fare. *Trezona v. Chicago G. W. R. Co.* (Ia.) 136

Tickets.

17. The holder of a railroad ticket who does not use it for a passage during its life for such a purpose is not entitled, as matter of law, to have the purchase price refunded. *Id.*

18. The mere stamping or printing of a limitation upon a railroad ticket, and the acceptance of such ticket by a passenger, are not sufficient to bind him to such limitation in the absence of actual notice of it, and his assent thereto when he purchases the ticket. *Louisville & N. R. Co. v. Turner* (Tenn.) 140

19. Posting notices of intention to limit the time for passage on railroad tickets in the waiting rooms, ticket offices, and on the cars, will not affect passengers with notice so that they will be bound by limitation by taking the ticket without agreeing to the limitation. *Id.*

20. To limit a general ticket for passage on a railroad, for which full price is paid, to the date on which it is sold, there must be an express contract based upon a consideration, or the alternative must be given the purchaser to have a full and unlimited ticket. *Id.*

Baggage or property of passenger.

21. The baggage which a passenger is entitled to take at common law includes, not only wearing apparel, but other articles, within reasonable limit, for personal use during his journey and in accomplishing its purposes. *Runyan v. Central R. Co. of N. J.* (N. J. Err. & App.) 284

22. The common-law right of a passenger to carry personal baggage with him is not restricted by a clause on his ticket stating: "Free transportation allowed for 150 lbs. baggage (wearing apparel) only, and company's liability expressly limited to \$1 per lb." *Id.*

23. Small packages of merchandise, the use of which is not personal to the passenger in accomplishing the purpose of his journey, cannot be taken in a passenger car as part of the baggage which he is allowed to take at common law. *Id.*

24. Long acquiescence by a common carrier in the carriage of small packages of merchandise by its passengers, and its pro-

vision therefor in passenger cars, will establish a regulation which cannot be rescinded without reasonable notice. *Id.*

Limiting liability.

25. A carrier cannot contract for relief from liability for injuries to a passenger paying fare, caused by its own negligence. *Illinois C. R. Co. v. Beebe (Ill.)* 210

Duty to furnish cars.

26. The duty of a railroad company to furnish cars for transportation to a person making a timely demand therefor is imposed by Tex. Rev. Stat. 1895, arts. 4494, 4495, without the necessity of a contract for the cars. *Houston, E. & W. T. R. Co. v. Campbell (Tex.)* 225

27. The proviso in Tex. Rev. Stat. art. 4498, that the place designated in an application for cars "shall be at some station or switch on the railroad," was not intended to require cars to be furnished at such switches as were not otherwise within the terms of the statute. *Id.*

28. A penalty for failure to furnish cars to a shipper under Tex. Rev. Stat. arts. 4497-4502, cannot be imposed for failure to furnish cars at a switch where the carrier has no agent, as "the agent" to whom, under art. 4500, a deposit must be made of one fourth the freight charge for the car, means the agent at or for the station where the cars are desired. *Id.*

29. A carrier's knowledge of a shipper's contract is not necessary in order to make it liable for failing to furnish cars when demanded, in order to make shipments to fill the contract. *Id.*

30. A notification to a railroad company by a person to whom shipments were being made under a contract, not to receive any more such shipments, will not relieve the carrier for failure to furnish cars to the shipper when demanded. *Id.*

31. Failure of a railroad company to furnish cars to a shipper who has property ready to ship under a contract, and demands cars, will render the carrier liable for his damages on account of the failure, although he does not continue to prepare and offer for shipment the remainder of the property required to fill the contract. *Id.*

Rates.

32. A mistake in a bill of lading, by stating interstate rates less than those scheduled in accordance with the act of Congress, does not preclude the carrier from recovering the full schedule rate as a condition of delivering the goods. *Southern R. Co. v. Harrison (Ala.)* 385

33. The omission from Ky. Stat. § 820, of the proviso found in Ky. Const. § 218, that the railroad commission may authorize a less charge for longer than for shorter distances, on application by the carrier, does not make the statute inconsistent with the Constitution, as the proviso is self-executing and the statute expressly provides that the commission may exonerate a carrier from its provisions even without previous application. *Louisville & N. R. Co. v. Com. (Ky.)* 541

34. Competition in transportation does not prevent "substantially similar circumstances and conditions," within the meaning of Ky. Const. § 218, and Ky. Stat. § 820, but those words relate to the actual cost of transportation. *Id.*

NOTES AND BRIEFS.

Carriers; stock owner on freight train as passenger. 211

Attempt to use invalid ticket; face of ticket as test of right; ejection for failure to pay fare. 137

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Tickets as exclusive evidence of contract: special contracts; effect of custom or usage; reasonableness of rules; what constitutes baggage; passenger's right to carry packages. 286

Duty of passenger to pay fare wrongfully demanded in order to avoid expulsion and lessen damages:—(I.) Summary; (II.) where the failure to have a proper ticket is the fault of the ticket agent; (III.) where another conductor is in fault; (IV.) where the conductor demanding fare is in fault; (V.) where the passenger loses his ticket; (VI.) conclusion. 706

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Duty of railroad company to furnish cars to shippers:—(I.) General or statutory duty; (II.) contract duty; (III.) Interstate Commerce Act. 225

CARS.

See CARRIERS, 26-30, NOTES AND BRIEFS.

CASE.

Maliciously to persuade another to break his contract with a third person for the purpose of injuring the latter is an actionable wrong if the injury results as intended. *Doremus v. Hennessy (Ill.)* 797

NOTES AND BRIEFS.

Case; liability for inducing breach of contract. 798

CASES CERTIFIED.

A judge has sat in a case so as to be entitled to dissent from the decision and cause the case to be certified to another court on the ground of a conflict of decisions, notwithstanding the fact that he has not had any consultation with the other judges on the merits of the case, where he was on the bench when the case was argued and submitted, and afterwards agreed with the other judges that the decision should be withheld for a time, and on learning of a decision rendered by them in his absence promptly sent to the judge who wrote the opinion a memorandum stating that it was in conflict with another decision, and that a motion for rehearing ought therefore to be granted, in addition to which he filed a dissenting opinion pending

the motion for rehearing, and was on the bench, but not consulted, when his associates overruled that motion in accordance with an agreement they had previously made and of which they had notified him. *State, Hazel, v. Bland (Mo.)* 845

CERTIFICATES.

See **CONTRACTS**, 6.

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See **TAXES**, 7.

CIVIL DAMAGES.

See **INTOXICATING LIQUORS**, 4.

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See **INTOXICATING LIQUORS**, 1-3.

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See **PLEDGE AND COLLATERAL SECURITY**.

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See **TAXES**, 2-4.

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See **WILLS**, 2, 3.

CONFEDERATE CERTIFICATE.

See **PUBLIC LANDS**, 2.

CONFLICT OF LAWS.

See also **RECEIVERS**, 3, 4.

1. The law of the state in which a contract for carriage is made controls as to its nature, interpretation, and effect if it is entire and indivisible, although it is to be performed partly in that state and partly in another. *Illinois C. R. Co. v. Beebe (Ill.)* 210

2. The law of the state in which a contract of interstate transportation was made, and in which the performance begins, cannot govern the contract so far as it conflicts with the Act of Congress to Regulate Commerce. *Southern R. Co. v. Harrison (Ala.)* 385

3. Nonresident creditors of a corporation in the hands of a receiver, when they are not residents of the state in which the receiver is appointed, have the same right to contest the receiver's title to property that domestic creditors have. *Linville v. Hadden (Md.)* 222

4. A conveyance by a committee of the land of a lunatic is not valid when authorized only by judgment of a court of another state, in which the lunatic and the committee reside. *Hotchkiss v. Middlekauf (Va.)* 806

5. A real-estate mortgage made by a foreign corporation to nonresident creditors to secure a bona fide antecedent debt may be held valid in the state where the land is, when it is not prohibited by the statutes of the state in which the corporation and the creditors reside, although the judicial decisions in that state hold such a mortgage to be an unlawful preference. *Nathan v. Lee (Ind.)* 820

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As to contract for transportation. 210, 386

As to enforcement of stockholder's liability. 696

CONSPIRACY.

See also **DAMAGES**, 1.

1. Withdrawal of patronage from a person by members of an association by concerted action becomes illegal when the concert of action is procured by the coercion of a by-law which imposes a fine or penalty upon any member who violates it. *Boutwell v. Marr (Vt.)* 803

2. The fact that members of an association voluntarily assumed its obligations in the first instance does not make legal a by-law which, by fine or penalty, compels them to act in concert in withdrawing their patronage from another person. *Id.*

3. Members of a trade association who combine to induce or compel other persons not to deal or enter into contracts with one who will not join the association or conform his prices to those fixed by the association will be liable for the injuries caused to him by loss of business resulting from such combination. *Doremus v. Hennesey (Ill.)* 797

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CONSTITUTIONAL LAW.

See also **CARRIERS**, 33; **TRIAL**, 1, 2.

1. Judicial powers are not delegated to a special jury commissioner by providing that he shall eliminate from the jury list persons declared by law to be unfit or disqualified to sit in criminal cases, and thus prepare a list from which a panel of fit and impartial jurors may be chosen. *Peopie v. Dunn (N. Y.)* 247

2. A curative act which merely takes away the privilege of pleading usury does not change the agreement, but only removes a bar to its enforcement, and is not an unconstitutional impairment of a vested right. *Iowa Sav. & L. Asso. v. Heidt (Iowa)* 639

Ex post facto laws.

3. An *ex post facto* law is one which will increase the penalty or deprive a party of

substantial rights or privileges to which he was entitled as the law stood when the offense was committed. *Murphy v. Com.* (Mass.) 154

4. A statute requiring the approval of the governor and council to a permit for the release of a convict after the expiration of the minimum term of his sentence is not an *ex post facto* law, but relates merely to a matter of procedure. *Id.*

5. The duration of a sentence is not uncertain, and the determination of the term of imprisonment is not taken from the courts, so as to make the act *ex post facto* as applied to an offense previously committed, merely because it provides for a sentence that is indeterminate between a maximum and minimum, and gives the prison commissioners, after the minimum term, power to release the prisoner on a permit approved by the governor and council. *Id.*

6. A statute which alters or may alter in a substantial manner the positions of those committing offenses prior to its passage is unconstitutional as to such an offense, even if it is possible that in that particular case it might operate more beneficially than the prior law would have operated. *Id.*

7. Deductions for good conduct and permits to be at liberty, to which prisoners who were convicted of offenses committed when Mass. Stat. 1880, chap. 218, and Mass. Pub. Stat. chap. 222, § 20, were in force, are entitled as of right rather than by favor, for faithful observance of the rules and for not having been subjected to punishment, constitute rights which cannot be taken away or interfered with to their disadvantage by subsequent legislation. *Id.*

8. The provision of Utah Const. art. 1, § 10, that in courts of general jurisdiction except in capital cases a jury shall consist of eight jurors, applies to a prosecution for an offense committed before the adoption of the Constitution, as it affects the procedure merely, and in that view is not *ex post facto* when applied to past offenses. *State v. Bates* (Utah) 33

Equality.

9. Statutes exempting building and loan associations from the operation of the usury law are not unconstitutional as class legislation. *Iowa Sav. & L. Asso. v. Heidt* (Iowa) 689

10. The exclusion of residents of the state who are not taxpayers, but who are willing to pay the license tax, from fishing in the public waters of the state as taxpayers are allowed to do is in violation of Tex. Const. art. 1, § 3, which guarantees equal rights, and prohibits exclusive separate public emoluments or privileges, except in consideration of public services. *Gustafson v. State* (Tex.) 615

11. It is not an unconstitutional discrimination against persons who are to be tried in a criminal branch of the court to require them to be tried by jurors taken from the body of the county whose general qualifications have been more particularly ascer-

tained by a special jury commissioner, but who are still subject to judicial inquiry as to their qualifications and impartiality as in the case of an ordinary panel. *People v. Dunn* (N. Y.) 247

12. Jury trials by a jury of less than twelve under state laws in a state court does not violate U. S. Const. 14th Amend. § 1, making all persons born or naturalized in the United States and subject to its jurisdiction citizens of the United States and of the state wherein they reside, and declaring that no state shall make or enforce any law abridging the privileges or immunities of the citizens in the United States. *State v. Bates* (Utah) 33

13. A statute providing for labels and trademarks of associations or unions of working men does not violate a constitutional provision against special laws granting exclusive privileges, although it gives to the associations or unions privileges denied to single individuals. *Schmalz v. Woolley* (N. J. Err. & App.) 80

Due process of law.

14. What was due process of law before the adoption of the Federal Constitution continues such. *State v. Sponaugle* (W. Va.) 727

15. Due process of law is not denied by requiring the jury in a criminal case to be composed of persons taken from the body selected by a special commissioner of jurors from the general list. *People v. Dunn* (N. Y.) 247

16. Due process of law within U. S. Const. 14th Amend. § 1, declaring that no state shall deprive any person of life, liberty, or property without due process of law, is not denied by Utah Const. art. 1, § 10, providing that in courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. *State v. Bates* (Utah) 33

17. "Due process of law" guaranteed by Utah Const. art. 1, § 7, is not infringed by § 10 of the same article declaring that in courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. *Id.*

18. A judicial hearing is not necessary to due process of law in matters of taxation. *State v. Sponaugle* (W. Va.) 727

19. The forfeiture of land under W. Va. Const. art. 13, § 6, for the failure of the owner to enter it for taxation during five successive years, does not violate the provision as to due process of law in the Federal Constitution, as such forfeitures were a part of the law of the land before the provision of the Federal Constitution was adopted. *Id.*

20. To compel persons to accept the decision of a statutory umpire as to the weight of grain, and preclude them from showing error in his weight, whether it is the result of bad faith or not, would be a deprivation of property without due process of law. *Vega S. S. Co. v. Consolidated Elevator Co.* (Minn.) 843

21. An absolute right of a corporation to

use the street-railway tracks of another corporation cannot be burdened by a subsequent statute so as to make the exercise of the right depend on the consent of abutting owners. *Ingersoll v. Nassau Elec. R. Co.* (N. Y.) 236

Police powers.

22. An ordinance prohibiting any prostitution from being on the streets or alleys of a city between the hours of 7 o'clock P. M. and 4 o'clock A. M., without any reasonable necessity therefor, is a valid exercise of the police power under a statute giving authority to "restrain and punish prostitutes." *Dunn v. Com.* (Ky.) 701

23. Forbidding all but duly appointed agents of transportation companies from engaging in the business of ticket broker is a violation of the liberty guaranteed to citizens by the Constitution, which is not justified by the police power of the state. *People, Tyroler, v. Warden of New York City Prison* (N. Y.) 264

24. The owner of land over which a brook flows is not deprived of property without compensation by Vt. Stat. § 4568, allowing fish and game commissioners to place fish in the stream to prohibit fishing therein for not more than three years, and by other provisions that make the waters public for at least five years longer, but such provisions are justified by Vt. Const. chap. 1, art. 5, as a regulation of the internal police, and chap. 2, § 40, giving the inhabitants of the state the right to fish "in all boatable and other waters (not private property) under proper regulations, to be hereafter made and provided by the general assembly." *State v. Theriault* (Vt.) 290

NOTES AND BRIEFS.

See also TRIAL.

Changing punishment as *ex post facto* law. 155

Police power to restrict business; in case of ticket brokers. 264

Due process in forfeiture for violation of tax laws. 723

Statute making certain evidence conclusive. 843

CONTAGIOUS DISEASE.

See HUSBAND AND WIFE, 2.

CONTEMPT.

See also PARDON.

1. The supreme court retains jurisdiction to punish for contempt one making a publication tending to embarrass it in the decision of a case, even after the rendition of an opinion and the time for rehearing has elapsed, if time still remains for application for modification of the opinion, which is made soon after the article is published. *State v. Tugwell* (Wash.) 717

2. Punishment for contempt may be imposed upon one who, pending a suit, publishes articles which will tend to embarrass the court in deciding it, where the statutes have adopted the common law governing the punishment of contempts. *Id.* 43 L. R. A.

3. Liability to punishment for contempt for publishing articles tending to embarrass the court pending a suit is not taken away by a constitutional provision giving every person the right to freely write and publish on all subjects, being responsible for abuse of that right. *Id.*

4. A newspaper article published before the final determination of a cause, stating that the decision rendered is "rotten," that the judge who rendered it had no mind, and intimating that he was corrupt and that he misstated the facts, is a contempt of court. *Id.*

NOTES AND BRIEFS.

Contempt; by publication respecting pending action; how long pendency of action continues. 717

CONTRACTS.

See also ACTION OR SUIT, 1; CASE; CONFLICT OF LAWS, 1; INJUNCTION, 1; JUDICIAL SALE; MASTER AND SERVANT, 1, 2; MUNICIPAL CORPORATIONS, 1, 2; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER, 1-3.

1. The extension of the time for payment of a mortgage, made by a written agreement which is not based on any new consideration, is invalid. *Olmstead v. Latimer* (N. Y.) 685

2. An instrument written and signed by one person for another, in his presence and by his direction, is sufficient to bind him, under the statute of frauds, without any written authority to sign for him. *Morton v. Murray* (Ill.) 529

3. An oral agreement to give property by will to children who become members of the household of the promisor and give him their services, and also sell real estate at a sacrifice and pay over the proceeds to him, in consideration of his promise, is taken out of the statute of frauds by the fact that the value of their society and services cannot be measured in money, and they cannot be restored to the former position with respect to their property. *Svanburg v. Fosseen* (Minn.) 427

4. An agreement of husband and wife to convey by deed or will all their property, both real and personal, which they may own at the time of their death, will include all they own jointly or separately. *Id.*

5. A joint promise by the purchasers of real estate to pay the price cannot be modified by a mistaken construction placed upon the writing by the holder and makers, that each is to be liable for his share only. *Sully v. Campbell* (Tenn.) 161

6. A promise to pay certificates on condition that all certificates of similar import should be paid *pro rata*, and no preference given to any of them over others, entitles the holder of such certificates, when all the others have been surrendered and extinguished, only to such amount, if any, as was paid on the others, if they were surrendered without fraud or collusion. *Pistel v. Imperial Mut. L. Ins. Co.* (Md.) 219

7. The mere expression of dissatisfaction

with an article furnished under a contract providing that it shall be satisfactory will not justify a termination of the contract, if there was not an actual dissatisfaction. *Worthington v. Givin* (Ala.) 382

8. A promise to pay an acknowledged indebtedness at such times and in such sums as the debtor "might feel able to pay" creates a legal and moral obligation to pay when the debtor is able, and, although the debtor is made the judge of that fact, his judgment must be honestly exercised. *Pistel v. Imperial Mut. L. Ins. Co.* (Md.) 219

9. The fact that a small quantity of ore delivered under a contract providing for successive shipments of ore free from foreign substances was not free from them does not justify an abandonment of the entire contract. *Worthington v. Gwin* (Ala.) 382

10. County warrants indorsed "Not paid for want of funds," upon which, by Hill's (Or.) Ann. Laws, § 2455, interest is payable at the legal rate, are thereby made contracts on which the rate of interest cannot be decreased by subsequent statute. *Seton v. Hoyt* (Or.) 634

NOTES AND BRIEFS.

See also **BILLS AND NOTES.**

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To make will; to leave property to adopted child. 427

Liability on warrants. 634

As affected by change of rate of interest. 631

Statute of frauds as to writing signed by agent. 530

Performance as affecting statute of frauds; in case of contract to live with person during life. 427

Estoppel against defense of nonperformance. 631

Recovery on *quantum meruit* for part performance; when performance impossible. 811

Relief against, for mistake. 843

Termination of, by default. 382

CONVENT.

See **TAXES, 6.**

CONVERSION.

See **TROVER.**

CONVICTS.

See **CONSTITUTIONAL LAW, 4, 7.**

CORPORATIONS.

See also **CONFLICT OF LAWS, 5; COURTS, 4; INJUNCTION, 2, 3; INSURANCE; RECEIVERS.**

1. The absence of a fraudulent intent is no defense to a corporation in a suit for wrongfully assuming and using a name belonging to another. *Armington v. Palmer* (R. I.) 95

2. A purchase of the plant, machinery, stock, and such visible property of a manu-

facturing corporation, although it carries the right to use the name of the articles manufactured, does not give the purchaser the right to take the name of the corporation. *Id.*

3. A vote of a corporation which is purely voluntary and without consideration, to give the use of the corporate name to a new corporation which has previously purchased the plant of the former, is ineffectual as against a minority who do not consent. *Id.*

4. A corporation which still has assets consisting of accounts and bills and notes receivable, which were excepted from a sale of the remainder of the corporate property, can, without showing actual damage, restrain the use of its name by another corporation which has purchased the plant and is continuing the business of the former. *Id.*

5. A corporation is liable in damages to anyone purchasing for value, without notice, spurious stock issued by reason of its neglect to observe care in the issue of the certificates of stock and supervise its agent charged with the performance of such duty. *Cincinnati, N. O. & T. P. R. Co. v. Citizens' Nat. Bank* (Ohio) 777

6. That a certificate of stock is issued in favor of the secretary of the corporation is not sufficient to put a purchaser upon inquiry as to whether he is rightfully the owner, where no other mode of issuing stock than by the president or the secretary under the corporate seal is provided, and neither the secretary nor the president is prohibited from holding stock. *Id.*

7. A purchaser of a certificate of stock in open market, without knowledge of any fraud in its issue, is entitled to have it transferred to him on the books of the company without regard to the facts relating to any fraud or irregularity in its issuance. *Id.*

8. A foreign insurance company is not made a corporation of the District of Columbia by having an agency and doing business in the District, in compliance with the act of Congress of 1887, chap. 46, § 4, which subjects it to process when served on the agent. *Clark v. Mutual Reserve Fund L. Assn.* (D. C. App.) 390

NOTES AND BRIEFS.

See also **COURTS.**

Corporations; conflict of names of. 95

Distinguished from the stockholders. 659

Ultra vires acts of; notice of limitation of powers; officers as special agents of. 423

Rights of bona fide purchasers of corporate stock fraudulently issued. 730

CORPSE.

1. The disposal of the body of a person who has not made any testamentary provision therefor cannot be taken away from his widow and given to a stranger to his blood. *O'Donnell v. Slack* (Cal.) 393

2. Neither the court in probate nor the personal representative has any right to the body of a deceased person who has made no

testamentary provision on the subject, nor any right to control the manner of disposing of the remains, or to dictate the place of interment. Id.

CORRUPTION.

See ACTION OR SUIT, 2.

COTENANCY.

Temporary retention of leased premises by a firm of tenants, under a permit from one of the firm who is a tenant in common of the premises, owning an undivided one fourth, will not have the effect of renewing the lease,—especially when the lessees had a right to assume that their copartner had authority to give the permit because he had made the lease to the firm in the first place, and his cotenant had adopted it and thus recognized his authority to make it in his behalf. *Valentine v. Healey* (N. Y.) 667

COUNTY.

See INTEREST.

COURTS.

See also CONTEMPT; JUDGMENT, 5; OFFICERS, 3, 4.

1. A judge may be considered as sitting in a case without taking part in it at every stage. *State, Hezel, v. Bland* (Mo.) 845
See also CASES CERTIFIED.

2. County and circuit courts are, so far as their jurisdiction is concurrent, courts of the same grade or class within the meaning of a constitutional provision requiring laws relating to such courts and regulating their practice to be general and uniform throughout the state. *McClain v. Williams* (S. D.) 287

3. The circuit court of one county having jurisdiction of the parties and the original controversy has jurisdiction to decree a sale of land in another county as incidental to the relief originally sought. *Doty v. Deposit Bldg. & L. Asso.* (Ky.) 551

4. A suit to enjoin a foreign insurance company to which all assessments are payable at its home office, but which has an agency and carries on business within the jurisdiction of the court, against collecting from a resident therein any excessive and illegal assessments, and against forfeiting his policy for nonpayment of such assessments, while seeking also an accounting and a discovery of the books and papers of the corporation, and a determination of the true basis of assessments, is beyond the power or jurisdiction of a court of equity, as the relief sought would require the control, direction, and revision of the internal affairs of the corporation. *Clark v. Mutual Reserve Fund L. Asso.* (D. C. App.) 390

5. The court cannot interfere with the refusal of the railroad commission, under Ky. Const. § 218, to allow a less charge for a longer than for a shorter haul, as it is permitted to do in special cases by that section. *Louisville & N. R. Co. v. Com.* (Ky.) 541

6. A resolution by which a common council undertakes to make a compromise with 42 L. R. A.

a contractor to whom something is equitably due, though perhaps nothing legally, on a contract imperfectly performed, does not constitute a legislative act, but is part of the administrative duties of the council, which may be declared void for fraud and corruption. *Weston v. Syracuse* (N. Y.) 678

7. It is the duty of the courts to examine legislation complained of as a violation of the rights secured to the citizens by the Constitution, for the purpose of ascertaining whether the health, morals, safety, or welfare of the public justifies its enactment under the police power of the state. *People, Tyroler, v. Warden of New York City Prison* (N. Y.) 264

8. Bitter and intense feeling against township trustees, in the communities where they reside, cannot be considered by the courts in determining the validity of an act extending the time for the election of their successors. *State, Harrison, v. Menaugh* (Ind.) 408

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Courts; interference with internal management of foreign corporation. 391

Power to make order as to lands in other state. 806

When judge is sitting in a case. 846

COVENANT.

See also BANKRUPTCY; BILLS AND NOTES, 2; LANDLORD AND TENANT, 2.

An eviction, either actual or constructive, is necessary before a cause of action arises on a covenant of warranty. *Wight v. Gottschalk* (Tenn.) 182

CRIMINAL LAW.

See also CONSTITUTIONAL LAW, 3-7, NOTES AND BRIEFS; STATUTES, 8; TRIAL.

1. Imprisonment for a felony, terminated by an unconditional pardon, is not to be regarded as one of the two former imprisonments for felony required by 2 Bates's (Ohio) Ann. Stat. §§ 7388-11, to place the accused in the category of habitual criminals. *State v. Martin* (Ohio) 94

2. An ordinance allowing imprisonment without giving a person convicted an opportunity to pay a fine in lieu thereof is void, where the charter of the town authorizes imprisonment only in default of payment of a fine. *Calhoun v. Little* (Ga.) 630

CURATIVE ACTS.

See CONSTITUTIONAL LAW, 2.

CUSTOM.

NOTES AND BRIEFS.

Custom; as affecting carrier's contract. 286

DAMAGES.

See also CARRIERS, 31.

1. Exemplary damages cannot be recovered in an action against the several members of an association for acting in concert to withdraw their patronage from a dealer, when some of them have been coerced by a

by-law which imposed a penalty for its violation. *Boutwell v. Marr* (Vt.) 803

2. Punitive damages are recoverable against a telegraph company for the malicious transmission of a libelous message over its wires by its agent within the scope of his employment. *Peterson v. Western U. Teleg. Co.* (Minn.) 581

3. The expenditure for rails for a side track to be used in mining may be included in the damages for breach of a mining contract. *Worthington v. Gwin* (Ala.) 382

4. A stipulation that the damages for breach of contract in quitting the service of a contractor for loading and unloading vessels and cars upon docks shall be the loss of fifteen days' wages is justified by the uncertainty as to the injury that may be caused thereby to the employer's business. *Fisher v. Walsh* (Wis.) 810

5. The enhancement, because of fright, of the damages sustained by a passenger on whom a drunken man is thrown in a car while another drunken man is being removed from the car, must be limited to the fright caused by the personal contact with the former, and cannot extend to the fright resulting from the general disturbance. *Spade v. Lynn & B. R. Co.* (Mass.) 832

6. Three hundred dollars damages is excessive for putting a passenger off a train for attempting to ride after the time limited on the ticket has expired, although the limitation was unlawful, if no force was used, or purpose to humiliate was shown, and the passenger was within a few miles of his destination, which he reached without further outlay only five hours later than he would had the train carried him. *Louisville & N. R. Co. v. Turner* (Tenn.) 140

7. The measure of damages for wrongful ejection from a street car is not limited to the price of a ticket for another fare which plaintiff had in his possession and might have used, where the conductor, instead of ascertaining definitely whether or not plaintiff had paid his fare, which might have been done by a few moments' investigation, charged him with attempting to beat the company, and thus placed him in a position where the use of another ticket would be an apparent admission of the charge. *Sprenger v. Tacoma Traction Co.* (Wash.) 706

8. Damages for pain and suffering cannot be allowed in an action for the negligent killing of a passenger in a railroad accident where the force of the collision was such that many passengers were instantly killed and there is nothing to show that the death for which the action was brought was not instantaneous or that deceased was conscious after the shock. *Sweetland v. Chicago & G. T. R. Co.* (Mich.) 568

9. The damages for failure to furnish cars to ship property in fulfillment of a contract are the profits which the shipper would have made on the contract if the cars had been furnished. *Houston, E. & W. T. R. Co. v. Campbell* (Tex.) 225

10. A verdict of \$2,000 for the libelous 43 L. R. A.

transmission of a telegram by one agent or employee of the telegraph company to another is excessive, where the plaintiff himself was the only person to whom the contents of the message were divulged by the agent who received it. *Peterson v. Western U. Teleg. Co.* (Minn.) 581

11. The sendee's damages for failure to properly deliver a telegram are limited to what might reasonably have been in contemplation of the parties, but will include compensation for all injurious results which flow therefrom by ordinary natural sequence without the interposition of any other negligent act or overpowering force. *McPeck v. Western U. Teleg. Co.* (Iowa) 214

12. Damages for failure to promptly deliver a telegram advising the sendee of the whereabouts of a fugitive from justice may include loss of a reward offered for the capture, although the message did not contain such information on its face, if the company knew that it was important and that the sendee was expecting a message relating to such capture, and although neither the company nor the sendee knew at the time of the offer of reward, since the company was charged with knowledge that the reward might be made and that negligence might result in its loss. Id.

NOTES AND BRIEFS.

Damages; punitive for act of servant. 581
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DEAD BODY.

See CORPSE.

DEATH.

See also DAMAGES, 8; EVIDENCE, 4.

NOTES AND BRIEFS.

Death; causes of action for wrongfully causing. 503

DEBTOR AND CREDITOR.

The fact that creditors are nonresidents will not affect the question of the validity of a mortgage made to them as against other creditors. *Nathan v. Lee* (Ind.) 823

DELEGATION OF POWER.

See CONSTITUTIONAL LAW, 1.

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See also BILLS AND NOTES, 5.

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Demand; before sale of property by pledgee. 759

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See LEADING, 7, 8.

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DISORDERLY PERSONS.

See CONSTITUTIONAL LAW, 22.

DITCH.

See EASEMENTS, 2.

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DRAYS.

See HIGHWAYS, 2.

DRUGGIST.

See ASSAULT.

DUE PROCESS.

See CONSTITUTIONAL LAW, 16.

DURESS.

See HUSBAND AND WIFE, NOTES AND BRIEFS.

EASEMENTS.

See also INJUNCTION, 5.

1. The doctrine of prescription is not applicable to percolating water. *Wheelock v. Jacobs* (Vt.) 105

2. A prior appropriator who owns a ditch across lands subsequently patented by the state to another person has the right to enter on such lands to clean and repair the ditch. *Carson v. Gentner* (Or.) 130

3. The fact that electric-light wires are about 14 feet above the surface of a private alley over which they are strung without right will not prevent the court from ordering their removal,—especially when they might interfere with the operations of the fire department, and obstruct the transfer of freight or other materials to and from the second-story windows of a building. *Carpenter v. Capital Electric Co.* (Ill.) 645

4. Electric-light wires and the cross arm attached to a pole which stands outside of an alley cannot be lawfully extended over a private alley the easement of which is confined to abutting owners, although it is done to furnish electric light to one of the parties entitled to the easement, but without the consent of the others. *Id.*

ELECTIONS.

See VOTERS AND ELECTIONS.

ELECTRICAL USES AND APPLICATIONS.

See EASEMENTS, 3, 4; EVIDENCE, 9, 10, 35; HIGHWAYS, 1.

ELECTRIC LIGHTS.

See EMINENT DOMAIN, 5.

ELEVATORS.

See STATUTES, 7; SUBROGATION; WAREHOUSEMEN; WEIGHTS.

EMINENT DOMAIN.

1. The constitutional provision against 40 L. R. A.

taking private property for public use without just compensation applies to money as well as other property, and prevents a municipal tax on property or business so situated that it can receive no protection or benefit from the municipality. *Kaysville v. Ellison* (Utah) 81

2. A change of a county road to a city street in consequence of the incorporation of the city does not impose an additional servitude upon the real property over which the highway is constructed, so as to require any new condemnation. *Huddleston v. Eugene* (Or.) 444

3. An electric motor street railway built upon street grade, doing no special injury to the fee, is not an imposition of a new or additional servitude upon the highway for which the owner of the fee is entitled to compensation,—especially when the law at the time when the street was made authorized the use of electricity by street railways. *Birmingham Traction Co. v. Birmingham Ry. & Elec. Co.* (Ala.) 233

4. Laying an electric street-car track on a turnpike within about 7 feet of a building does not entitle the abutting owner to compensation, although it prevents teams from standing in front of his place of business as they have formerly been able to do. *Ashland & C. Street R. Co. v. Faulkner* (Ky.) 554

5. Poles for electric-light wires are not additional burdens upon the fee of a country highway in a town which has granted the right to maintain the wires and contracted for lighting the streets with the electric lights, as light may be necessary for the safe use of the streets. *Palmer v. Larchmont Elec. Co.* (N. Y.) 672

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Eminent domain; injury to abutting owner by laying street railway near side of street:—(I.) General principles; (II.) effect of title to bed of street; (III.) extent of right to compensation; (IV.) damages; (V.) the California statute. 554

Rights of abutting owners as to use of street railway by second company. 236

Additional servitude on highway; changing road to city street. 444

Additional burden of electric-light poles in highway. 673

EQUITY.

See also ACTION OR SUIT, 1; INJUNCTION.

1. The aid of equity to enforce a claim against a decedent's estate cannot be sought until the claim has been established at law. *Smith v. Smith* (Ill.) 403

2. Equity has jurisdiction of a suit to obtain the cancelation and surrender of a receipt renewing a lapsed life insurance policy, which was obtained by fraud, although the fraud would be a good defense to the pending action at law on the policy. *John Hancock Mut. L. Ins. Co. v. Dick* (Mich.) 556

NOTES AND BRIEFS.

Equity; jurisdiction as to cancelation of instrument. 566

Adequate remedy at law. 855

ESTOPPEL.

1. An estoppel in pais arises whenever an act is done or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair. *American Gas & V. M. Co. v. Wood* (Me.) 449

2. The acceptance of the decree in a divorce suit by a defendant over whom no jurisdiction was obtained, and his remarrying, do not estop him from disputing the validity of a subsequent *ex parte* proceeding in the divorce suit, by which the judgment is opened and a decree for alimony entered against him. *Hekking v. Pfaff* (C. C. App. 1st C.) 618

3. Heirs who appear in the courts of the state of their ancestor's late domicile to contest the making of a family allowance to his widow are not estopped by a judgment making the allowance from contesting its payment out of land which descended to them in another state, since the judgment is not against them personally. *Smith v. Smith* (Ill.) 403

4. An estoppel against claiming that the maker of a note has lost his right to receive it back on the surrender of certain stock by failure to exercise it within the time stipulated arises when his failure was induced by the acts and declarations of the other party assuring him that his right would not be waived by the delay. *American Gas & V. M. Co. v. Wood* (Me.) 449

5. Representations may constitute an estoppel, although not made to any particular person, if made to all persons likely to come into contractual relations with another, and relied upon by one of them in good faith. *Anglo-American Sav. & L. Asso. v. Campbell* (D. C. App.) 622

6. A waiver, to be effective, must be made with full knowledge of the rights which one intends to waive. *Hotchkiss v. Middlekauf* (Va.) 806

EVICITION.

See COVENANT.

EVIDENCE.

See also CONSTITUTIONAL LAW, 20; WEIGHTS; WITNESSES.

Presumption and burden of proof.

1. No presumption can be indulged in favor of the jurisdiction of the court in authorizing the mortgage of an infant's property, as the jurisdiction for that purpose is special and limited and wholly dependent upon the statute. *Warren v. Union Bank* (N. Y.) 256

2. A husband who lives and cohabits with his wife, having children by her, is presumed to have an affection for her, which presumption will continue until overthrown by a fair preponderance of evidence to the contrary. *Beach v. Brown* (Wash.) 114
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3. Opinion evidence based upon disputed evidentiary facts not a subject of scientific investigation, is not admissible except in response to properly framed hypothetical questions. *Green v. Ashland Water Co.* (Wis.) 117

4. To recover for suffering of a person killed by negligence plaintiff has the burden of showing that conscious suffering on the part of deceased existed. *Sweetland v. Chicago & G. T. R. Co.* (Mich.) 588

5. A person is presumed to have knowledge of the impurity of a water supply, when for several years it has been notorious and a matter of common knowledge that the supply is contaminated with sewage, causing epidemics of typhoid fever annually. *Green v. Ashland Water Co.* (Wis.) 117

6. The bursting of a water main under ordinary pressure after it has previously twice burst under such pressure is sufficient evidence to go to the jury on the question of negligence of the city officials in respect to such pipe. *Esberg-Gunst Cigar Co. v. Portland* (Or.) 435

7. Freedom from contributory negligence must affirmatively appear in evidence, or, at least, by some legitimate inference from the evidence, and is not to be presumed. *McLane v. Perkins* (Me.) 487

8. Failure to prove freedom from contributory negligence precludes recovery for the drowning of an employee who, with others, was going to their work in an old punt, with a crack in one side calked with waste, and a part of one end split off, when all were drowned and there is no evidence as to the cause or manner of the accident. *Id.*

9. An electric company maintaining overhead wires along a public alley is *prima facie* liable for injuries caused to persons rightfully in the alley by live grounded wires. *Gannon v. Laclede Gas Light Co.* (Mo.) 505

10. An allegation in a suit for damages for injuries caused by a live grounded electric wire in a public alley, that its owner permitted it to become broken and to remain down a long time when it knew or ought to have known its condition, does not shift the burden of proof as to care of the wire from defendant to plaintiff. *Id.*

11. A broker claiming commissions on a sale to a person who declines to take the property because of defective title has the burden of proving the actual existence of the defect. *Brackenridge v. Claridge* (Tex.) 593

12. The failure of a party to offer himself as a witness does not justify any prejudicial inferences against him, unless it is shown that there were facts peculiarly within his knowledge which were not known so fully to any other witness. *Weeks v. McNulty* (Tenn.) 165

Documentary.

13. The admission in evidence of newspaper publications and proceedings of public bodies, consisting, in the main, of declarations and statements irrelevant to the issue, and manifestly tending to inflame the

minds of the jury, is prejudicial error, though containing some evidence which, standing alone, might be proper. *Green v. Ashland Water Co.* (Wis.) 117

14. Letters written by a husband to his wife during coverture are admissible to prove his affection for her in an action by her against a third person for alienation of his affections from her. *Beach v. Brown* (Wash.) 114

15. The record and judgment of dismissal in a divorce proceeding for adultery is not admissible in a subsequent criminal prosecution for nonsupport of wife in defense of which the same acts of adultery are sought to be set up. *State v. Bradneck* (Conn.) 620

16. Medical books, although admitted to be standard, cannot be read to the jury for the purpose of proving the symptoms of diseases, where they have not been referred to by the witnesses whom they are offered to contradict. *Bixby v. Omaha & C. B. R. & B. Co.* (Ia.) 533

17. Medical works are not admissible under Iowa Code, § 4018, making historical works and books of science or art presumptive evidence of facts of general notoriety or interest therein stated. *Id.*

18. A certified copy of a proclamation of the governor which has been deposited in the office of the secretary of state is admissible in evidence under statutes permitting such proof of records in his office where the statutes require him to keep papers deposited to be kept in his office, although no express provision is made as to proclamations. *McPeck v. Western U. Teleg. Co.* (Iowa) 214

Oral, as to writings.

19. Oral warranties made contemporaneously with a written lease cannot be proved where presumptively the parties have reduced their entire contract to writing. *York v. Steward* (Mont.) 125

20. Evidence of declarations of a husband as to his purpose in writing letters to his wife during coverture is not admissible to contradict expressions of affection contained in them. *Beach v. Brown* (Wash.) 114

21. Parol evidence is admissible to show that an instrument purporting to be signed by one person for another was written and signed by the latter's direction, in his presence. *Morton v. Murray* (Ill.) 529

22. Parol testimony is competent in the construction of wills to prove the circumstances of the testator at the time, the condition of his property, his relations to his family, etc., but never to prove his declarations prior to or after the execution of the instrument. *Ransdell v. Boston* (Ill.) 525

23. The meaning of a cipher telegram may be proved by the person who sent it. *Carland v. Western U. Teleg. Co.* (Mich.) 289

Opinions.

24. An expert may testify directly from personal investigation as to his opinion on a matter of scientific investigation. *Green v. Ashland Water Co.* (Wis.) 117
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25. The opinion of an attorney that the title of land is defective is not evidence, as that is a question of law for the court. *Brackenridge v. Claridge* (Tex.) 593

26. Testimony as to the price of wheat at a certain market, by one who testifies that he knew what it was, is sufficient to go to the jury. *Carland v. Western U. Teleg. Co.* (Mich.) 289

Declarations.

27. Declarations of a conductor when leaving cars on a switch, that the railroad company has determined to furnish no more cars for the shipments that were being made, are evidence against the carrier in an action for failure to furnish cars. *Houston, E. & W. T. R. Co. v. Campbell* (Tex.) 225

28. Declarations of the superintendent of a company when receiving ore, as to its being satisfactory, are competent evidence to show that it was satisfactory. *Worthington v. Gwin* (Ala.) 382

29. A statement by a telegraph agent to the sender of a message, that it has not been delivered, made as a report of his efforts to trace the telegram, is admissible, as against the telegraph company, to show the fact of nondelivery. *Carland v. Western U. Teleg. Co.* (Mich.) 289

30. Statements by a man when stopped on his way from the room of a married woman at night are not admissible as part of the *res gestæ* upon the question of the woman's adultery. *State v. Bradneck* (Conn.) 620

31. Putting in evidence a portion of the cross-examination of a party in a prior case to show his admission will entitle him to have all his evidence read, so far as it bears upon or explains the admission. *Weeks v. McNulty* (Tenn.) 185

Relevancy.

32. The cause of the animosity between a railroad company and a person to whom shipments were being made is not material in an action by the shipper against the carrier for failure to furnish cars, although the existence of the animosity may be relevant. *Houston, E. & W. T. R. Co. v. Campbell* (Tex.) 225

33. Evidence of a situation after the occurrence of an injury is inadmissible in an action for negligence unless preceded by *prima facie* proof that no change has taken place in the meantime. *Green v. Ashland Water Co.* (Wis.) 117

34. Evidence of precautions taken to prevent injuries of like character after the happening of one complained of is inadmissible in an action for negligence. *Id.*

35. Unproved allegations of knowledge and want of care on the part of an electric-light company will not prevent recovery for death of a fireman killed while in the discharge of his duty by stepping on a live grounded wire in a public alley, if sufficient is proved to establish the fact and manner of death, defendant's negligence, and due care on the part of deceased. *Gannon v. Laclede Gas Light Co.* (Mo.) 505

36. Evidence as to trouble which plaintiff had about the payment of fare on a railroad train is not admissible in an action to recover damages for alleged wrongful ejection from a street car. *Springer v. Tacoma Traction Co.* (Wash.) 700

37. Positive testimony by a street-car conductor that one suing for wrongful ejection from a car had not paid his fare cannot be bolstered up by asking him upon his examination in chief the reason which led him to that conclusion. Id.

38. Upon the question of liability for failure to promptly deliver a telegram directing the sendee to "come on first train" to arrest a fugitive from justice who had been entrapped by the sendee, evidence of the arrangement between sender and sendee with reference to the capture is admissible. *McPeck v. Western U. Tele. Co.* (Iowa) 214

39. An averment in answer to an action for rent that the lessor made false representations as to the fitness and condition of the building, is not such an allegation of fraud as will entitle defendant to show the condition of the building. *York v. Steward* (Mont.) 125

Weight; sufficiency.

40. Proof that placards were nailed up in cars and over platforms is not equivalent to proof that they were on a particular car on which a passenger was riding. *Watkins v. Birmingham R. & E. Co.* (Ala.) 297

41. A verdict cannot be directed for defendant in an action to recover damages for negligent injuries, although his evidence is uncontradicted and sufficient, if true, to overcome a prima facie cause made by plaintiff. *Gannon v. Laclede Gas Light Co.* (Mo.) 505

NOTES AND BRIEFS.

Presumption as to fraud. 538
Of circumstances showing guilt. 620
Proof of signature by mark. 530
Reading extracts from medical books. 533

EXECUTORS AND ADMINISTRATORS.

See also AGREED STATEMENT; CORPSE, 2; EQUITY, 1; ESTOPPEL, 3; JUDGMENT, 4.

1. An executor will not be personally bound by his indorsement of commercial paper by the words "Estate of" his testator, followed by his own name, "Executor." *Grafton Nat. Bank v. Wing* (Mass.) 831

2. The proceeds of a decedent's land sold for partition are not personally subject to be transmitted to the administrator appointed at his domicile in another state and there distributed to creditors whose claims have not been allowed by the courts in whose jurisdiction the land was situated. *Smith v. Smith* (Ill.) 403

NOTES AND BRIEFS.

Executors and administrators; liability for indorsement of note. 831

Principal and ancillary administration; 43 L. R. A.

remitting funds to other state; adjudication as affecting realty in other state. 405

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See STATE INSTITUTIONS.

EXPECTANCY.

See WILLS, 1.

EXPERT.

See EVIDENCE, 24.

EXPLOSION.

See EVIDENCE, 6.

EX POST FACTO.

See CONSTITUTIONAL LAW, 3-8.

FAIRS.

See STATE INSTITUTIONS.

FALSE IMPRISONMENT.

See OFFICERS, 4.

FINE.

See BUILDING AND LOAN ASSOCIATIONS, 6.

FIRE ESCAPES.

See BUILDINGS, NOTES AND BRIEFS.

FIREWORKS.

An incorporated town is not liable for personal injuries occasioned by the firing of squibs, rockets, fireworks, and firearms on the streets, by a crowd of citizens, although such acts are done with the knowledge and consent of the mayor, council, police, and other officers of such corporation. *Bartlett v. Clarksburg* (W. Va.) 295

FISHERIES.

See also CONSTITUTIONAL LAW, 10, 24.

A statute authorizing the granting of a license for taking oysters in public waters is altogether invalid when it limits the privilege to taxpayers. *Gustafson v. State* (Tex.) 615

NOTES AND BRIEFS.

Fisheries; statutory regulation of; property rights in. 290

State ownership of; legislation of. 616

FIXTURES.

See LANDLORD AND TENANT, 2, 3.

FOREIGN CORPORATIONS.

See CORPORATIONS, 8.

FOREIGN RECEIVERS.

See RECEIVERS, 2-4.

FORFEITURE.

See CONSTITUTIONAL LAW, 19; INSURANCE, 6.

FORGERY.

See also BILLS AND NOTES, 3, 4.

Forgery is committed by indorsing one's own name upon commercial paper belonging to another of the same name with knowledge

of want of title and with intent to perpetrate a fraud. *Beattie v. National Bank of Illinois* (Ill.) 654

FRAUD.

See INFANTS, 2; PLEADING, 4; WATERS, 8.

FREEDOM OF THE PRESS.

See CONTEMPT, 3.

FREIGHT TRAIN.

See CARRIERS, 3, 14, 15.

FRIGHT.

See CARRIERS, 7, 8; DAMAGES, 5; TRIAL, 6.

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GOODWILL.

NOTES AND BRIEFS.

Goodwill; protection of. 97

GOVERNOR.

See PARDON.

GRAIN.

See WAREHOUSEMEN.

GUARDIAN AND WARD.

The general guardian of an infant has no right to carry on business in the name and with the capital or on the credit of the infant. *Warren v. Union Bank* (N. Y.) 256

HABITUAL CRIMINALS.

See CRIMINAL LAW, 1.

HACKS.

See also HIGHWAYS, 2.

A railroad company has no right to give one hackman an exclusive privilege of entering, with his hacks, its inclosed station grounds to solicit passengers. *State v. Reed* (Or.) 134

NOTES AND BRIEFS.

Hacks; exclusiveness of right at depot. 134

HIGHWAYS.

See also ADVERSE POSSESSION; EMINENT DOMAIN, 2-5; INJUNCTION, 8; PUBLIC IMPROVEMENTS; RAILROADS; STREET RAILWAYS.

1. The determination by town authorities of the necessity of electric light in a highway cannot be questioned in a proceeding by an abutting owner to compel the removal of the wires and poles from in front of his premises. *Palmer v. Larchmont Elec. Co.* (N. Y.) 672

2. An ordinance prohibiting hackmen and draymen from stopping their vehicles on certain streets except when actually engaged in receiving or delivering passengers or goods is not within charter authority to prevent the encumbering of streets, and is unreasonable and void. *Ex parte Battis* (Tex.) 863

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HOTEL.

See BUILDINGS.

HUSBAND AND WIFE.

See also CONTRACTS, 4; ESTOPPEL, 2; EVIDENCE, 2; JUDGMENT, 3; WILLS, 2, 3.

1. The fact that a man's consent to marriage was reluctant and passive and was yielded upon consideration of the pressure which was brought to bear upon him by the wife's relatives and of his duty to repair a wrong he had done her by seduction, is not sufficient ground for annulling the marriage. *Collins v. Ryan* (La.) 814

2. A woman cannot recover damages from a man from whom she contracted a venereal disease while living with him in marital relations under a marriage which was void because she had not been legally released from a former marriage, where she was not induced to enter into the void marriage by any fraud, deceit, or misrepresentation. *Deeds v. Strode* (Id.) 207

3. A married woman may maintain an action in her own name to recover damages for the alienation of her husband's affections where the statutes abolish all disabilities of the wife and give her the same right to sue as if she were single. *Beach v. Brown* (Wash.) 114

4. Procuring a divorce from her husband will not prevent a woman from maintaining an action against a third person for prior alienation of his affections. Id.

NOTES AND BRIEFS.

Husband and wife; duress to avoid marriage:—(I.) Effect of, generally; (II.) what duress is sufficient: (a) generally; (b) threats; (c) arrest or imprisonment; (III.) ratification; (IV.) matters of procedure. 814

Right of action for alienating husband's affections. 114

ILLEGITIMACY.

See PARENT AND CHILD.

IMITATION.

NOTES AND BRIEFS.

Imitation; of goods to deceive public. 827

IMPRISONMENT.

See CRIMINAL LAW, 2.

INCOMPETENT PERSONS.

See also CONFLICT OF LAWS, 4.

The charterer of a vessel who is in command is not liable for her loss because of a lack of care or skill in her navigation after he has become irresponsible, on account of physical and mental exhaustion resulting from his being on duty almost continuously for three days and nights in efforts to save the vessel during a storm. *Williams v. Hays* (N. Y.) 253

NOTES AND BRIEFS.

Incompetent persons; power of committees as to land. 806

INDICTMENT.

1. An indictment for charging a greater rate for transportation for a shorter than for a longer distance over the same line of road, including the shorter transportation, "namely, from Pittsburg to Louisville and to Elizabethtown," is not demurrable as charging two distinct offenses. *Louisville & N. R. Co. v. Com. (Ky.)* 541

2. An indictment for unjust discrimination by a carrier is fatally defective under Ky. Const. § 217, providing for the punishment of such discrimination unless it charges that it was knowingly and wilfully committed. *Id.*

3. That freight for which different charges were made for transportation between the same points was of the same kind or class must be stated in an indictment for unjust discrimination in rates under Ky. Const. § 215. *Id.*

INFANTS.

See also EVIDENCE, 1; GUARDIAN AND WARD; NEGLIGENCE, 4-6; PARENT AND CHILD.

1. No jurisdiction to authorize the mortgage of an infant's property is acquired under N. Y. Code Civ. Proc. chap. 17, art. 4, tit. 7, where the petition, proofs, and all the papers show that the sole purpose is to mortgage the property of the infant to pay a debt contracted by his guardian in carrying on business, without authority, in the infant's name. *Warren v. Union Bank (N. Y.)* 256

2. An original action in equity to set aside an order of court for the mortgage of an infant's property, and the mortgage made under it, can be maintained when they were in fraud of the infant's rights and were procured by fraud and collusion. *Id.*

NOTES AND BRIEFS.

Infants; right of, to set aside judgment: relief against mortgage of property of, by guardian. 257

INITIAL.

See NAME.

INJUNCTION.

See also COURTS, 4.

1. An injunction will lie to prevent a department store from violating its contract with one occupying floor space for the sale of a particular article not to allow to be sold on the premises during the duration of the contract any other make of such article. *Standard Fashion Co. v. Siegel-Cooper Co. (N. Y.)* 854

2. A suit to restrain the use of its name by a corporation is not in effect a suit to annul the corporation, which must be brought by the state. *Armington v. Palmer (R. I.)* 95

3. An injunction against the wrongful assumption and use by a corporation of the name of an individual or of another corporation may be granted in a suit by the owner 43 L. R. A.

of the name, without the intervention of the state, if there is no statute to the contrary. *Id.*

4. The original manufacturer of Waltham watches may have an injunction against the use of the word "Waltham" or the words "Waltham, Mass.," by another manufacturer of watches at that place, without any distinguishing statements, in such a way as to deceive the public to the damage of the former. *American Waltham Watch Co. v. United States Watch Co. (Mass.)* 826

5. Equity may order the removal of an obstruction to an easement,—especially when the injury is continuing or permanent. *Carpenter v. Capital Electric Co. (Ill.)* 645

6. Citizens and taxpayers who will be deprived of free access to a public landing and river and of the free enjoyment of light and air from the landing, by the unlawful erection of a building thereon by a lessee, can maintain a suit for an injunction against the structure. *Reighard v. Flinn (Pa.)* 502

7. A purpresture may be enjoined and abated in a court of equity, although it is not injurious and is not a public nuisance. *Revell v. People (Ill.)* 790

8. An injunction against the construction and operation of an electric railway on a public street cannot be granted to an abutting owner on the ground that the company has no legislative authority to construct the road even by condemnation and payment of compensation, since, if this is true, the construction of the road will constitute only a private trespass which may be adequately compensated at law. *Birmingham Traction Co. v. Birmingham Ry. & Elec. Co. (Ala.)* 233

9. One who can look out from the front of his house, with an unobstructed view, upon a park near by, can maintain a suit to prevent the destruction of the park, although he may not be strictly an abutting owner. *Douglass v. Montgomery (Ala.)* 376

10. Equity has jurisdiction of a suit to enjoin a licensed warehouseman from using his license so as to suppress competition in trade in the articles stored in his warehouse, and enable him to monopolize the business. *Central Elevator Co. v. People, Moloney (Ill.)* 658

NOTES AND BRIEFS.

Injunction; against illegal use of corporate name. 95
To enforce contract. 855
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INNKEEPERS.

See also BUILDINGS; CARRIERS, 4.

NOTES AND BRIEFS.

Innkeepers; liability of, for safety of guest. 185

INSANITY.

See INCOMPETENT PERSONS.

INSOLVENCY.

See INSURANCE, 1.

INSURANCE.

See also CORPORATIONS, 8; COURTS, 4; EQUITY, 2.

1. In case of the insolvency of a mutual benefit society the assets should be applied to unsettled death claims as far as they will go, leaving the balance unpaid and the living members to lose all they have paid in. *Lehman v. Clark* (Ill.) 648

2. The constitution and by-laws of a mutual insurance association are binding upon the members, whether they have actual knowledge thereof or not. *Clark v. Mutual Reserve Fund L. Asso.* (D. C. App.) 390

3. The attachment to an insurance policy of a copy of the application followed by the word "signed" but without the signature of the applicant does not entitle the company to rely on any part of such application, under Iowa Acts 18th Gen. Assem. chap. 211, § 2, providing that all insurance companies shall on the issue of any policy attach thereto "a true copy" of any application, and that if it neglects to do so it shall be forever precluded from pleading, alleging, or proving such application or any part thereof. *Seiler v. Economic L. Asso.* (Iowa) 537

4. The contract of a member of a mutual benefit association is purely unilateral, and he may refuse to continue his payments at any time, in which event the association can only declare his interest forfeited, and cannot sue for unpaid assessments. *Lehman v. Clark* (Ill.) 648

5. No equitable principle exists to compel a member of a mutual benefit association to pay assessments on the ground that he has had the benefit of the insurance, where the plan of the association is that all payments are in advance and entitle the member to protection until the next assessment is due. *Id.*

6. The forfeiture is self-executing, and requires no action on the part of the association under a by-law of a mutual benefit association providing that any member failing to pay assessments shall forfeit his membership and all benefits therefrom. *Id.*

7. An insurance policy containing no stipulation as to suicide, taken out in good faith by the assured, will not be avoided as against the beneficiary named therein by the fact that the assured thereafter while sane deliberately and purposely took his own life. *Seiler v. Economic L. Asso.* (Iowa) 537

8. An owner has an insurable interest to the extent of its value, in a building in process of construction at the time of a fire under a contract requiring the delivery of a completed building within a specified time, not yet expired, although the loss in the absence of insurance would fall on the contractor and not on the owner. *Foley v. Manufacturers' & B. F. Ins. Co.* (N. Y.) 664

9. A policy of insurance on a steam fire engine, hose pipe, and hose cart, while located and contained in the fire engine house, "and not elsewhere," does not cover such property while being used in attempting to

extinguish a fire several hundred feet from that building. *L'Anse v. Fire Asso. of Phila.* (Mich.) 838

10. Death resulting from a ruptured artery was not accidental, when it occurred while one was reaching over a chair to close window shutters, and he did not fall, slip, or lose his balance, and in fact nothing was done or occurred which he had not foreseen and planned, excepting the rupture of the artery. *Feder v. Iowa State Traveling Men's Asso.* (Iowa) 693

11. A suit by a mutual benefit association will not lie to cover assessments where the contract provides only for forfeiture of interest in case of nonpayment. *Lehman v. Clark* (Ill.) 648

12. A receiver of a mutual benefit society cannot maintain a suit to recover assessments if the society itself could not do so. *Id.*

NOTES AND BRIEFS.

Insurance; on property in certain place only. 838

Insurable interest in unfinished building during its construction by a contractor. 664

Rights of member of mutual company; effect of by-law on contract; interference with management of foreign company. 391

Assessments on members of company; contract of mutual company. 648

Effect of suicide on life insurance in absence of any stipulation concerning it. 537

Rupture of artery as accident. 693

INTEREST.

See also CONTRACTS, 10.

A county is but an arm or agent of the state, which cannot be required to pay interest except when self-imposed. *Seton v. Hoyt* (Or.) 634

NOTES AND BRIEFS.

Interest; statute reducing rate of, as affecting contracts. 634

INTOXICATING LIQUORS.

1. The fact that "only members" are permitted in the rooms of a social club will not take the organization out of a statute prohibiting the keeping open of tippling houses on the Sabbath Day. *Mohrmann v. State* (Pa.) 398

2. One who is a manager and also a member and officer of a social club, and exercises a general superintendence over its affairs, including a bar from which intoxicating liquors are furnished, is amenable to a statute prohibiting tippling houses to be kept open on the Sabbath Day. *Id.*

3. The mere fact that the selling and drinking of intoxicating liquors was "only an incident, and not the main object," of the incorporation of a social club, will make the place where such liquors are dispensed and drunk none the less a tippling house. within the meaning of a statute making penal the

keeping open of such houses on the Sabbath Day. Id.

4. The loss of money taken from the owner's pockets while he was intoxicated is not included in the damages occasioned by the sale of liquor to him, within the meaning of Sand. & H. (Ark.) Dig. § 4870, since the sale of the liquor is not the proximate cause of the loss, but this is due to the intervening wrongful act of a third person. Gage v. Harvey (Ark.) 143

NOTES AND BRIEFS.

Intoxicating liquor; illegal sale of, by club. 398

Construction of civil damage law; when sale of liquor is cause of damage. 144

JOINT CREDITORS AND DEBTORS.

See also **BILLS AND NOTES**, 6; **CONTRACTS**, 5.

NOTES AND BRIEFS.

Joint debtors; effect of judgment in an action against part of the obligors on a joint or joint and several contract to release or limit the liability of other obligors:— (I.) Where the prior judgment is in an action on a joint obligation; (II.) where the prior judgment is in an action on a partnership obligation; (III.) where the common-law rule is affected by statute; (IV.) where some of the debtors are nonresidents; (V.) where the prior judgment is on a separate obligation; (VI.) where the prior judgment is on a joint and several obligation; (VII.) where prior proceedings affect subsequent proceedings in the same action; (VIII.) where the obligors are principal and surety; (IX.) classification by states and countries. 161

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JUDGE.

See **CASES CERTIFIED**; **COURTS**, 1; **OFFICERS**, 3, 4.

JUDGMENT.

See also **ESTOPPEL**, 2, 3; **EVIDENCE**, 1, 15; **INFANTS**, 2.

1. Judgment upon the merits in an action for negligence is a bar to another action for the same injury grounded on the defendant's fault or negligence in respect to the same occurrence, although other elements of negligence are alleged. *Columb v. Webster Mfg. Co.* (C. C. App. 1st C.) 195

2. Probate of a will does not bar the specific performance of a contract for disposal of property by will. *Svanburg v. Fosseen* (Minn.) 427

3. A personal judgment for alimony cannot be rendered in a divorce suit against a defendant over whom the court has acquired no jurisdiction. *Hekking v. Pfaff* (C. C. App. 1st C.) 618

4. A judgment by the courts of the state of the late domicile of a decedent making a family allowance to his widow out of his assets according to the laws of that state is 43 L. R. A.

not binding upon his land in another state whose laws do not recognize such an allowance. *Smith v. Smith* (Ill.) 403

5. A Federal court in which a suit is brought upon the decree of a court in a state other than that in which it is sitting may inquire into the jurisdiction of that court to render the decree, for the purpose of determining its validity. *Hekking v. Pfaff* (C. C. App. 1st C.) 618

NOTES AND BRIEFS.

See also **JOINT CREDITORS AND DEBTORS**.

Judgment; effect of, as to validity of will. 427

As affecting real property in other state. 405

As to what matters conclusive. 196

JUDICIAL SALE.

A contract to sell the bid or interest of a successful bidder at a judicial sale, before its confirmation, for more than the amount bid, is contrary to public policy, unless the advance on the bid inures to the benefit of the parties to the suit. *Camp v. Bruce* (Va.) 146

JURISDICTION.

See **COURTS**; **INFANTS**, 1; **JUDGMENT**, 3.

JURY.

See **CONSTITUTIONAL LAW**, 1, 8, 11, 12, 15-17; **TRIAL**, 1-3, **NOTES AND BRIEFS**.

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See **TRADEMARK**.

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Labor organizations; protection of; trademarks of. 86

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See **BOUNDARIES**; **WATERS**, 1.

LANDINGS.

See **PUBLIC LANDINGS**, **NOTES AND BRIEFS**.

LANDLORD AND TENANT.

See also **COTENANCY**; **EVIDENCE**, 19.

1. The flowing of water into leased apartments from an upper tenement owned and occupied by the lessor, because of defective plumbing, causing injury to the lessee's goods, which the lessor refused to remedy within a reasonable time after notice, constitutes a breach of the implied covenant for quiet en-

joymont, in the absence of excusing facts.
York v. Steward (Mont.) 125

2. There is no implied warranty that a leased house is fit for the use for which it is let, or that it is suitable for any purpose, or that it shall remain in a tenable condition.
Id.

3. A provision in a lease of an unfinished hotel, for a lien for rent on all personal property of the lessees that may be brought upon the premises, is not valid as against a chattel mortgage on furniture afterwards placed in the hotel. New Lincoln Hotel Co. v. Shears (Neb.) 588

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Landlord and tenant; lease creating lien on property. 588

Effect of holding over. 667

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LAW OF PLACE.

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See COURTS, 7.

LETTERS.

See EVIDENCE, 14, 20.

LIBEL.

See DAMAGES, 2, 10.

LICENSE.

See EMINENT DOMAIN, 1; FISHERIES; WAREHOUSEMEN.

LIENS.

See also MORTGAGE, 1, 2; TRUSTS; VENDOR AND PURCHASER, 4.

1. A statutory laborer's lien for harvesting grain is not superior to a chattel mortgage executed and recorded before the grain was ready for harvesting, where the statute does not provide for such superiority. Wilson v. Donaldson (Cal.) 524

2. In a suit for the compensation by persons who have performed labor on a building to which a mortgagee who has failed to comply with his contract to advance money to erect the building, and the obligors in a bond to release the building from mechanics' liens, are made parties, the decree should not go against the latter if it merely impresses the funds in the hands of the mortgagee with a trust in favor of the laborers, and does not purport to foreclose the liens. Anglo-American Sav. & L. Assn. v. Campbell (D. C. App.) 622

3. The purchaser under foreclosure sale of property subject to a mechanic's lien is within the meaning of a statute providing that in proceedings to enforce such liens the "defendant" may file an undertaking with

sureties and release the property from the lien. Id.

NOTES AND BRIEFS.

Liens; for labor. 524

LIMITATION OF ACTIONS.

1. Laches is not imputable to the state, in the absence of a statute providing therefor, although a statute has made the state subject to statutes of limitation. State v. Spangler (W. Va.) 727

2. Laches will not bar a landowner from assailing a tax sale of his land, when there is no actual possession under the tax title. Id.

LOAN ASSOCIATIONS.

See BUILDING AND LOAN ASSOCIATIONS.

MARK.

NOTES AND BRIEFS.

Mark; proof of. 530

MARRIAGE.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See also CARRIERS, 4, 5; TELEGRAPHS, 2.

1. No recovery can be had for services under an entire contract, where the employee voluntarily abandons work, without valid excuse, before the stipulated time. Fisher v. Walsh (Wis.) 810

2. Threats of strikers which excuse an employee for quitting service in breach of his contract, although they entitle him to recover the actual benefit conferred by his services, do not relieve him from liability for the damages sustained by the employer on account of his quitting the service, which must be deducted from his wages. Id.

3. Rules adopted by railroad companies to govern the movement of trains cannot be regarded as unreasonable or insufficient in the absence of proof that they are so. Little Rock & M. R. Co. v. Barry (C. C. App. 8th C.) 349

4. A railroad company operating a single-track road is not negligent in failing to give those in charge of trains moving in the same direction telegraphic information of the relative position of the trains. Nolan v. New York, N. H. & H. R. Co. (Conn.) 305

5. The legal duty of a railroad company operating a single-track road to its employees is not violated by failure to provide in its rules for giving those in charge of trains moving in the same direction telegraphic information of the relative position of the trains. Id.

6. An emergency requiring telegraphic communications to those in charge of trains moving in the same direction, of their relative position, is not shown by the fact that the rear train is an engine pushing a snow plow running faster than the forward train and throwing snow, which interferes with the lookout, while the forward train is behind schedule time and required to stop for cars at a siding where trains stop only occasionally and at irregular intervals. Id.

7. Telegraphic information is not, as matter of law, required to be given to those in charge of trains moving in the same direction on a single-track road as to the respective position of the trains, where the rules which have been generally adopted by railroads to govern such cases do not require it, but place the duty of looking out for the other train upon the train crews and the rules are not shown to be palpably unreasonable or insufficient. *Little Rock & M. R. Co. v. Barry* (C. C. App. 8th C.) 349

8. One taking service without objection or protest with a railroad whose rules to his knowledge require employees on trains out on the road to look out for other trains moving in the same direction assumes the risk incident to the operation of trains under such rules. *Id.*

9. The mere fact that rules of a railroad company for the regulation of the movement of trains on the road are sometimes violated by employees to the knowledge of conductors does not charge the company with liability for injury to an employee for failure to enforce its rules. *Nolan v. New York, N. H. & H. R. Co.* (Conn.) 305

10. The rule exempting an employee from liability for injury to one servant through the negligence of a fellow servant is too firmly established to be reversed or seriously modified by any power vested in courts. *Id.*

11. The servants of a bailee for hire are not the servants of the bailor so as to make the latter responsible to a third party for their negligence. *New Jersey Elec. R. Co. v. New York, L. E. & W. R. Co.* (N. J. Sup.) 849

NOTES AND BRIEFS.

Master and servant; duties of master and servant with regard to rules promulgated for the safe conduct of a business:—(I.) General principles; (II.) limits of the duty to promulgate rules: (a) in general; (b) extent of employer's duty tested by the usage of other persons engaged in the same business; (c) rules prescribed must be definite and intelligible; (d) necessity for rules, whether for court or jury to decide; (III.) habitual practice of employees, how far a legal substitute for a rule; (IV.) the master's duty to promulgate his rules; (V.) the master's duty to enforce his rules; (VI.) no recovery by servant unless omission to promulgate rules was proximate cause of the injury; (VII.) construction and meaning of rules; (VIII.) illustrative decisions as to the sufficiency of rules framed for the protection of railroad servants; (IX.) illustrative decisions as to the sufficiency of rules framed for the protection of servants in miscellaneous employments; (X.) relation between the doctrine of common employment and the duty of a master to promulgate rules: (a) duty of making rules, assignability of; (b) duty to publish the rules, assignability of; (c) position of employees vested with power to suspend general rules by special directions; (XI.) duty of the servant in regard to the rules promulgated by his employer: (a) generally; (b) violation of rule by plaintiff not a bar to recovery, unless shown to be proximate cause of injury; (c) servant not bound by rules not known to him: (1) general principles stated; (2) when a servant is deemed to have knowledge of a rule; (d) validity of rules as regards employees: (1) public policy; (2) reasonableness; (e) illustrative cases with regard to the violation of rules by the servant; (f) waiver of rules habitually disregarded; (g) obligation of rules and other duties, effect of conflict between; (h) injuries caused by coservants' violation of rules, liability for: (1) under common-law principles; (2) under statutes modifying the common law. 305

ery, unless shown to be proximate cause of injury; (c) servant not bound by rules not known to him: (1) general principles stated; (2) when a servant is deemed to have knowledge of a rule; (d) validity of rules as regards employees: (1) public policy; (2) reasonableness; (e) illustrative cases with regard to the violation of rules by the servant; (f) waiver of rules habitually disregarded; (g) obligation of rules and other duties, effect of conflict between; (h) injuries caused by coservants' violation of rules, liability for: (1) under common-law principles; (2) under statutes modifying the common law. 305

MAXIMS.

1. Impossibility is an excuse in law. *Williams v. Hays* (N. Y.) 253
2. Respondeat superior. *Esberg-Gunst Cigar Co. v. Portland* (Or.) 435
3. Sic utere tuo ut alienum non ladas. *State v. Theriault* (Vt.) 290
4. The law intends what is agreeable to reason; it does not suffer an absurdity. *Williams v. Hays* (N. Y.) 253

NOTES AND BRIEFS.

- Res ipsa loquitur.* 506
Respondeat superior. 438
Sic utere tuo ut alienum non ladas. 438

MECHANICS' LIEN.

See LIENS.

MEDICAL BOOKS.

See EVIDENCE, 16, 17.

MINES.

See also DAMAGES, 3; TAXES, 1.

Where a party holds a lease upon land for oil and gas purposes, upon the usual terms and conditions, paying one eighth of the oil produced as royalty, the oil while it remains *in situ* must be regarded as realty, and as remaining the property of the lessor until brought to the surface. *Carter v. Tyler County Ct.* (W. Va.) 725

MONOPOLY.

See INJUNCTION, 10.

MORTGAGE.

See also ACTION OR SUIT, 1; CONFLICT OF LAWS, 5; DEBTOR AND CREDITOR; INFANTS; LANDLORD AND TENANT, 3; LIENS, 1, 2; TRUSTS.

1. A mortgage for money to be advanced for building purposes, when put on record before any contract for building, has priority over all liens for labor and materials subsequently supplied for the buildings. *Anglo-American Sav. & L. Asso. v. Campbell* (D. C. App.) 622

2. A mortgagee may continue to make advances to a mortgagor, when the loan is made expressly for building purposes, although he has notice of claims for labor and materials furnished for the buildings, and of the filing of liens therefor, if his contract

does not require him to see to the application of the money advanced. Id.

3. The lien for the unpaid balance of the mortgage debt is not restored upon a redemption by the mortgagor under statutory authority by repaying the amount for which the property was sold at the trustee's sale, although such amount is less than the face of the mortgage. *Fields v. Danehower* (Ark.) 519

4. A tender by a mortgagor seeking to exercise his statutory right to redeem from the trustee's sale of the amount bid at such sale which is less than the face of the mortgage is ineffectual if coupled with a condition that the mortgagee release all claims upon the land although the payment would have cut off the mortgage lien, since that question is one which the mortgagee had a right to test in the courts. Id.

NOTES AND BRIEFS.

Mortgage; redemption from foreclosure sale; effect of. 520

For future advances; agreement to make such advances. 623

MOTIVE.

See TORTS, NOTES AND BRIEFS.

MUNICIPAL CORPORATIONS.

See also ACTION OR SUIT, 2; BANKS, 2; CONSTITUTIONAL LAW, 22; COURTS, 6; CRIMINAL LAW, 2; EMINENT DOMAIN, 1; FIREWORKS; HIGHWAYS, 2; OFFICERS, 1; PARKS; PUBLIC LANDINGS.

1. A right of action for damages against a city accrues on its wrongful refusal to accept a contract as completed and make assessments to pay the contractor, under a contract which provided that no payments should be made until the money was collected by assessments. *Weston v. Syracuse* (N. Y.) 678

2. A waiver of strict performance of a sewer contract according to specifications is within the power of the common council of a city. Id.

3. Wrongful acts or negligence of the officers or agents of an incorporated town in the exercise of powers and functions of a public, governmental character will not render the town liable for the damages thereby caused. *Bartlett v. Clarksburg* (W. Va.) 295

4. City waterworks are not maintained in the public or governmental as distinguished from the private capacity of the city, so as to relieve the city from liability for injuries caused by negligence in their construction or maintenance. *Esberg-Gunst Cigar Co. v. Portland* (Or.) 435

5. The appointment of the water committee of a city by the legislature, and its independence of the control of any other department of the city government, will not relieve the city from liability for injuries caused by negligence in the construction or maintenance of the waterworks. Id.

6. A municipality has no power to col-

lect a tax upon property or business so situated that it cannot receive any protection or benefit from it, and the legislature cannot extend or maintain the limits of a city for such purpose and which has such an effect. *Kaysville v. Ellison* (Utah) 81

NOTES AND BRIEFS.

Municipal corporations; interference with local self-government. 409

Liability for negligence as to waterworks. 436

Inquiring into motives of officers voting for ordinance. 681

Power to tax land in. 81

MUTUAL INSURANCE COMPANIES.

See INSURANCE.

NAME.

See also BILLS AND NOTES, 4; CORPORATIONS, 1-4; INJUNCTION, 2-4.

The middle initial letter is not a part of a person's Christian name. *Beattie v. National Bank of Illinois* (Ill.) 654

NOTES AND BRIEFS.

Name; conflict of rights as to; protection of. 96

NEGLIGENCE.

See also CARRIERS, 8; EVIDENCE, 6-10, 33-35; JUDGMENT, 1; LANDLORD AND TENANT, 1; TRIAL, 6-10; WATERS, 7, 8.

1. A landowner is under no duty to keep his premises safe for mere trespassers, even if they are children. *Ritz v. Wheeling* (W. Va.) 148

2. A trespasser injured on dangerous premises cannot recover therefor from the landowner, unless the latter's negligence was so gross as to amount to a wanton injury. Id.

3. Negligence of a bailee or his servants is not imputable to the bailor so as to prevent a recovery by the latter against a third party for injuries to the property. *New Jersey Elec. R. Co. v. New York, L. E. & W. R. Co.* (N. J. Sup.) 849

4. The negligence of parents, contributing to an accident which injures a minor child, cannot be imputed to the child in an action by the child against a third person for personal injuries sustained through negligence. *Ploof v. Burlington Traction Co.* (Vt.) 108

5. The contributory negligence of parents is a defense to an action for the death of their minor child, under Vt. Stat. §§ 2451, 2452, which give the right of action to the personal representative of the child for the benefit of the next of kin. Id.

6. Negligence of parents in permitting a boy ten years old to go upon the street does not proximately contribute to an accident resulting from his attempt to cross the street in front of a moving car. Id.

NOTES AND BRIEFS.

Negligence; injury in attempt to escape from seeming peril. 833

As to structures dangerous to children. 148

Imputing parent's negligence to child. 109

NEGOTIABLE INSTRUMENTS.

See **BILLS AND NOTES.**

NONRESIDENTS.

See **DEBTOR AND CREDITOR.**

NOTICE.

See **CARRIERS, 19; EVIDENCE, 5.**

OFFICERS.

1. Previous residence in territory annexed to a city is to be deemed residence within the city, for the purpose of computing the period of residence necessary to make a person eligible to a city office. *Gibson v. Wood (Ky.)* 699

2. A statute changing the time for an election of township trustees, whereby it is to come more than four years after the previous election, does not violate Ind. Const. art. 15, § 2, which inhibits the creation of an office the tenure of which shall be longer than four years, where the statute does not in any manner profess or attempt to extend the tenure of the trustees then in office, but, if their term is extended, it will be by operation of Ind. Const. art. 15, § 3, which provides that officers may hold over until their successors have been elected and qualified. *State, Harrison, v. Menaugh (Ind.)* 408

3. A member of a town council when presiding as judge over a police court is not within the provisions of Ga. Pol. Code, § 752, making municipal officers personally liable for official acts done without authority of law. *Calhoun v. Little (Ga.)* 630

4. The presiding officer of a municipal court, who judicially determines that a given ordinance which authorizes imprisonment without any alternative of a fine is valid, and imposes sentence accordingly, when he has jurisdiction of the subject-matter and the person, is not liable in a civil action for the unlawful detention of the person sentenced. *Id.*

NOTES AND BRIEFS.

Officer; right to choose; constitutional power of appointment. 409

Liability for judicial acts. 630

OIL.

See **MINE; TAXES, 1.**

OYSTERS.

See **FISHERIES.**

PARCELS.

See **CARRIERS, 21, 23, 24.**

PARDON.

See also **CRIMINAL LAW, 1.**

The pardoning power of the governor extends to cases of contempt. *Sharp v. State, Cason (Tenn.)* 788
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NOTES AND BRIEFS.

Pardon; extent of power of. 94

PARENT AND CHILD.

The fact that the parents of an illegitimate child could not lawfully marry at the time the child was begotten, because the mother was a married woman, does not prevent the legitimization of the child, under Ohio Rev. Stat. § 4175, by the subsequent legal marriage of the parents and the acknowledgment of the child by the father, as the statute makes no exception of adulterine bastards. *Ives v. McNicoll (Ohio)* 772

NOTES AND BRIEFS.

Legitimation of child by subsequent marriage. 774

PARKS.

See also **INJUNCTION, 9.**

A grant of a right to construct a railway over a city park and the abandonment and discontinuance of the park by the city, which attempts to confirm the title of a reversioner, is a violation of the trust of the city for the public, where the lands were conveyed for a street or common only, with a provision for their reversion if used for other purposes, and were afterwards dedicated by the city as a public park or pleasure ground. *Douglass v. Montgomery (Ala.)* 376

NOTES AND BRIEFS.

Parks; grant by city council of rights in; misappropriation of. 376

PARTNERSHIP.

See **COTENANCY.**

PAYMENT.

See **CONTRACTS, 8.**

PENALTIES.

See **CARRIERS, 28; STATUTES, 9.**

PERCOLATING WATER.

See **EASEMENTS, 1; WATERS, 3, 4.**

PIERS.

See **WATERS, 1.**

PLEADING.

See also **APPEAL AND ERROR, 16, 17; EVIDENCE, 39.**

1. A waiver relied upon to preclude a defense must be pleaded. *Trezona v. Chicago G. W. R. Co. (Ia.)* 136

2. A complaint which states a good cause of action is not demurrable because it is of the class in which the court may refuse to act, owing to the difficulty of enforcing its decree. *Standard Fashion Co. v. Siegel-Cooper Co. (N. Y.)* 854

3. An allegation that a railroad commission has not authorized a carrier to charge less for a longer than for a shorter distance is a sufficient statement that the commission has refused to exonerate the carrier from Ky. Stat. § 820, after investigation of the com-

plaint, if such allegation is necessary. *Louisville & N. R. Co. v. Com.* (Ky.) 541

4. The use of the word "fraud" or "fraudulent" is not necessary to charge that acts are fraudulent. *Warren v. Union Bank* (N. Y.) 256

5. An allegation as to what constitutes a contract of insurance in a mutual company is simply the statement of a conclusion of law, which is not sufficient as against a demurrer, when by-laws, rules, regulations, and circulars referred to are not set out. *Clark v. Mutual Reserve Fund L. Asso.* (D. C. App.) 390

6. An allegation that defendant has failed and refused to pay, although "able to do so," is not sufficient to show a right of action on a promise to pay when defendant "might feel able to pay," in the absence of any allegation that defendant felt able, or knew it was able, or something equivalent thereto. *Pistel v. Imperial Mut. Ins. Co.* (Md.) 219

7. A demurrer for want of jurisdiction does not reach an objection of defect of parties. *Svanburg v. Fossecn* (Minn.) 427

8. Mere allegations of the effect and operation of the charter or by-laws of a corporation are not facts that are admitted by a demurrer. *Clark v. Mutual Reserve Fund L. Asso.* (D. C. App.) 390

NOTES AND BRIEFS.

Pleading; of statute of frauds. 146

PLEDGE AND COLLATERAL SECURITY.

See also *TROVER*.

1. A pledgee cannot become the purchaser of pledged property at his own sale, in the absence of an express agreement authorizing it. *Glidden v. Mechanics' Nat. Bank* (Ohio) 737

2. A contract of pledge is not terminated or the relations of the parties changed, unless the pledgeor so elects, by the pledgee's purchase of the pledged property at his own sale without the consent of the pledgeor. *Id.*

NOTES AND BRIEFS.

Pledgee's conversion of pledged property by invalid sale:—(I.) What sales amount to a conversion: (a) generally; (b) with reference to corporate stock; (II.) power to sell: (a) general statement as to; (b) implied authority: (1) the general rule; (2) as to goods and chattels; (3) as to stocks and bonds; (4) as to choses in action; (c) special authority: (1) express contracts generally; (2) blank transfers of stock; (III.) demand and notice: (a) necessity of, generally; (b) when term for redemption or payment is indefinite; (c) where stock is held as security for advances; (d) under special contract; (e) sufficiency of; (IV.) conduct of sale; (V.) purchase by pledgee; (VI.) tender of payment to render conversion actionable; (VII.) ratification of sale and waiver of conversion; (VIII.) remedies: (a) by direct action; (b) by way of 43 L. R. A.

defense; (c) as against purchasers from the pledgee; (IX.) measure of damages: (a) as to personal property generally; (b) as to stocks, bonds, and other securities; (c) as to notes and other choses in action. 737

POWER OF ATTORNEY.

See *PRINCIPAL AND AGENT*, 2.

PRACTICAL JOKE.

See *ASSAULT*.

PRESUMPTION.

See *EVIDENCE*, 1-12.

PRINCIPAL AND AGENT.

See also *BROKERS*.

1. The agent of an undisclosed principal cannot be held responsible for the subsequent dealings with his principal after his agency is disclosed. *Brackenridge v. Claridge* (Tex.) 593

2. Power to convey land is not included in a power of attorney to demand and receive real and personal estate and prosecute suits, and to perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises. *Hotchkiss v. Middlekauf* (Va.) 806

PRINCIPAL AND SURETY.

A surety is not discharged by an agreement for the extension of the time of payment, when that is invalid for want of consideration. *Olmstead v. Latimer* (N. Y.) 685

NOTES AND BRIEFS.

Principal and surety; release of surety by extension of time to principal; lack of consideration for extension. 680

PROCESS.

See *WRIT AND PROCESS*.

PROCLAMATION.

See *EVIDENCE*, 18.

PROMISSORY NOTES.

See *BILLS AND NOTES*.

PROSTITUTES.

See *CONSTITUTIONAL LAW*, 22.

PROXIMATE CAUSE.

See also *CARRIERS*, 8; *INTOXICATING LIQUORS*, 4; *NEGLIGENCE*, 6; *TRIAL*, 4.

1. The negligence of a carrier in taking a passenger past her station was not the proximate cause of an injury received by the passenger in consequence of the explosion of a lamp at a hotel at which she was waiting for a return train. *Central of Ga. R. Co. v. Price* (Ga.) 402

2. Failure of a railroad company to notify those in charge of two trains moving in the same direction of the relative position of the trains is not the proximate cause of a collision between them, where the crews in charge of them took no precautions to look out for and prevent a collision with the

other train as required by the rules of the road. *Little Rock & M. R. Co. v. Barry* (C. App. 8th C.) 349

PUBLIC GROUNDS.

NOTES AND BRIEFS.

Public grounds; municipal corporation as trustee of. 376

PUBLIC IMPROVEMENTS.

See also ASSUMPSIT, 2; MUNICIPAL CORPORATIONS, 1, 2.

1. Assessments upon owners of abutting lots for new sidewalks and drains which were necessary only because of a change of the grade of the street are in violation of the South Carolina Constitution, which requires the whole property of the municipality to be taxed for any public or corporate purpose. *Mauldin v. Greenville* (S. C.) 101

2. The benefit to abutting property from the watering of a street in front of it may be such an improvement to the property that it can be made the subject of an assessment upon it. *Sears v. Boston* (Mass.) 834

3. Assessments for the sprinkling of streets within a certain territory may be lawfully made upon abutting property, although the sprinkling of other parts of the city is done at the public expense. *Id.*

4. The frontage rule of assessments for watering streets may be upheld when it does not appear that, as applied to the property assessed, it is not an approximately accurate method of determining benefits. *Id.*

5. Street sprinkling assessments made by a superintendent of streets by direction of the board of aldermen, and reported to them, may be regarded as made by the aldermen themselves, when they have made an appropriation based on the report. *Id.*

NOTES AND BRIEFS.

Public improvements; justification for assessment. 835

Constitutionality of assessments. 101

PUBLIC LANDINGS.

See also INJUNCTION, 6.

A lease of part of a public landing to a private person is not within the lawful power of a city council,—especially when the city charter conferring rights of property on the corporation provides that it shall not be construed to authorize the sale, lease, or alienation of such landings. *Reighard v. Flinn* (Pa.) 502

NOTES AND BRIEFS.

Public landing; lease of. 502

PUBLIC LANDS.

1. The reservation of vested rights of the owners of ditches provided for by Hill's (Or.) Ann. Laws, §§ 4057-60, on the issue of patents for land by the state, is not the grant of a new easement, but the recognition of a pre-existing right. *Carson v. Gentner* (Or.) 130

2. A Confederate certificate properly 43 L. R. A.

located, surveyed, and returned, with field notes, to the land office in Texas, confers a good title upon the holder. *Brackenridge v. Claridge* (Tex.) 592

PUBLIC MONEY.

See BANKS.

PURPRESTURE.

See INJUNCTION, 6, 7; WATERS, 1.

RAILROAD COMMISSION.

See COURTS, 5; PLEADING, 3.

RAILROADS.

See also ADVERSE POSSESSION; HACKS; MASTER AND SERVANT, 3-9; PARKS; PROXIMATE CAUSE, 2; TRIAL, 5.

1. A right granted to a specified railroad company to construct its road across a public road or highway does not authorize the construction of branch roads which are neither a part of, nor appurtenant to, the main line. *St. Paul & D. R. Co. v. Duluth* (Minn.) 433

2. A railroad corporation, which, under its charter, constructs its tracks across an existing public highway or street of a city, does so on the implied condition that it will yield to the reasonable burdens imposed by the growth and development of the country or the city, and, where the public welfare demands a change of the grade of the highway or street, the railroad company must, at its own expense, make such alteration in the grade of its crossing as will conform to the new grade. *Cleveland v. Augusta* (Ga.) 638

NOTES AND BRIEFS.

See also MASTER AND SERVANT.

Liability for changing grade to conform to change of grade of street. 639

REAL PROPERTY.

See also CONFLICT OF LAWS, 4, 5.

NOTES AND BRIEFS.

Real property; constructive notice by record to holders of instruments previously recorded. 623

RECEIVERS.

See also ATTACHMENT; CONFLICT OF LAWS, 3; INSURANCE, 12.

1. After the appointment of a receiver for a corporation, the directors cannot ratify a transfer of property previously made without authority. *Linville v. Hadden* (Md.) 222

2. The right of a receiver appointed in another state to maintain an action is not absolute, but rests in the discretion of the court. *Wyman v. Eaton* (Iowa) 695

3. An order of appointment of a receiver which gives him authority to bring suits in other states is without efficiency to create such right without sanction in the state where the suits are brought. *Id.*

4. A receiver of a corporation appointed in another state should not be allowed, by an exercise of comity, to sue for the enforce-

ment of the liability of stockholders, when it would be in contravention of the rights of the citizens of the state and operate to their injury. Id.

NOTES AND BRIEFS.

Receivers; intervention of creditor in receivership; rights of in other states. 222
Right of action in other state; enforcement of stockholder's liability. 697

RECORD.

See REAL PROPERTY, NOTES AND BRIEFS.

RES GESTÆ.

See EVIDENCE, 30.

RESIDENCE.

See OFFICERS, 1.

RÉSUMÉ.

For résumé of contents of book, see 865

RETURN.

See WRIT AND PROCESS.

REWARD.

See DAMAGES, 12.

RIPARIAN RIGHTS.

See WATERS, 1.

RULES.

See MASTER AND SERVANT, 3, 9, NOTES AND BRIEFS.

SALE.

See BILLS AND NOTES, 1; WATERS, 6.

SATISFACTION.

See CONTRACTS, 7.

SCALPERS.

See TICKET BROKERS.

SCHOOLS.

See TAXES, 5-8.

SHIPPING.

See INCOMPETENT PERSONS; TRIAL, 10.

SIDEWALKS.

See PUBLIC IMPROVEMENTS, 1.

SIGNATURE.

See EVIDENCE, 21.

SPECIAL JURY.

See TRIAL, 1.

SPECIFIC PERFORMANCE.

1. The fact that enforcement of a contract may require a multiplicity of orders by the court in its endeavor to superintend the business to which it relates does not deprive the court of jurisdiction, but justifies its refusal, in its sound discretion, to exercise it. *Standard Fashion Co. v. Siegel-Cooper Co.* (N. Y.) 854

2. A bill to enforce specific performance of a contract by a department store giving a certain person the exclusive right to sell 43 L. R. A.

a certain article in the store states a good cause of action, although owing to the difficulty attending the enforcement of the decree and the absence of public interest the court may refuse relief. Id.

NOTES AND BRIEFS.

Specific performance; of contract for exclusive sale of certain articles. 856

SPRING.

See WATERS, 5.

STATE.

See LIMITATION OF ACTIONS, 1.

STATE INSTITUTIONS.

A Board of Managers of the World's Columbian Exposition which is created by statute and the members of which are appointed by the governor as an agency of the state, although it is not expressly named as a corporation, but is expressly given power to make contracts and furnish with certain funds, while the state expressly declares that it will not be responsible for any indebtedness of the board, is at least a quasi corporation, and may be sued for breach of contract without the consent of the state. *Gross v. Kentucky Bd. of Managers of World's Columbian Expo.* (Ky.) 703

STATUTE OF FRAUDS.

See CONTRACTS, 2, 3.

STATUTES.

See also TRADEMARK, 3.

1. The provision against private or local bills, found in N. Y. Const. art. 3, § 18, as amended in 1874 and continued in the revision of 1894, does not affect previously existing legislation. *Ingersoll v. Nassau Elec. R. Co.* (N. Y.) 236

2. A statute providing for special juries in each county having a population of 500,000 or more is a general, and not a local, act. *People v. Dunn* (N. Y.) 247

3. A statute for protecting labels of labor unions, which applies to every locality in the state and embraces every association or union of working men or women, is a general law, and in no sense local or private. *Perkins v. Heert* (N. Y.) 858

Title.

4. But one subject is indicated in the title of an act for the protection of skilled labor and the registration of labels, trademarks, names, brands, or devices covering the products of such labor associations or unions. Id.

5. The title of an act, which is, "A Further Supplement to an Act Entitled 'An Act to Protect Trademarks and Labels,'" sufficiently shows the object of the law, which is the protection of trademarks and labels, although the title of the prior act is not correctly recited. *Schmalz v. Woolley* (N. J. Err. & App.) 86

Construction.

6. A section of the Code, codified from a decision of the court, will be construed in

the light of the source from which it came, unless its language imperatively demands a different construction. *Calhoun v. Little* (Ga.) 630

7. Failure of warehouse commissioners to appeal to the attorney general to institute suits or to question the legality of the conduct of warehousemen in storing their own grain in their warehouses does not amount to a practical construction of the statute providing for licensing warehouses so as to show that it authorizes such conduct. *Central Elevator Co. v. People, Moloney* (Ill.) 658

8. Mass. Stat. 1895, chap. 504, providing for indeterminate sentences, is to be construed prospectively and does not apply to sentences for offenses committed before it took effect. *Murphy v. Com.* (Mass.) 154

9. A heavy statutory penalty will not be awarded in a case which does not come strictly within the terms of the statute. *Houston, E. & W. T. R. Co. v. Campbell* (Tex.) 225

10. A statute exempting college property from taxation in accordance with a well-settled and long-established public policy is to be construed reasonably so as to give full effect to the policy declared, as well as to avoid abuse and frustrate evasion, and is not within the rule of strict construction. *Yale University v. New Haven* (Conn.) 490

11. That a construction of a statute regulating railroad rates in such a manner as to deny power to make special rates to competitive points will injure an industry of the state will not require an opposite construction if the effect of the latter might be injurious to other industries and interests connected or identified with noncompetitive points. *Louisville & N. R. Co. v. Com.* (Ky.) 541

12. An argument drawn from hardship or inconvenience should have due weight with the court in determining the true construction of a statute which is doubtful or obscure, but never so much as to induce a construction that is absurd, defeats the evident object in view, or involves a stultification of those who made it. *Id.*

NOTES AND BRIEFS.

Statutes; construction of, in reference to their purpose and intent. 537

STOCK.

See CORPORATIONS, 5-7.

STREET RAILWAYS.

See also CARRIERS, 7; CONSTITUTIONAL LAW, 21; DAMAGES, 7; EMINENT DOMAIN, 3, 4; INJUNCTION, 8.

1. The consent of abutting owners is not necessary to the exercise by a street-railway company of its contract right to use the tracks of another company. *Ingersoll v. Nassau Elec. R. Co.* (N. Y.) 236

2. The operation of a street surface railway, for which the consent of abutting owners is required under the New York railroad law, § 91, does not include the use of the 43 L. R. A.

tracks of one company by another company which has a contract right to use them. *Id.*

NOTES AND BRIEFS.

See also EMINENT DOMAIN.

Street railway; right acquired by occupation of street. 433

STREET SPRINKLING.

See PUBLIC IMPROVEMENTS, 2-4.

STRIKE.

See also MASTER AND SERVANT, 2.

NOTES AND BRIEFS.

Strike; effect of, on contract obligation. 812

SUBROGATION.

A carrier which, by bill of lading, has insured the quantity of grain carried, and has been obliged to pay the consignee for a deficiency, is subrogated to his rights against a public elevator which delivered the grain to the carrier. *Vega S. S. Co. v. Consolidated Elevator Co.* (Minn.) 843

SUICIDE.

See INSURANCE, 7.

SUMMONS.

See WRIT AND PROCESS.

SUNDAY.

See INTOXICATING LIQUORS, 1-3.

SURETY.

See PRINCIPAL AND SURETY.

TAXES.

See also CONSTITUTIONAL LAW, 18, 19; EMINENT DOMAIN, 1; LIMITATION OF ACTIONS, 2; MUNICIPAL CORPORATIONS, 6; STATUTES, 10.

1. The prospective condition of oil from a leased well cannot be properly taxed to the lessee, as personal property. *Carter v. Tyler County Ct.* (W. Va.) 725

2. Buildings used by a college exclusively as dormitories and dining halls for its students are exclusively occupied as a college, within the meaning of Conn. Gen. Stat. § 3820, providing for the exemption of such buildings from taxation. *Yale University v. New Haven* (Conn.) 490

3. Students' fees, whether apportioned to room rent or tuition, cannot be treated as income of real estate, and land occupied and reasonably necessary for the plant of a college is not productive real estate, within the meaning of a statute providing that a college shall not hold real estate exempt from taxation which shall afford more than a specified annual income. *Id.*

4. Real property substantially owned and enjoyed by a private person, although the title remains in a college, is not within the exemption of college property from taxation. *Id.*

5. A school building erected and maintained entirely by voluntary contributions, and the school in which is open to all free

of charge, without regard to creed, color, race, or condition, is a purely public charity which may be exempt from taxation under Pa. Const. art. 9, § 1. *White v. Smith* (Pa.) 498

6. A convent building used solely as a residence for the teachers in a school maintained as a charity, and which is a part of the school property and is necessary for the efficient operation and management of the school, is included in the exemption of the school property from taxation as a purely public charity. *Id.*

7. The fact that the legal title to school property is in a bishop, with no declared trust in the grantee for a charitable use, so that the charity may be terminated at any time by a sale of the property, does not prevent the exemption of the property from taxation while used as a charity. *Id.*

8. The fact that all the trustees of property used for a school maintained as a charity are Catholics does not prevent the exemption of the property as a purely public charity, when there is no evidence to show the exclusion of any children because of their belief. *Id.*

9. An omission to state the estate of the owner, in a list of sales of lands for taxes, will not make the tax deed void. *State v. Sponaugle* (W. Va.) 727

10. Payment of taxes for subsequent years by a purchaser at an invalid tax sale will not prevent forfeiture under W. Va. Const. art. 13, § 6, for failure of the real owner to enter the lands for taxation. *Id.*

NOTES AND BRIEFS.

Taxes; construction of statutes as to; exemptions of college property. 490

On oil in land. 717

Exemptions of schools and charities; public use to determine. 498

Forfeiture of land for failure to list it for taxes. 728

TELEGRAPHS.

See also ASSUMPSIT, 1; DAMAGES, 2, 11, 12; EVIDENCE, 23, 38; MASTER AND SERVANT, 4-7; TRIAL, 11, 12.

1. The action by the sendee of a telegram for failure to promptly deliver it is based, not on breach of contract, but upon defendant's neglect of its duty as a public carrier of messages. *McPeck v. Western U. Teleg. Co.* (Iowa) 214

2. A telegram operator is acting within the scope of his authority in agreeing that a telegram shall be delivered out of office hours, so that his act will bind the company. *Id.*

3. A telegram company which received a message under the agreement to deliver it about 9 o'clock P. M. cannot refuse to deliver it because that is out of office hours. *Id.*

4. Liability for neglect to deliver a telegram requiring the sender's presence at another town that night cannot be defeated by showing that no train went until morning, 43 L. R. A.

where he had made arrangements to go with horses. *Id.*

5. The sender of a telephone message to the agent in charge of a telegraph office, with directions to send it by telegraph, does not make such agent his agent, although the telegraph company requires all messages to be given to the agent in writing, unless that fact is known to the sender. *Carland v. Western U. Teleg. Co.* (Mich.) 230

NOTES AND BRIEFS.

Telegraphs; acts of telegraph agent to bind company; as agent of sender of message. 281

TELEPHONES.

See TELEGRAPHS, 5.

TENANT IN COMMON.

See COTENANCY.

TENDER.

See also MORTGAGE, 4.

NOTES AND BRIEFS.

Tender; to pledge before action for conversion against him. 759

TICKET.

See CARRIERS, 17-20.

TICKET BROKERS.

See also CONSTITUTIONAL LAW, 23.

That dishonest persons have engaged in the ticket brokerage business, and that the business enables the transportation companies to engage in unfair competition, will not justify the legislature in prohibiting all persons except those designated by the transportation companies from engaging in it. *People, Tyroler, v. Warden of New York City Prison* (N. Y.) 264

NOTES AND BRIEFS.

Ticket brokers; restriction of business of, by statute. 264

TIPPLING HOUSES.

See INTOXICATING LIQUORS, 1-3.

TORT.

NOTES AND BRIEFS.

Tort; effect of malicious motive. 798

TOWN.

See OFFICERS, 2.

TRADEMARK.

See also CONSTITUTIONAL LAW, 13; INJUNCTION, 4.

1. The manufacturer who first uses a geographical name for his goods may put later comers to the trouble of taking such reasonable precautions as are commercially practicable to prevent their lawful names and advertisements from deceitfully diverting his custom. *American Waltham Watch Co. v. United States Watch Co.* (Mass.) 826

2. A workman, or a number of workmen

engaged in the same branch of industry, banded together for their mutual profit in the pursuit of their common vocation, may acquire a right of property in a trademark designed to distinguish their workmanship from that of other persons, although they do not own the articles to which the trademark is affixed; and a trademark so owned is entitled to the same protection as other trademarks. *Schmalz v. Woolley* (N. J. Err. & App.) 86

3. The boycotting of nonunion laborers, to deprive them of the legitimate fruits of their labors, cannot be deemed the purpose for which a statute for the protection of union labels was procured, so as to make the statute invalid. *Perkins v. Heert* (N. Y.) 858

4. A statute authorizing associations or unions of workmen to adopt labels or devices to distinguish the products of their labor does not make an unjust discrimination against nonunion workmen. *Id.*

NOTES AND BRIEFS.

Trademarks; of labor unions. 86, 858

In geographical name; attempt to deceive by use of geographical name. 827

TRADE NAME.

See also CORPORATIONS, 1, 2.

NOTES AND BRIEFS.

Trade name; protection of; of corporation. 95

TRESPASS.

See also NEGLIGENCE, 2.

One who has a fixed reversionary interest in personal property has the right to sue one who is not in possession thereof, for such an injury by him thereto as will depreciate its value when it comes to the hands of the former. *New Jersey Elec. R. Co. v. New York, L. E. & W. R. Co.* (N. J. Sup.) 849

TRIAL.

See also CARRIERS, 13.

1. The constitutional right of trial by jury is not violated by a statute providing that a jury in a criminal case shall be selected from a special list made from the general list by a jury commissioner. *People v. Dunn* (N. Y.) 247

2. The requirement of U. S. Const. Amend. 6, that in all criminal prosecutions the accused shall enjoy the right to a public trial by an impartial jury of the state and district wherein the crime shall have been committed, is confined to prosecutions in the United States courts, and does not apply to those in the state courts. *State v. Bates* (Utah) 33

3. The offense charged in the indictment, the description of which includes murder in the first degree as well as in the second degree, but which expressly characterizes the crime as murder in the second degree, is within Utah Const. art. 1, § 10, providing that in courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. *Id.*

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Questions for jury.

4. Whether or not inducement of a person to break his contract with another is the proximate cause of the resulting injury to the latter is a question for the jury. *Doremus v. Hennessy* (Ill.) 797

5. The reasonableness of rules adopted by a railroad company for the movement of trains is a question of law for the court. *Little Rock & M. R. Co. v. Barry* (C. C. App. 8th C.) 349

6. The reasonableness of the conduct of a lady passenger who hurts her arm while attempting to escape in haste and fright from a car in which an oil lamp has blazed up, and oily waste with which a brakeman tries to smother the flame has caught fire, is a question for the jury. *Gannon v. New York, N. H. & H. R. Co.* (Mass.) 833

7. The meaning of the word "negligent" is a question of law where the law declares that the other conditions being present a person is liable for the injury caused by his conduct if it is negligent in the sense denoting the conception of moral blame or fault imputed to a person legally liable for the consequences of an unintentional act. *Nolan v. New York, N. H. & H. R. Co.* (Conn.) 305

8. The questions of the negligence of a carrier and the contributory negligence of a passenger who is injured while riding on a car platform are for the jury. *Graham v. McNeill* (Wash.) 300

9. It is a question for the jury whether a man is guilty of negligence in stepping from a car, or preparing to do so, when it is going about three miles an hour. *Watkins v. Birmingham R. & E. Co.* (Ala.) 297

10. The question of negligence of the mate of a vessel in failing to resort to strong measures to obtain command of the ship because the captain has become mentally deranged is for the determination of the jury. *Williams v. Hays* (N. Y.) 253

11. Whether or not the failure to capture a fugitive from justice was due to neglect to deliver the telegram conveying information of his whereabouts is a question for the jury, where he had been enticed to a room and disarmed while a person having three assistants and a team engaged was waiting 12 miles away for notice to come and make the arrest. *McPeck v. Western U. Teleg. Co.* (Iowa) 214

12. Whether or not sufficient diligence was exercised in attempting to deliver a telegram of the importance of which the company was notified is a question for the jury, where the messenger testifies that he went to the sender's house at the proper time, and repeatedly rapped loudly on the door, but received no response, and members of the sender's family testify that they were in the house at that time and heard no rapping, although they would have been likely to have heard it had there been any. *Id.*

Instructions.

13. Error in admitting a judgment as evidence in another suit is not relieved by the court's statement to the jury that the judg-

ment is not conclusive but merits serious consideration. *State v. Bradneck* (Conn.) 620

14. A requested instruction to find for defendants if plaintiff quitted their services pursuant to an agreement for a strike should not be qualified or confused by adding a clause as to his reason for quitting and the effect upon him of danger or apparent danger. *Fisher v. Walsh* (Wis.) 819

Verdict.

15. A verdict for defendant may be directed when, upon the facts conceded as shown, a verdict for the plaintiff would be against law. *Ritz v. Wheeling* (W. Va.) 143

NOTES AND BRIEFS.

Trial; by jury; special jury; struck jury. 248

Number and agreement of jurors necessary to constitute a valid verdict:—(I.) Common-law doctrine; (II.) adoption of common-law doctrine: (a) by constitutional provisions; (b) construction placed upon constitutional provisions: (1) in general; (2) state Constitutions; (3) United States Constitution; (III.) meaning of the terms "jury" and "jury trial;" (IV.) in criminal matters: (a) felony and high-grade offenses; (b) misdemeanors; (c) offenses triable in justices' and other inferior courts; (V.) in civil actions: (a) less than twelve valid; (b) invalid; (VI.) the power of the legislature: (a) general doctrine; (b) under state Constitutions; (VII.) the question of consent and waiver: (a) general doctrine; (b) constitutional and statutory provisions; (c) in cases of felony; (d) in misdemeanors; (e) in civil actions; (f) as affecting appeal jury; (VIII.) absent, sick, or unqualified juror: (a) constitutional and statutory provisions; (b) decisions of the court; (IX.) showing of the record: (a) in criminal cases: (1) in general; (2) consent; (b) in civil cases: (X.) distinction between courts of record and not of record; (XI.) jury of more than twelve; (XII.) the question of demand of jury of twelve; (XIII.) agreement of the jury: (a) unanimity; (b) majority verdicts. 33

Offering evidence for defense after demurrer to plaintiff's evidence is overruled. 506

TROVER.

1. A pledgee may be held for the conversion of all the pledged property as of the time when he makes a disposal of a part of the property which prevents his performing his part of the agreement. *Glidden v. Mechanics' Nat. Bank* (Ohio) 737

2. A pledgee who has put it out of his power to perform his part of the agreement, by an unauthorized disposition of the property, is liable for its conversion without demand and offer of performance by the pledgeor. Id.

3. A pledgee is not liable for conversion without demand for the return of the pledged property, accompanied with an offer by the pledgeor to perform his part of the agreement. 43 L. R. A.

ment, merely because he has bid it off at his own sale. Id.

TRUSTS.

1. A mere promise to advance the full amount of a loan for building purposes does not impress a trust upon a part thereof retained by the mortgagee in favor of the holders of mechanics' liens. *Anglo-American Sav. & L. Asso. v. Campbell* (D. C. App.) 622

2. Money withheld by a mortgagee in breach of his promise to advance the full amount of a mortgage loan made expressly for the erection of buildings by the mortgagor, on land not yet paid for, is subject to a constructive trust in favor of persons who have furnished labor or materials for the buildings in reliance upon the mortgagee's representations that the money was to be advanced to the mortgagor. Id.

UNFAIR COMPETITION.

See LIMITATIONS; TRADEMARK, NOTES AND BRIEFS.

USURY.

See also CONSTITUTIONAL LAW, 9.

NOTES AND BRIEFS.

Usury; in contract with building and loan association. 689

VENDOR AND PURCHASER.

1. Relief to a vendee who has made default on a contract of which time is the essence can be granted only after a showing of fraud, mistake, surprise, or other ground of purely equitable cognizance, excusing the breach. *Glock v. Howard & W. Colony Co.* (Cal.) 199

2. No legal or equitable right to the recovery of moneys paid by a vendee who makes default on a contract of which time is the essence can be acquired by subsequently tendering the amount due, without excusing his default. Id.

3. The right of a vendor to retain moneys paid by a vendee who makes default on a contract of which time is the essence is not lost because the parties have declared that such moneys may be retained as stipulated damages, and this provision is void. Id.

4. A vendor's lien may be enforced against real property for the entire amount remaining unpaid upon a sale for a gross consideration of such real property and certain personal property, there being no apportionment of the price between the two classes of property. *Doty v. Deposit Bldg. & L. Asso.* (Ky.) 551

NOTES AND BRIEFS.

Loss of payments made by purchaser and forfeiture of contract. 199

VERDICT.

See TRIAL, 15, NOTES AND BRIEFS.

VOTERS AND ELECTIONS.

See also COURTS, 8; OFFICERS, 2.

1. The pledge required of each signer of

a nomination paper by Ohio act April 3, 1898, § 7, that he will support the candidate or candidates whose nominations are therein requested, does not infringe the right of suffrage as guaranteed by the Constitution. *State, Plimmer, v. Poston (Ohio)* 90

2. A suitor has no standing in court to compel the holding of an election under an earlier law because the later one is unconstitutional where the earlier one is subject to the same objection although his pleadings do not show that fact. *State, Harrison, v. Menaugh (Ind.)* 408

NOTES AND BRIEFS.

Constitutional right to vote; restrictions and conditions of franchise. 91

WAIVER.

See ESTOPPEL, 6; PLEADING, 1.

WAREHOUSEMEN.

See also INJUNCTION, 10; STATUTES, 7; SUBROGATION; WEIGHTS.

One licensed to keep a public warehouse for storage of grain will not be permitted to deal in grain and store the same in his own licensed warehouse; and the same rule applies to stockholders of a corporation so licensed. *Central Elevator Co. v. People, Moloney (Ill.)* 658

NOTES AND BRIEFS.

Warehousemen; license of; right to store their own grain. 658

WARRANTY.

See COVENANT; LANDLORD AND TENANT, 2; WATERS, 6.

WATERS.

See also BOUNDARIES; EASEMENTS, 1, 2; EVIDENCE, 5, 6; MUNICIPAL CORPORATIONS, 4, 5; PUBLIC LANDS, 1.

1. Piers built into the waters of Lake Michigan to protect the land of a shore-owner from erosion, and not in aid of navigation, the effect of which is also to reclaim submerged land of which the fee is vested in the state in trust for the people, constitute a purpresture which the state may require to be removed, although they are not detrimental to the public interest and will not become so until the state wishes to reclaim and use the land. *Revell v. People (Ill.)* 790

2. A prior appropriator of water from a natural stream flowing through state lands has such a vested right to the use of the water and to the ditch in which it flows, also constructed on said lands, as will defeat the claim of one who, with notice of such diversion and existence of the ditch, obtains from the state a deed of the premises, without reservation of any water rights. *Carson v. Gentner (Or.)* 130

3. Percolating water is regarded as a part of the earth itself, as much as the soil and the stones, with the same absolute right of use and appropriation by the owner of the land in which it is. *Wheelock v. Jacobs (Vt.)* 105

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4. A stream of water large enough to fill a $\frac{5}{8}$ pipe, running through a fissure or hole in the bed rock several feet below the surface of the ground, but not flowing in a well-defined channel underground, is to be deemed percolating water, which can be appropriated by the owner of the land without liability to the owner of a spring a short distance therefrom, into which some of the water has been accustomed to find its way. *Id.*

5. A grant of a spring does not by implication convey percolating water before it reaches the spring. *Id.*

Public water supply.

6. A waterworks company operating under a franchise from and contract with a municipal corporation in distributing water for public and domestic use is not responsible as an implied warrantor of the purity of the water distributed by it. *Green v. Ashland Water Co. (Wis.)* 117

7. A water company which knowingly supplies to its customers water so contaminated with impurities as to be dangerous for domestic use, under circumstances such that they are liable to use the water in ignorance of the danger, if it does not disclose the danger to them, is liable on the ground of negligence or fraud for any damages sustained by a customer without contributory fault on his part. *Id.*

8. Knowledge, or reasonable means of knowledge, of the dangerously impure condition of a water supply, will prevent a consumer who is injured by the impure water from recovering damages from the water company either because of its negligence or fraud in supplying impure water. *Id.*

NOTES AND BRIEFS.

See also FISHERIES.

Waters; percolating; rights in spring. 105

Right of appropriator to enter upon the land of an upper proprietor to clean out ditch. 130

Riparian rights as to wharves. 792

Negligence in respect to polluted water supply; negligence of user. 118

WEIGHTS.

See also CONSTITUTIONAL LAW, 20.

A state weighmaster's certificates of the weight of grain delivered from a public elevator, under statutes which require him to weigh it without any option of the elevator owner, unless the shipper otherwise directs, cannot be made by statute absolutely conclusive against either party, although clear, strong, and satisfactory evidence of a substantial mistake may be required to impeach them. *Vega S. S. Co. v. Consolidated Elevator Co. (Minn.)* 843

WHARVES.

See WATERS, 1.

WILLS.

See also **CONTRACTS**, 3; **EVIDENCE**, 22; **JUDGMENT**, 2.

1. The interest of the son during the life of his mother is at most a mere expectancy under a will bequeathing property to a trustee to hold for the benefit of the widow during her life and upon her death to vest absolutely in the son if he shall procure a divorce from his wife. *Ransdell v. Boston* (Ill.) 526

2. A condition attached to the vesting of an absolute estate under a devise or bequest to a son, that he shall procure a divorce from his present wife in default of which his interest shall be restricted to a life estate will not be deemed void as contrary to public policy where the divorce action between the son and his wife was pending when the will was executed. *Id.*

3. The condition attaching to the absolute vesting of the fee under a devise in trust to pay the income of real property to the testator's son until he shall procure a divorce from his wife and upon the happening of that event to convey the fee to him with a limitation over to "other devisees under the will in case he dies childless without having obtained a divorce,"—is a condition precedent and if broken prevents him from taking the fee even if it is invalid as contrary to public policy. *Ransdell v. Boston* (Ill.) 526

WITNESSES.

See also **EVIDENCE**, 12.

1. Bondsmen of a banker who received city funds are not incompetent after his death, on the ground that they are the real parties in interest, to testify to an arrangement between him and other bankers for dividing the deposits, where the action is by the city for the funds held by the other banks and claimed by his assignee for creditors as part of his estate. *Marquette v. Wilkinson* (Mich.) 840

2. A witness who has testified as to dis-
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satisfaction with the methods of a party in mining ore may be asked on cross-examination if he did not afterwards propose to contract with him for mining. *Worthington v. Gwin* (Ala.) 382

3. One who pleads adultery of his wife to a criminal charge of nonsupport cannot be held to the answers given on cross-examination by a witness for the state to the effect that witness never had said that he had been criminally intimate with defendant's wife, but may introduce evidence to contradict him. *State v. Bradneck* (Conn.) 620

4. One who puts a witness on the stand, but excuses him without asking him any questions that are material to the issues on trial, is not thereby precluded, if the witness is afterwards called and examined by the opposite party, from cross-examining him and discrediting him by proving his contradictory statements out of court. *Fall Brook Coal Co. v. Hewson* (N. Y.) 676

NOTES AND BRIEFS.

Witness; opposite parties in case of decedent's estate. 841

Contradiction of, by party first calling. 676

Contradiction of. 621

WORLD'S COLUMBIAN EXPOSITION.

See **STATE INSTITUTIONS**.

WRIT AND PROCESS.

An attack upon an officer's return of summons in the action in which the same was made, is a collateral attack within Ky. Stat. § 3760, providing that, unless in a direct proceeding against himself or his sureties, no fact actually stated by an officer in respect to a matter about which he is required to make a statement in writing shall be questioned except in case of fraud in the party benefited thereby, or mistake on the part of the officer. *Doty v. Deposit Bldg. & L. Assn.* (Ky.) 55

